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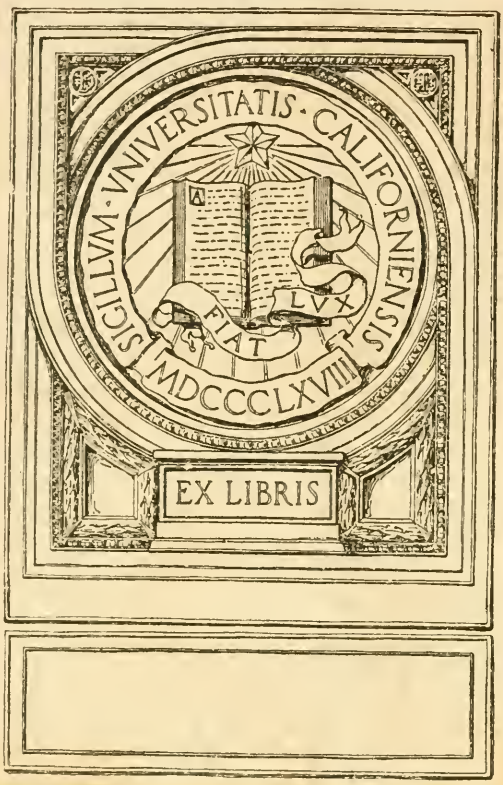

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PREFACE.

This work forms the third volume of the second edition of Burge's Commentaries on Colonial and Foreign Law, originally published in 1838, which deals with the laws of Marriage and Divorce in the principal legal systems of the world. Those systems include the Roman Civil law, the Canon Law, the Roman-Dutch law, the ancient and modern French law, such typical modern systems as the Codes of Belgium, Italy, Spain, Germany, Austria, Hungary, and Switzerland; the laws of the British Dominions and the United States, and such Oriental systems as the Hindu and Muhammadan laws in British India, the Buddhist law in Burmah, the laws of China, Japan and Siam; and the rules of Private International Law. As regards the British Dominions the common law is the main foundation of the law in the Colonies settled by Great Britain; the Roman Civil law is the basis of the law of France, which still survives in the possessions originally French, such as the Coutume of Paris in Quebec and St. Lucia, the Coutume of Normandy in the Channel Islands, and the Code Civil in Mauritius; the Roman-Dutch law continues in force in the Union of South Africa, Ceylon and British Guiana; the law of Spain (now to a very limited extent) in Trinidad; the Ottoman law in Cyprus; and the Italian law has been largely adopted in Malta.

Marriage is the most important branch of the law of Persons; and the constitution of this status, its attributes and consequences as regards persons and property, and its dissolution during the lives of the spouses have always engaged in a pre-eminent degree the consideration of legislators and jurists. The international aspect of the status is now mainly regulated for the nations of Continental Europe by the recent Hague Convention on marriage and divorce, which, proceeding on lines generally accepted by jurists of all nations, has to some extent initiated an uniform private international law of marriage. The Anglo-Saxon nations, Great Britain and the United States (whose Courts are perhaps more

familiar than those of any other countries with the problems of reconciling conflicting systems of law, both external and internal), have not as yet taken any part in framing these international agreements for the regulation of conflicts between the different national systems.

The Editors have to express their indebtedness to the following persons, besides the Assistant Editors, for most valuable help with contributions to and revision of portions dealing with special subjects :—

M. l'Abbé Boudinhon, Paris, the Reverend Dr. Adrian Fortescue, the Reverend T. A. Lacey, the Reverend Canon W. J. Oldfield, the Reverend W. Sadler, Mr. J. Arthur Price, Barrister-at-Law, Miss Margaret Dampier, and Mr. Charles G. Saunders, Boston, for the Canon Law; H.R.H. Prince Rajburi Direkhiddi, Minister of Justice, Bangkok, for the law of Siam; Mr. J. Bromley Eames, Barrister-at-Law, for the law of China; Mr. J. S. Henderson, Barrister-at-Law, for the laws of the West Indies and Trinidad as regards married women's property; Moung Tun Lwin, K.S.M., Rangoon, for the Buddhist law in Burmah; Mr. J. Arthur Barratt, of the United States Supreme Court Bar and English Bar, for a part of the law of Divorce in the United States; Professor Oscar Platou, of the University of Christiania, for the Divorce laws of the Scandinavian countries; Mr. F. Fitzgerald, of the New South Wales Bar and English Bar, for the law of Divorce in the Australian States; Dr. David Soskice, of the Bar of the High Court of St. Petersburg, for the law of Russia; Mr. J. Lister Codlee, for the marriages of members of the Society of Friends; Mr. A. Hilgrove Turner, Attorney-General, Jersey; Mr. Edward Ozanne, K.C., Attorney-General, Guernsey, and Mr. G. A. Ring, Attorney-General of the Isle of Man, for the law of Marriage and Divorce generally in these Possessions.

They have also to acknowledge the valuable assistance of Mr. Leonard T. Ford, Barrister-at-Law, Lincoln's Inn, in compiling the tables of cases and authorities, and generally preparing the volume for the press.

A. W. R.
G. G. P.

September, 1910.

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ABBREVIATIONS USED IN THE CITATION OF REPORTS.

A. C.	Appeal Cases.
A. C. R.	Ceylon Appeal Court Reports.
Act.	Acton (Privy Council).
Ala.	Alabama.
All.	Allahabad.
Amer. Dec.	American Decisions.
Amer. Rep.	American Reports.
Am. St. Rep.	American State Reports.
Andr.	Andrews.
Ap. R.	Reports of Cases in Court of Appeal, Ontario.
App. Cas.	Appeal Cases.
Atl.	Atlantic Reporter (United States).
Australia C. L. R.	Australian Commonwealth Law Reports.
B. & Ad.	Barnewall and Adolphus.
B. & Ald.	Barnewall and Alderson.
B. & C.	Barnewall and Cresswell.
B. & P.	Bosanquet and Puller.
B. & S.	Best and Smith.
Barb.	Barbour's Reports (American).
Beav.	Beavan.
Beng. L. R.	Bengal Law Reports.
Beng. S. R.	Bengal Select Reports.
Binn.	Binney, Pennsylvania.
Bla.	Blackstone.
Blatchf.	Blatchford (United States, Federal Reports).
Bom. H. C. R.	Bombay High Court Reports.
Bridg.	Bridgman.
Bro. P. C.	Browne's Parliament Cases.
Buch.	Buchanan (Cape Colony).
Burr.	Burrow.
C. B.	Common Bench Reports.
C. B. N. S.	Common Bench New Series.
C. L. J.	Canada Law Journal (Toronto).
C. L. R.	Commonwealth Law Reports (Australia).
C. L. T.	Cape Law Times.
C. M. & R.	Crompton, Meeson and Roscoe.
C. P. D.	Common Pleas Division.
C. Rob.	Christopher Robinson.
C. T. R.	Cape Times Reports.
C. W. R.	Calcutta Weekly Reporter (Civil Rulings).
C. & E.	Cababé and Ellis.
C. & J.	Crompton and Jervis.
C. & M.	Crompton and Meeson.
C. & P.	Carrington and Payne.
Calc.	Calcutta.
Calc. W. R. C. R.	Calcutta Weekly Reports.
Calc. W. N.	Calcutta Weekly Notes.
Ch. D.	Chancery Division.
Cl. & F.	Clark and Finnelly, House of Lords.
Conn.	Connecticut.
Cowp.	Cowper.

Cox, Eq. Ca.	Cox, Equity Cases.
Cox C. C.	Cox's Criminal Cases.
Curt.	Curteis' Ecclesiastical Reports.
Cyp. L. R.	Cyprus Law Reports.
Dec. S. C.	Decisions of the Supreme Court of Mauritius.
De G. F. J.	De Gex, Fisher and Jones.
De G. & J.	De Gex and Jones.
De G. J. & S.	De Gex, Jones and Smith.
De G. & S.	De Gex and Smith.
De G. M. & G.	De Gex, Macnaghten and Gordon.
D. & C.	Dow and Clark.
Dod.	Dodson, Admiralty.
Dor. A. C.	Dorion (Quebec).
Dowl. P. C.	Dowling, Practice Cases (English).
E. & E.	Ellis and Ellis.
E. D. C.	Eastern District Court Reports (Cape Colony).
Esp.	Espinasse.
Ex.	Exchequer.
Ex. D.	Law Reports, Exchequer Division.
Fac. Coll.	Faculty Collection (Scots).
Fac. Dec.	Faculty Decisions (Scots).
Fed. Rep.	Federal Reporter (United States).
Ga.	Georgia.
Giff.	Gifford (English).
Gr.	Grant's Canadian Reports.
H. & C.	Hurlstone and Coltman.
H. & M.	Hemming and Miller.
H. & N.	Hurlstone and Norman.
H. Bl.	Henry Blackstone.
H. L. C.	House of Lords Cases.
Hagg.	Haggard.
Hagg. Adm. Rep.	Haggard's Admiralty Reports.
Hagg. C.	Haggard's Consistory Reports.
Hagg. Eccl.	Haggard's Ecclesiastical Reports.
How.	Howard (United States).
Ill.	Illinois.
Ind.	Indiana.
Iredell (N. C.)	Iredell's North Carolina.
Ir. Eq. R.	Irish Equity Reports.
Ir. L. R.	Irish Law Reports.
I. L. R. All.	Indian Law Reports, Allahabad.
I. L. R. Bom.	Indian Law Reports, Bombay.
I. L. R. Calc.	Indian Law Reports, Calcutta.
I. L. R. Mad.	Indian Law Reports, Madras.
J.	Journal du droit International Privé.
J. R. N. S. S. C.	New Zealand Jurist Reports, New Series, Supreme Court.
J. & H.	Johnson and Hemming.
Jac.	Jacob's Reports.
James N. S. Rep.	James's Nova Scotia Reports.
Jur.	Jurist Reports.
Jur. (N. S.)	Jurist, New Series.
K. B.	King's Bench.
K. & J.	Kay and Johnson.
Kan.	Kansas.
Kay	Kay's Reports.
Kerr N. B.	Kerr's New Brunswick.
L. C. J.	Lower Canada Jurist.
L. C. R.	Lower Canada Reports.
L. N.	Legal News, Montreal.
L. R. Ch.	Law Reports, Chancery Appeal Cases.
L. R. C. P.	Law Reports, Common Pleas.
L. R. E. C.	Law Reports, Equity Cases.
L. R. H. L. Sc.	Law Reports, Scotch and Divorce Appeals, House of Lords.
L. R. Ind. App.	Law Reports, Indian Appeals.
L. R. P. C.	Law Reports, Privy Council.

L. R. Q. B.	Law Reports, Queen's Bench.
L. R. Sc. App.	Law Reports, Scotch Appeals.
L. T.	Law Times.
L. R. A. & E.	Law Reports, Admiralty and Ecclesiastical.
L. R. P. & D.	Law Reports, Probate and Divorce.
La. Ann.	Louisiana Annual.
M. L. R. S. C.	Manitoba Law Reports, Supreme Court.
M. L. R.	Maritime Law Reports.
M. P. C.	Moore's Privy Council Cases.
M. & Rob.	Moody and Robinson.
M. & S.	Maule and Selwyn.
M. & W.	Meeson and Welsby.
Mac. H. L. Cas.	Macqueen's Scotch Appeal Cases.
Mac. H. L. Pract.	Macqueen's House of Lords Cases.
Mad.	Madras.
Mad. H. C. R.	Madras High Court Reports.
Madd.	Maddocks.
Man. R.	Manitoba Reports.
Man. & G.	Manning and Granger, C. P.
Man. & R. (M.C.)	Manning and Ryland, Magistrates Cases.
Mass.	Massachusetts.
Me.	Maine.
Mer.	Merivale.
Men.	Menzies (Cape Colony).
Milw. Prerg.	Milward's Reports (Ireland).
Miss. App.	Missouri Appeals.
Mo.	Missouri.
Mod.	Modern.
Moo. Ind. App. Ca.	Moore's Indian Appeal Cases.
Mor. Dict.	Morrison's Dictionary of Decisions (Scotland).
Mumf.	Mumford, Virginia.
Myl. & Cr.	Mylne and Craig.
N. B. R.	New Brunswick Reports.
N. C.	Notes of Cases.
N. Car.	North Carolina.
N. E.	North Eastern (United States).
N. H.	New Hampshire.
N. J. L.	New Jersey Law Reports.
N. L. R.	Ceylon New Law Reports.
N. S.	Nova Scotia Reports.
N. S. W. L. R.	New South Wales Law Reports.
N. S. W. W. N.	New South Wales Weekly Notes.
N. Y.	New York.
N. Y. S. C.	New York Superior Court.
N. Y. Supp.	New York Supplement.
Natal L. R.	Natal Law Reports.
Neb.	Nebraska.
O. L. R.	Ontario Law Reports.
O. R.	Ontario Reports.
Ohio St.	Ohio State.
P. C.	Privy Council.
P. P.	Parliamentary Papers.
P. D.	Probate Division.
P.	Probate.
P. Wms.	Peere Williams.
Pa. L. J.	Pennsylvania Law Journal.
Pa. St.	Pennsylvania State.
Pat.	Paton's House of Lords Appeal Cases (Scotch).
Perry Or. Ca.	Perry's Oriental Cases.
Pick.	Pickering (Massachusetts).
Q. B.	Queen's Bench, Adolphus and Ellis, N. S.
Q. B. D.	Queen's Bench Division.
Q. L. R.	Quebec Law Reports.
R.	Roscoe (Cape Colony).
R. de J.	Revue de Jurisprudence (Quebec).
R. J. Q. Q. B.	Rapports Judiciaires, Quebec, Queen's Bench.
R. J. Q. S. C.	Rapports Judiciaires, Quebec, Superior Court.

Ram.	Ramalunga (Ceylon).
Raym. (Ld.)	Lord Raymond's Reports, K. B.
Rep.	Coke's Reports.
Rob. Adm. Rep.	Robinson's Admiralty Reports.
Rob. Eccl.	Robertson's Ecclesiastical Reports.
Rolle Abr.	Rolle's Abridgment.
Rul. Cas.	Ruling Cases.
Russ.	Russell.
S.	Searle (Cape Colony).
S. A. R.	South African Republic.
S. C. C.	Supreme Court Circular (Ceylon).
S. C. R.	Supreme Court Reports (Cape Colony).
S. C. R. Can.	Supreme Court of Canada, Reports.
S. W.	South Western Reporter (United States).
Salk.	Salkeld.
Sandf. Ch. N. Y.	Sandford's Chancery, New York.
Saw. U. S.	Sawyer, United States.
Serg. & R.	Sergeant and Rawle (Pennsylvania).
Sess. Ca.	Sessions Cases (Scots).
Sim.	Simon's Reports.
Sim. & St.	Simon and Stuart, Chancery.
Smith L. C.	Smith's Leading Cases.
Stark. N. P.	Starkie's Reports, Nisi Prius.
Sh. & Mc.	Shaw and Maclean (Scots).
Str.	Strange's Reports.
St. Tri.	State Trials.
Sup. Ct.	Superior Court.
Swa.	Swabey.
Sw. & Tr.	Swabey and Tristram.
T. L. R.	Times Law Reports.
T. R.	Term Reports.
T. S.	Transvaal Supreme Court.
Tamb.	Tambiah's Reports (Ceylon).
Tenn.	Tennessee.
T. & R.	Turner and Russell.
Tr. Off. Rep.	Official Reports of High Court of Transvaal Republic.
U. C. C. P.	Upper Canada, Common Pleas.
U. C. R.	Upper Canada Reports.
U. S.	United States.
Upp. Can. Q. B.	Upper Canada, Queen's Bench.
V. L. R.	Victoria Law Reports.
V. & B.	Vesey and Beames' Reports.
Vent.	Ventris' Reports.
Vern.	Vernon's Reports.
Ves. Sen.	Vesey Senior, Reports.
Ves.	Vesey Junior, Reports.
W. N.	Weekly Notes, Law Reports.
W. R.	Weekly Reporter.
W. & S.	Wilson and Shaw.
Wall. U. S.	Wallace, United States.
Watts & Serg.	Watts and Sergeant, Pennsylvania.
Wend. N. Y.	Wendell, New York.
W. T.	White and Tudor's Leading Cases in Equity.
Wils.	Wilson.
Wis.	Wisconsin.
Y. & C. C. C.	Younge and Collyer, Chancery Cases.

In this table, Reports which are not identified with the name of a particular country are English.

TABLE OF CASES.

ADDENDA.

Page 208. **Dominica**. The law of marriage is now contained in the Act, Marriage Ordinance, No. 2 of 1910, repealing Act of 1837 (marriage by Wesleyan missionaries) and the Registration Act of 1874.

Page 211. **Hong Kong**. Marriage Amendment Ordinance, No. 20 of 1910, amends marriage law of 1875, s. 37 (marriages of Chinese).

Page 213. **Northern Nigeria**. Marriage Proclamation 1 of 1907 and Marriage Amendment Proclamation 5 of 1908.

MARRIAGE LAWS.

INTRODUCTION.

THE STATUS OF MARRIAGE, OR THE RELATION OF HUSBAND AND WIFE.

Marriage is a bond between husband and wife which is based on nature and sanctioned by law, and which has as its object that they shall live together for life in the closest community to the exclusion of all other men and women (*a*).

Thus marriage may be called a contract, in the sense of a declaration of will by two persons which has a legal result; but it is not a contract in the limited sense of the word—viz., a mutual consensus of the wills of two or more persons to create an obligation upon either of them, or one or more of them (*b*). For, though the bond is made by the common consensus of the parties, and may therefore be compared to a consensual contract, it requires certain solemnities for its validity in the eyes of the law besides the consensus, and it cannot be dissolved by common consent like the ordinary consensual contracts (*c*).

In most civilised countries the sanctions of religion have been superadded to it. In countries which admit the spiritual supremacy of the Latin and Greek (Western and Eastern) Catholic Churches it

(*a*) Inst. i., 9, 1; Dig. xxiii., 2, 1; Burge, i., p. 136, note; Ontwerp 1820, p. 120, 121; Grotius, Introd., i., 5, 1. The procreation of children, though a natural consequence, is not an essential part of a marriage. A marriage *in extremis* is a valid marriage, though the procreation of children is out of the question. A childless marriage is perfectly valid, though incapacity of procreating children is a lawful ground of divorce.

(*b*) Drucker, Handboek voor het Romeinsch Recht, ii., par. 122; J. v. d. Linden, Koopmanshandboek i., 3, 1, n. 1.

(*c*) Von Savigny, System, i., par. 53, 54.

is regarded as a sacrament (*d*), and in some cases religious marriage is made obligatory by civil law upon Catholics.

Marriage forms part of family law. It is the basis for the parental power (parental duty) and its equivalent of guardianship. It is the source of the relationship existing between the members of one family.

In treating of the law governing this status, the subjects of inquiry are: (1) the constitution of the status, or, what is essential to the validity of a marriage; (2) the personal powers, capacities, or disabilities incident to it, and the rights of the husband and wife in the property, real and personal, which either possessed at the time of their marriage, or acquired during the coverture; and (3) the termination of the status, or the dissolution of marriage by divorce, where divorce has that effect, or by the death of either of the parties.

It is necessary to appropriate to each of these subjects a distinct and separate consideration, because the law which decides whether the marriage is valid—that is, whether the status exists—may not be that to which recourse is had in ascertaining the powers, capacities, or disabilities incident to the status, or the rights of the husband and wife in the property of each other. Again, it may be necessary to resort to the law of another country, in order to determine whether the status is terminated, or, in other words, whether the marriage is dissolved by divorce, or to what extent.

Questions arise under these several heads in which there may be conflicting laws of different countries, whenever the country in which the marriage is celebrated is not the same as that to which the parties belong by their personal law at the time of their marriage or subsequently.

In the present chapter the attempt is made to state in outline the provisions of the principal systems of law with regard to the constitution of the marriage status, such as (1) the Roman law; (2) the Roman-Dutch law; (3) the canon law of the Western Church (a) generally; (b) in Catholic countries such as France, Italy, Austria-Hungary, Spain, and Switzerland; (c) in Protestant countries, the marriage law of the Protestant Churches, especially in Scandinavia, Germany, and Holland; (d) in the United Kingdom (England, Scotland, Ireland, and Wales), and the

(*d*) Lord Stowell in Dalrymple *v.* Dalrymple, 1811, 2 Hagg. Cons. 54, 64.

United States, with an account, due to the exceptional position accorded to them in England, of the Jewish law of marriage and the usages of the Society of Friends; (4) the canon law of the Eastern Church which is in force in Turkey, Russia, Austria-Hungary, Greece, Roumania, Montenegro, Bulgaria, and Cyprus, and the East generally; (5) the chief Oriental systems of law, such as the Hindu and Muhammadan laws in India, and the latter law which is also in force in Cyprus, Gambia, and elsewhere in British dominions, the Buddhist law in Burmah, and the laws of China, Japan, and Siam.

CHAPTER I.

PRINCIPAL ORIGINAL SYSTEMS OF MARRIAGE LAW.

SECTION I.

Roman Law.

In the Institutes of Justinian marriage is defined as *viri et mulieris conjunctio individuam vitæ consuetudinem continens* (*e*). An earlier definition by Modestinus adds the words "*divini et humani juris communicatio*" (*f*), emphasising the essentially religious character of the relation according to early ideas, especially when the tie was formed by *confarreatio*.

Fundamental Conditions.—These have to do with (a) the capacity (*conubium*), (b) the age of the parties, and (c) the consents necessary.

(a) **Conubium.**—*Justæ nuptiæ*, which gave the husband paternal power over the children, required *conubium* (*g*), and this was reserved to Roman citizens or communities to which this privilege had been expressly granted. After the decree of Caracalla (211—217 A.D.) this qualification was general throughout the Roman world.

Relative Impediments.—The chief bars to marriage were (1) too close relationship, whether by blood, affinity, or adoption; and (2) inequality of position, and certain other grounds peculiar to Roman legislation.

The prohibition of marriages between near relatives goes back to a remote period. As to Greece, there is a remarkable passage in Euripides (Andromache, 172—177), where the absence of laws prohibiting incestuous union is described as a characteristic of the barbarians:

Τοιοῦτον πᾶν τὸ βαρβαρον γένος πατήρ τε θυγατρὶ παῖς τε μητρὶ μίγνυται

(*e*) Inst. i., 9, 1.

(*f*) Dig. xxiii., 2, 1.

(*g*) Ulp. v. 3. "Conubium est uxoris jure ducendæ facultas." Under this head are grouped, not only the absolute conditions of capacity, *i.e.*, freedom and citizenship, but the relative conditions, *i.e.*, the absence of legal impediments from relationship or otherwise.

κόρη τ' ἀδελφῷ . . . . καὶ τῶν̀ὸ οὐδὲν ἐξείργει νόμος. ἃ μὴ παρ̀ ἡμᾶς εἴσφερ.

Impediments from Relationship.—Consanguinity.—Natural relationship (*cognatio*) extended to the seventh degree, and ascendants and descendants in any degree, and collaterals generally up to the fourth degree could not intermarry—*e.g.*, marriages between great-uncle and great-niece and great-aunt and great-nephew are forbidden (*h*). The civil law reckoned a degree for each generation in the direct line of ascent and descent, and for collaterals a degree for each generation from one party up to the common ancestor, and from him down to the other party without reckoning the common stock. Thus, first cousins are in the fourth degree to each other, and marriage of first cousins (which in the earlier Roman law was prohibited (*i*)) was finally legalised after the law had fluctuated several times (*j*).

Affinity.—Affinity is the tie connecting one of the spouses with the kindred of the other. Under the Empire it was a bar to marriage both in the direct and collateral lines. Hence the marriage of a man with his step-daughter or daughter-in-law, step-mother or mother-in-law, or deceased brother's widow or deceased wife's sister was forbidden. Marriage was lawful between the son of a husband by one wife and the daughter of another wife of that husband by another husband, but a marriage between a man and a daughter born to his wife after being divorced from him by another father, though not unlawful, was discouraged (*k*). But although a man may not marry his brother's widow (she being by affinity his sister), he may marry the widow of his former wife's brother; for although a wife's brother is brother by affinity to a husband, yet the affinity does not extend to his wife (*l*).

No Affinity between Spouses' Kindred.—It should be observed that with respect to affinity the civil and canon law concur in regarding the kindred of the husband as not being of affinity to the kindred of the wife, and the kindred of the wife as not being of affinity to the kindred of the husband. Hence the husband's brother may lawfully marry his brother's wife's sister; the husband's son (by a

(*h*) Dig. xxiii., 2, 39.

(*i*) See Roby, Roman Private Law, on pp. 128, 129.

(*j*) Cod. v., 5, 5.

(*k*) Dig. xxiii., 2, 85; Hunter 687.

(*l*) Dig. xxiii., 2, 34; Voet, ad eund. tit. n. 36; Inst. i., 10, 9.

first wife) may marry his father's (second) wife's daughter (by a former husband); a son (by a first marriage) may marry his father's (second) wife's sister.

Illegitimate Consanguinity and Affinity.—The consanguinity or affinity is not the less an impediment because the kindred are illegitimate (*m*). "Nec intererit quod ad consanguinitatem vel affinitatem contrahendam ex justis nuptiis aliqui an ex damnato coitu invicem copulati fuerint" (*n*).

"Cognati sunt qui a communi stipite descendunt, sive ex justis nuptiis ea cognatio sit, sive ex illegitimo coitu."

Adoptive relationship extended to the adopted and adopting persons and their immediate families. Spiritual relationship was created between godparent and godchildren, between a baptising minister and the baptised child, and its parents and godparents, etc. (*o*).

Impediments on other Grounds.—Certain impediments to marriage in the civil law were described as being *ex causâ potestatis*. Thus a tutor or curator could not marry his female ward until his office had terminated, or unless his accounts had been passed (*p*). A person administering a government or public office in a province, and the members of his family, were not permitted to intermarry with a person domiciled in his province, unless they had been betrothed to each other before he had accepted the office (*q*). Notwithstanding these prohibitions, the subsequent voluntary cohabitation of the parties, after the relationship which caused the prohibition had ceased, rendered the marriage valid *ab initio* (*r*).

There were also special bars to marriage *ex causâ publicæ honestatis* (*s*)—*ex causâ inæqualitatis conditionis aut dignitatis*—*ex causâ diversitatis religionis*.

Thus, certain classes of persons could not intermarry, *e.g.*, senators and their families with freed men or freed women (*t*), or actresses (*u*), Jews and Christians (*v*), and persons guilty of adultery together or parties to an abduction (*x*).

(*m*) Voet, lib. 23, tit. 2, n. 35; 1 Hagg. C. R. 352, 393.

(*n*) Inst. Jur. Can., lib. 2, tit. 13; Dig. xxiii., 2, 54; Burge, (1st ed.) i., 149.

(*o*) Cod. v. 4, 26.

(*p*) Dig. xxiii., 2, 36, 66, 67.

(*q*) Pothier on the Pandects, lib. 23, ut. 2; Dig. xxiii., 2, 38, 57.

(*r*) Voet, lib. 23, tit. 2, n. 39.

(*s*) But see p. 23.

(*t*) Dig. xxiii., 2, 31; *ibid.*, 44.

(*u*) Dig. xxiii., 2, 44; Cod. v., 4, 29; Nov. 117, 6.

(*v*) Cod. i., 9, 6; Hunter, 687.

(*x*) Cod. ix., 24, 1; Nov. cxxxiv., 12; *ibid.*, cxliii., cl.; Dig. xxxiv., 9, 13.

(b) **Age.**—The parties must be capable of marriage; the rule had long been that females must be over twelve, and Justinian fixed the age of fourteen for males (*y*).

(c) **Consents Required.**—The consent of the parties themselves was necessary, and also the consent of persons to whose power they were subject.

"Nuptiæ consistere non possunt, nisi consentiant omnes; id est, qui cöeunt, quorumque in potestate sunt" (*z*). "Nuptias non concubitus sed consensus facit" (*a*).

Thus the father's consent was requisite to the validity of the marriage of such of his children as had not been emancipated, and notwithstanding the child was a soldier. "Filius familias miles matrimonium sine patris voluntate non contrahit." But an implied consent was sufficient, "qualis est ejus qui scit nec contradicit" (*b*).

But if those persons could not give their consent by reason of absence and the like, consent could be supplied by a Court for good cause (*c*). The consent of parents was required for the marriage of emancipated daughters, *e.g.*, of widows under twenty-five years of age (*d*). The consent of a woman's guardian to her marriage was not necessary (*e*).

Form of Marriage.—The marriage relation was created by the consent of the parties and no specific rites, civil or religious, were necessary.

For the ordinary marriage of Imperial times, *non-manus* or free marriage, no form of solemnisation was prescribed; the requisite consent might be proved in any way whatever.

The most ancient forms of marriage in Rome were those which were celebrated according to formal rites, *per confarreationem* or *per coemptionem*. The former was an elaborate religious celebration, and the latter represented a fictitious purchase of a wife. Both constituted the *manus* marriage, that is to say, the marriage whereby the wife was brought under the *manus* or power of the husband. A third method of creating *manus* was *usus*, an informal cohabitation

(*y*) Inst. i., 10 pr.

(*z*) Dig. xxiii., 2, 2.

(*a*) *Ibid.*, l. 17, l. 30.

(*b*) Cod. v., 4, 12; Dig. xxiii., 2, 2, 18, 35; Cod. v., 4, 5. See further Baudry-Lacan. ii., pp. 40, 98.

(*c*) Dig. xxiii., 2, 2.

(*d*) Cod. v., 4, 20.

(*e*) *Ibid.*, 4, 18, 20; Dig. xxiii. 2, 20.

as husband and wife continuing for a year without interruption. This was already known at the time of the Twelve Tables (*f*). During the time of the Empire and long before the reign of Justinian, the strict marriages with *manus* fell into disuse, and were superseded by marriages without *manus*, known as "free" marriages.

The latter did not alter the status of the wife, nor subject her to the marital power (*manus*) of her husband, but she still remained within the *manus* of her *pater familias* or of the person who took his place.

The marked distinction between these marriages may be inferred from the different appellation bestowed on the wife according as her marriage was with or without *manus*. "Genus est uxor; ejus duæ formæ; una matrumfamilias, earum quæ in manum conveniunt; altera earum quæ tantummodò uxores habentur." (*g*).

The traditional ceremonies (*h*) observed at a Roman marriage were not deemed essential to its validity. "Si vicinis, vel aliis scientibus, uxorem liberorum procreandorum causâ domi habuisti, et ex eo matrimonio filia suscepta est: quamvis neque nuptiales tabulæ, neque ad natam filiam pertinentes, factæ sunt, non ideo minùs veritas matrimonii aut susceptæ filiæ suam habet potestatem" (*i*).

"Si donationum ante nuptias, vel dotis instrumenta defuerint, pompa etiam aliaque nuptiarum celebritas omittatur: nullus existimet ob id deesse rectè alias inito matrimonio firmitatem, vel ex eo natis liberis jura posse legitimorum auferri; inter pares honestate personas nullâ lege impediente consortium, quod ipsorum consensu atque amicorum fide firmatur" (*j*).

The marriage might be contracted even without the actual presence of the husband, if the wife were taken to his house. "Mulierem absenti per literas ejus, vel per nuncium posse nubere placet, si in domum ejus deduceretur; eam verò, quæ abesset, ex literis vel nuncio [suo] duci à marito non posse: deductione enim opus esse in mariti, non in uxoris domum; quasi in domicilium matrimonii" (*k*).

"Denique Cinna scribit: Eum qui absentem accepit uxorem, et

(*f*) Gaius, Inst. i., 110 *et seq.*
(*g*) Cicero, Topics, 3.
(*h*) Brissonius de Ritu Nuptiarum.
(*i*) Cod. v., 4, 9.
(*j*) *Ibid.*, 22.
(*k*) Dig. xxiii., 2, 5.

deinde rediens à cœna juxta Tiberim perisset, ab uxore lugendum, responsum est" (*l*).

Betrothal.—The marriage was generally preceded by a formal betrothal (*sponsalia*), defined as *mentio et repromissio nuptiarum futurarum* (*m*). Originally this took the shape of a verbal contract (*stipulatio*), and an action seems to have been given for breach of the promise by allowing a penalty agreed upon to be enforced; but afterwards it was made informally (*nudus consensus sufficit ad constituenda sponsalia*) (*n*), and the only remedy for breach was that the betrothal gifts (*arrha sponsalicia*) given by the party breaking off the engagement were forfeited, and the gifts given to him or her restored to the giver (*o*). Betrothal was converted into marriage by actual cohabitation. By the *lex Papia Poppaea*, if the marriage did not take place in two years, except for special reasons, such as ill-health of the parties, or death of parents, the contract was at an end (*p*).

Dissolution.—Marriage was determined by a party dying, or becoming a slave or an alien; by supervening prohibited degrees of relationship consequent on adoption; or by divorce (*q*).

Concubinage.—Concubinage under the Empire was admitted as a permanent legal relation, which in many respects was assimilated to marriage, *e.g.*, so far as the children's paternity, maintenance, and rights of succession or intestacy were concerned (*r*). It was distinguished from marriage by the absence of the *adfectio maritalis*, and concubines generally belonged to the class of slaves of freed women or *personæ inhonestæ* (*s*). A man could not have more than one concubine at a time, nor a wife and concubine at the same time (*t*). Under the later Empire it was discouraged and prohibited for high officials under Constantine, and finally made illegal in the ninth century.

Contubernium.—Though slaves were incapable of marrying, two slaves, or a slave and a free person, might form a connection known as *contubernium*, of which the issue were *cognati* to each other on becoming free (*u*).

(*l*) Dig. xxiii., 2, 6.
(*m*) *Ibid.*, 1, 1.
(*n*) *Ibid.*, 1, 4.
(*o*) Cod. v., 3, 15.
(*p*) Dig. xxiii., 1, 17; Cod. v., 1, 2.
(*q*) Dig. xxiii., 2, 67, 3.
(*r*) Dig. xxv., 7, 3; xxxii., 49, 4.
(*s*) *Ibid.*, 7, 1.
(*t*) Cod. v., 26; v., 5, 2; ix., 9, 18; but see Esmein, ii., 106—9.
(*u*) Dig. xxiii., 2, 14, 3.

Stuprum was any other connection between a man and an unmarried free woman (*x*).

The personal capacities of the spouses and their proprietary relations as a consequence of the marriage, and the termination of the marital relation by divorce, are referred to subsequently under those heads.

SECTION II.

Roman-Dutch Law.

Marriage a Form of Guardianship.—The customs of the Germanic tribes, including those settled in Holland, which, subsequently modified by the Roman law, developed into the system of Roman-Dutch law, regarded marriage primarily as a form of guardianship.

According to Germanic custom, a woman was always in the *mundium* of some male person. By *mundium* was understood the protection and representation granted to persons who are socially and physically weak—that is to say, all those who were incapable of bearing arms. In a society of persons in which the authority to maintain the law was in the hands of its members, and of which the membership rested on the ability to bear arms and defend oneself ("weer"), those who, for want of strength or some other reason, were unable to do so, could not play an active part, and were necessarily placed under the authority of those whose protection they needed. Originally, *mundium* was not limited to family law. Gradually it lost its wider meaning, and in its restricted sense it received different applications, as family relations became classified into separate groups, and the conception of *mundium* appeared under different forms, with special rules and special names —*e.g.*, of marital power, parental power, guardianship, and curatorship (*y*).

The woman came within the legal sphere of the head of the family. He was bound to protect her, and the relatives had an obligation to see that he did so. On the other hand, she could not arbitrarily withdraw herself from this protection nor be withdrawn

(*x*) Dig. xlviii., 5, 34.

(*y*) Fockema Andreæ, Bijdragen, i., 37 *et seq.*; Het. Oud. Nederlandsch B. R., i., 120 *et seq.*, and authors quoted.

from it without his consent (*z*). His guardianship entitled him to act as her agent and as such to enter into contracts on her behalf. The man who wanted her for his wife had to negotiate with the head of the family and to enter into a contract of purchase and sale, as to which the male relatives of the woman were consulted (*a*). By purchasing her, he made her subject to his own *mundium*.

Though originally this contract was entered into and performed at the same time, subsequently the two acts—that of negotiation with the head and members of the family (*desponsatio*) and that of taking away the bride (*traditio puellæ*)—became separated, and took place at different periods. The purchase price was first settled between the negotiators (which formed the betrothal), and the marriage ceremony was afterwards performed with many formalities in order to show that the bride had left the *mundium* of the head of her own family and had entered that of her husband (*b*).

Betrothal by Guardian.—This point marked a distinct phase in the evolution of the marriage contract. Instead of representing the value of the woman, the purchase price became the sum paid to the head of the family for his giving up the *mundium* exercised over her. Gradually this payment lost its substantial character of purchase-money, and retained a symbolic character only. The betrothal became a contract whereby an *arrha* or *mundium* was delivered as a symbol of its binding nature (*c*).

This had a twofold consequence. The person in whose *mundium* the woman was at that moment (*mundoaldus*) became bound to give her in marriage, while the bridegroom, on his part, bound himself to take the woman as his wife, and to pay the agreed purchase price, even if no actual sum of money passed between them (*d*) at the time, but only an *arrha* or *mundium*.

The consent of the bride to this betrothal, though originally not required, became essential at an early period, and, after once consenting, she became bound by the betrothal to allow herself to be given as a wife to the bridegroom, and to consider herself bound

(*z*) Fock. Andr., Het Oud Ned. B. R., ii., 132. Yet the cohabitation of a woman with the man with whom she had eloped was considered a valid marriage: Fock. Andr., Bijdragen, i., 65—66.

(*a*) As to her own consent, cf. Fock. Andr., Bijdragen, i., 66.

(*b*) Fock. Andr., Het Oud Ned. B. R., ii., 133—134.

(*c*) Fock. Andr., Bijdragen, i., 67.

(*d*) Fock. Andr., *ibid.*

as such from that moment. The betrothal created a *vinculum juris* between the bride and the bridegroom (*e*).

Thus the sum of money which the bridegroom promised to pay again changed its character. Instead of being kept by the *mundoaldus* for the benefit of the nearest relatives (the family), it became a gift to the bride—at first partly, afterwards wholly—with the idea that it should serve as a provision for her widowhood. The bride was no longer bought by the bridegroom, but provided with a *dos* by him (*f*).

The betrothal could be rescinded by mutual consent, and, in certain cases, at the will of either of the parties. It was revoked by a second betrothal of one of the parties followed by *concubitus*, or by the elopement of the bride with another person than the bridegroom, and with the consent of her *mundoaldus*.

If the bridegroom broke off the betrothal for no valid reason he became liable to a fine.

The marriage ceremony was made a formal and symbolical act in order to give publicity to the passing of the bride into the *mundium* of the husband. The principal part of that ceremony was the actual taking possession of the wife by the husband, but the marriage was not complete unless, and until, it was consummated by the *concubitus* (*g*).

As the emancipation of women advanced, the marriage contract underwent a further change (*h*). With the extension of the royal power and the capacity of the executive authority to enforce the laws of the land, the *mundium* of the family lost its importance. It became incumbent on the central authority, by reason of its obligation to secure equal rights to all the members of the community, and to grant special protection to the weaker classes. The duty of protection which was involved in the *mundium* became vested in the central authority of the State, in so far as this was possible.

Women were first to benefit by the strengthening of the royal power; though in this respect the evolution has been very gradual. Step by step the woman became emancipated from the family guardianship. Its character relaxed. The number of instances

(*e*) Fock. Andr., Bijdragen, i., 67.

(*f*) Possibly the *meta* (*dos*) had always been given by the bridegroom: see Villari, History of Florence (Fisher Unwin, 1901), pp. 391, 392.

(*g*) Fock. Andr., Bijdragen, i., 60, 69.

(*h*) Fock. Andr., *ibid.*, i., 38.

where a woman was absolutely incapable of acting without a guardian became definitely marked out. It rendered, on the one hand, the necessity of a permanent guardian less obvious; and, on the other hand, introduced a guardian of choice, specially appointed for the occasion. Thus it became common for women to remain without a guardian unless, and until, they had to perform an act for which the assistance of a guardian remained essential. The last survival of the former condition of things was the inability of a woman to appear in Court except by a guardian, and the necessity of a guardian's assistance in case she wished to enter into a contract (*i*).

In the course of this development, the former characteristic idea has disappeared that a member of the community, in order to be *mondig*, should be able to bear arms, as the person who had the authority to keep the peace also possessed the power to maintain that authority. As the character of *mondig* became detached from the idea of physical ability for self-defence, it was only natural that the recognition of *mondigheid* in women who had come of age should follow.

Betrothal by Wife.—As soon as it was recognised that a woman was capable of becoming *mondig*, and that her status, after she had come of age, became equal to that of a man, she was rendered capable of entering into a betrothal herself, with the consent of her guardian, and of promising that she would give herself as wife to the bridegroom. This again changed the form of the contract. Like all other contracts, it was entered into between the two parties by the handing over of a symbol, a *godspenning*, or even without any symbolic formalities by the mere expression of intention in the presence of witnesses, whereby both parties bound themselves to enter into marriage with each other.

The marriage ceremony should have changed accordingly, when the giving away of the bride by her guardian lost its significance, and the bride, by fulfilling the contract which she had entered into at the time of the betrothal, gave herself into the *mundium* of her husband. Here, however, the old form was retained, and the giving away of the bride by her guardian, or some special representative—as a rule selected by the bride herself—remained one of the usual marriage ceremonies (*j*).

(*i*) Fock. Andr., Bijdragen, i., pp. 38 *et seq.* (*j*) Fock. Andr., *ibid.*, i., 70, 71.

There is, however, nothing extraordinary in this, as the marriage ceremony itself never was, and never became, absolutely essential to constitute a valid marriage.

The *concubitus* and the living together of the parties as husband and wife remained sufficient for the conclusion of a binding marriage (*k*).

Influence of Canon Law.—But a still greater factor in this result than the development of a strong central worldly authority was the influence exercised upon the character and form of marriage by the canon law. Its object was twofold. On the one hand, it desired to facilitate marriage and legalise cohabitation actually existing between a man and a woman; on the other hand, it desired that such a relation should be binding and of public knowledge. Thus while the Church enjoined a formal ceremony—the parties to a secret marriage, or the persons performing it, were liable to ecclesiastical penalties—the formality was not regarded, even by the Church itself, as indispensable for the constitution of a valid marriage. The Church was too anxious to uphold the sacrament of marriage. Even in case the marriage ceremony had been gone through, the marriage only became indissoluble after its consummation (*l*). On similar lines the Church, though trying to introduce its own requirements, recognised the validity of a marriage which had been entered into without the intervention of the priest by the mere *sponsalia de præsenti*, or by the living together of the parties (*copula carnalis*) having taken place after the betrothal (*sponsalia de futuro*) (*m*).

On the other hand, its desire to enforce the prohibition of all secret marriages, especially those which would be invalid, *e.g.*, within the forbidden degrees of relationship, made the Church insist on publicity. No marriage ceremony might be celebrated unless the wish of the parties had been expressed to the parish priest, and had been made publicly known by him to the community by the pronouncement of "banns" on consecutive Sundays. The celebration should take place *in facie ecclesiæ* (*n*).

Though the Church only recommended, and did not yet impose, the observation of these rules upon its members as a condition for the validity of their union, most of them complied with the wishes of the Church, and the bride, when electing the special guardian

(*k*) Fock. Andr., *ibid.*, i., 68—69.
(*l*) Cf. pp. 18, 20, Fock. Andr., *ibid.* i., 71, note 2.
(*m*) Cf. p. 18.
(*n*) Cf. pp. 18, 20.

who should "give her away," often chose the parish priest. The priest thus *in facie ecclesiæ* heard the parties once again express their wish to be married to each other, and thereupon gave the bride to the bridegroom. Immediately afterwards he entered the church, together with the parties, and performed the religious marriage ceremony. In later times the whole ceremony took place within the church.

Neither the *traditio puellæ* nor the celebration of the marriage were made essential in themselves: as to these, parties could please themselves if they refused to please the Church (*o*).

Finally, the Council of Trent (1536—63), following this line of thought, decreed in its 24th session, c. 1, *de reform. matrim.* that the *sponsalia de præsenti*, in order to be valid, should take place before the proper priest of the parties and two witnesses, and that this ceremony should be the only valid ceremony to constitute marriage, with the exclusion of all other modes of celebrating marriage (*p*).

In order to follow the effect of the canon law on marriage it will be necessary to consider more fully the rules laid down by the Catholic Church, and its two main branches of the Western and Eastern Churches, and especially the system as it was built up by the former Church in the Middle Ages.

SECTION III.

The Canon Law of the Western Church.

I. **Generally.**—The contribution made by the canon law to the conception, attributes, and conditions of marriage has been perhaps the most important factor in its legal development. The term canon law is here applied to the provisions of the various compilations which go to make up the *Corpus juris Canonici* of Western Church law, namely, the "Decretum Gratiani" (1139—1142): the "Decretals of Gregory IX." (1234); the "Liber Sextus" or "Sext" (1298); the "Clementines" (1313, 1317); the "Extravagants of John XXII." (1316—1334); and the "Extravagantes Communes" (1281—1284) (*q*). The canon law of the Eastern Church is considered separately.

The golden age of the canon law was the period from the middle

(*o*) Fock. Andr., Bijdragen, i., 71—73 and 139, 140.

(*p*) Cf. p. 27.

(*q*) See Burge, Commentaries, vol. i., p. 12.

of the twelfth to the middle of the sixteenth centuries. After the Reformation and the Council of Trent the exercise of the power of legislation and jurisdiction by the Church was greatly restricted. In Protestant countries the canon law system continued, though with a different interpretation and a distinct development in each country from those previously followed by the Catholic Church generally. In Catholic countries, as a result of these events, a considerable modification of the influence of the canon law took place. But in neither case was the general Church law absolutely discarded nor the system of ecclesiastical jurisdiction abolished.

At the outset the canon law had not the rigid character which it afterwards acquired, especially in matters of practice and usage, which were left for local determination; and when supremacy was claimed for it over the rules of particular Churches already in force, two opinions were developed as to the extent of its authority. The one party upheld the absolute binding character of the decretals—such were Athon and Lyndwood in England; others held the fluid opinion which in France was crystallized into the "Gallican" theory of *reception*—*e.g.*, that decretals acquired force of law (even spiritually) only when received.

Moreover, even the most pronounced curialists such as Hostiensis allowed the force of *consuetudo* or custom as nullifying the general law, and later writers explained this by the tacit assent of the legislator—*i.e.*, the Pope (*r*).

The opinion has been stated that a solution of many of these vexed questions may be found in recognising this doctrine of *consuetudo*, for civil legislation and jurisprudence affect the practice of Christians, and practice is generated by *consuetudo* (*s*); while others consider that custom is always liable to be opposed by presumption drawn from the written law. There must always have been opportunity for conflict between the ecclesiastical and civil jurisdictions; and it did not necessarily follow that the civil power accepted the provisions of canon law as recognised law when it gave its aid to ecclesiastical authorities for the execution of these laws at the requests of bishops or ecclesiastical judges. In later times the civil law while maintaining the validity of the canon law as a whole—*e.g.*, with regard to marriage—resisted its application to specific objects, such as legitimation and consent

(*r*) See Lyndwood, p. 264, *s.v. solent.*

(*s*) See Lacey, Handbook of Church Law, pp. 44—73.

of parents. The authority enjoyed by this general law of the Church in the different countries which acknowledged its spiritual supremacy will be considered in more detail subsequently.

The historical development of the canon law of marriage is stated comprehensively in such works as Esmein's "Le Mariage en Droit Canonique," and Holtzendorff's "Encyclopædia" (*ss*), to which the following account is largely indebted. It is sufficient for historical purposes here to say that under the Roman Empire the marriage law of the Church was distinct from the civil law and subordinate to it and the civil jurisdiction; after the fall of the Empire the same conditions continued, and the Church only exercised a disciplinary power with regard to marriage; after the tenth century the Church acquired full jurisdiction and legislation over marriage and retained them till the sixteenth century. With the Reformation, as already noticed, the Church's exercise of the power of legislation and jurisdiction as regards marriage was considerably restricted both in Protestant and Catholic countries.

The subject is here considered under the following heads:

(1) The character and constitution of the status;

(2) The conditions of the marriage contract as regards capacity of parties and formalities, and the effect of non-compliance with them, or "impediments";

(3) The ways of impugning the validity of marriages;

(4) Second marriages and concubinage;

(5) Dispensations;

(6) Changes made by the Council of Trent.

The provisions of the canon law with regard to the effect of marriage on the personal and proprietary rights of the spouses, and with regard to dissolution of marriage and separation, are considered subsequently.

1. Character and Constitution of the Status.—The canon law assigned to the contract creating the status the quality of a sacrament in addition to the obligation formed by the contract of marriage.

The marriage contract (*sponsalia*) was distinguished from the relationship between the parties consequent upon it (*nuptiæ*). In the early period of canon law the term *sponsalia* meant the contract completed by the spouses living together, but preliminary to it and made with certain formalities. Subsequently this ceremony came to be restricted to precontracts or betrothals.

(*ss*) Article Kirchenrecht, by U. Stutz, Encyc. ii., 811 *et seq.*

By the end of the twelfth century two distinct forms of marriage contracts had become recognised: the *sponsalia per verba de præsenti*, formed by exchange of consents which the Church recommended its members (*fideles*) to make in public *in facie ecclesiæ*, and this was indissoluble except in the case where it was not consummated, and it was null *ab initio* in the case of impotence, or of the parties being within prohibited degrees of relationship to each other; and the *sponsalia per verba de futuro*, which entailed an obligation to marry, and on sexual relations taking place became what was called a presumptive marriage.

Marriages were also distinguished as *matrimonium ratum*, where consents were exchanged, and *consummatum*, where there was also bodily intercourse, and different schools of canonists emphasised respectively the element of consent, or that of *copula*. Nuptial benediction by a priest was also required by the Church, but was not essential.

For betrothals, which implied an obligation to marry the betrothed person and no one else, in the Western Church, during the thirteenth to the sixteenth centuries, when they were made in anticipation of a non-immediate marriage, it was established that no form was required, but the parties must be of sufficient age, and for this purpose seven years was taken to be the minimum. The consent of the parents was not necessary, though, if the parties were *infra pubertatem*, the parents could enter into the contract on their behalf; and while in theory such contracts were obligatory, they could be dissolved by the parties' consent or for causes for which non-consummated marriages could be dissolved. Recognition was also made of the element of contract by allowing betrothal by proxy under a special and actual mandate from the parties (*t*).

In the West conditional marriages were also allowed, which could be converted into actual ones by subsequent *consensus de præsenti* or by *copula*.

Clandestine marriages—*i.e.*, those of which proof was wanting by their being not made in public (*in facie ecclesiæ*)—were prohibited under pain of ecclesiastical punishment, such as penance; but nevertheless when made they were valid. Similarly proclamation of banns (*denuntiationes*), which were required for the whole of the Church by the Lateran Council (1215), was not an essential the absence of

(*t*) Esmein, i., 153—163.

which invalidated the marriage. Such marriages, however, besides being canonically punishable, gave no right to dowry.

The proof of marriage was at first allowed to be made by the avowal of the spouses, but complete proof required two witnesses. The "act" (or instrument executed by the parties) of marriage was not enough, and in early times marriage registers were not kept. Proof could be made by showing possession of the marriage status by cohabitation, and according to some opinions (which did not, however, influence the Courts), the man's word was allowed to prevail over that of the woman, though it could be rebutted by physical inspection. No presumption was held to arise from having a wedding-ring, and only a doubtful one from giving it.

2. **Capacity, Forms, and Impediments.**—The term "impediments" is the most convenient head under which to consider the conditions of the marriage contract; and the canon law gave special importance to, as it had also originated, the following classification of impediments. They might be (a) destructive, which prevent the constitution of the status (*dirimentia, dirimants, trennende Ehehindernisse*), and these again might be "public"—*i.e.*, if the impediment is based on considerations of general interest, and is therefore available to third parties, or *ex officio*, such as previous marriage or holy orders, or private, if the impediment is one granted merely in the interest of certain persons and available to them only—*e.g.*, impotence; or (b) prohibitive (*prohibitiva* or *impedientia, prohibants, aufschiebende Ehehindernisse*), which prohibit or suspend entering into the contract. A disregard of these entails ecclesiastical penalties on the offenders, but does not invalidate a contract actually entered upon.

Destructive Impediments.—The former class were summarised in the following verse:

> Error, conditio, votum, cognatio, crimen,
> Cultus disparitas, vis, ordo, ligamen, honestas,
> Aetas, affinis, si clandestinus et impos,
> Raptave sit mulier nec parti reddita tutæ
> Hæc facienda vetant connubia, facta retractant.

They may also be grouped under the heads of (1) want of consent—*e.g.*, mental weakness; (2) incapacity or disability, which may be (a) absolute—*e.g.*, want of age, or (b) relative—*e.g.*, prohibited degrees of relationship or affinity.

Want of Consent.—This head embraces the cases of *dissensus* where one spouse was incapable of contracting owing to mental incapacity or the consent was given without intention—*e.g.*, in joke; force (*vis*) and fear (*metus*), which nullified the contract, though mere trickery (*dolus*) did not; error of person—*i.e.*, identity or condition, the last-named including such a status as slavery, but not of quality—*e.g.*, virginity, or fortune; and consummation after knowledge of the defect prevented nullity being claimed.

Absolute Incapacity or Disability.—These include the impediments of want of age (though for this it was held that "*presumptio cedebat veritati*," and if such a marriage had been consummated "*malitia supplebat ætatem*"); difference of faith (*cultus disparitas*), *i.e.*, of a baptised with a non-baptised person, with regard to which it may be noted that the marriage of a Christian with a heretic or excommunicated person was held good in the Western Church, but not in the Eastern; impotence (*coeundi impotentia*), in which case it was required that the incapacity should have existed before marriage and not have merely supervened after it, though this could be presumed from the proof of its existence after marriage, and a cohabitation of three years from the marriage was necessary before the contract could be repudiated; prior marriage (*ligamen*); solemn vows of religion (*votum*) if these were made anterior to marriage, but if they were taken after it, they did not affect it, and then they could only be made by mutual consent, and by both parties together; and holy orders (*ordo*). As regards this last, in the Western Church, in practice, married persons are not admitted to orders, though there is no express prohibition of it; but from the end of the fourth century it was required that married clerks in the higher grades should live with their wives as with sisters.

Relative Incapacity or Disability.—The third head requires more consideration. Relationship (*cognatio*) might be natural, legal, or spiritual. A marriage which was subject to a destructive impediment, if not clandestine, and one of the spouses contracted in good faith, was admitted as valid for the purpose of making the issue of it legitimate. This rule was not admitted in Roman law, and the Eastern Church continued its exclusion (*u*); but in the twelfth century the theory of the putative marriage made its way into the general canon law from a source which is said to have been the French

(*u*) Esmein, ii., 33.

Church. The recognition of this rule afterwards extended to make the proprietary relations of the spouses under such a marriage the same as under a valid union (*x*).

The Church followed the provisions of the civil law with regard to natural relationship, but adopted a different reckoning of degrees in the collateral line (*y*).

Degrees of Consanguinity and Affinity.—How Computed in Civil and Canon Law.—The civil law, in reckoning degrees, counts, as regards the direct line, a degree for each generation; as regards collaterals, it counts from one of the persons whose relationship is in question up to the common ancestor, and then down to the other. Thus father and son are in the first degree, brothers in the second, uncle and nephew in the third, first cousins in the fourth. The canon law reckoned direct relationship in the same way, but in the collateral line it counted only up to the common ancestor, and not down again. According to this mode of computation first cousins are in the second degree, because each of them is only two generations distant from the grandfather, who is the common stock. In the unequal collateral line, where one of the two is further removed than the other from the common ancestor, the canon law reckons the distance by the number of generations of the person furthest removed. Thus, a niece is related in the second degree to her uncle, because she is related in the second degree to her grandfather, the common stock; while, according to the same method of reckoning, brothers are in the first degree, and first cousins in the second (*a*).

The civil law reckoning is followed by the Eastern Church, but the seventh degree is treated by it as a prohibitive impediment only. After the fall of the Western Empire the prohibition was extended by Western Church Councils to the sixth degree of the civil law—*i.e.*, second cousins. Until the fourth Lateran Council, in 1215, in the West, the prohibition extended to the seventh degree (canonical or Germanic) (*b*), though the *impedimentum dirimens* did not go so far. After that Council the canon law confined the effect of the prohibition and the nullity to the same

(*x*) Esmein, ii., 36, 37.

(*y*) See Hammick, Marriage Law (1887), pp. 37, 38.

(*a*) Gibson, Codex, 498; Blackstone, Comm. ii., s. 206; Erskine, i., 6, 8.

(*b*) See Stephen, Eccles. Statutes, i., 270; and this was the law of the Church of England.

extent as the civil law—*i.e.*, up to the fourth canonical degree (eighth degree civil); and such is still the law. But dispensations allowing marriages within the third and fourth degrees, and even within the second, are very largely and easily granted; and there is reason for holding that the canon law is practically relaxed to this extent.

Legal relationship—*i.e.*, by adoption—is accepted by the canon law exactly in the same terms as in the legislation of Justinian; it forbids marriage "inter adoptantem et adoptatum (vel adoptatam); inter adoptantem et filiam adoptati; inter adoptatum et adoptantis matrem aut sororem, imo et viduam; inter adoptatum et filios adoptantis." But there is no canonical legislation on the subject; and the law of each different country must be compared with the adoption of Justinian as the model.

Spiritual relationship—*i.e.*, relationship by baptism or confirmation—was held in both Western and Eastern Churches to debar marriage between godparent and godchild, and the baptised child and the baptising minister (*paternitas*), between natural parents of a baptised or confirmed child and its godparents, and between the baptising minister and the parents of the baptised child or the godparents (*compaternitas*), and between a baptised child and the natural children of its godparent (*fraternitas*); and in the Eastern Church, *indirecta compaternitas*—*i.e.*, between natural parents and godparents, and their spouses—was also a bar (*c*).

Affinity as an impediment to marriage was derived from the Levitical law, and in the case of collaterals (as in that of persons related directly to each other) by the sixth century A.D. it was a bar to a man marrying his deceased wife's sister or his brother's wife (except as a duty in the Jewish law), or the wife of his paternal uncle, though it seems that such marriages were not thereby made null in law (*d*). From that time the impediment was gradually extended till the twelfth century, when affinity was made an impediment as far as relationship, and besides primary affinity—*i.e.*, that existing between a spouse and the relations of the other spouse—further kinds were introduced. The Lateran Council, however,

(*c*) This was also for a time admitted in the West, but exceptionally, and certain individual forms of it were left to local custom to decide upon.

(*d*) Turner, Church Quarterly Review, October, 1908, citing the Councils of Elvira and Neocaesarea.

established the primary kind of affinity only, making it an *impedimentum dirimens* up to the fourth degree.

Affinity by illicit connection was also recognised (*e*); and the impediment extended as far as the affinity from marriage; it was restricted by the Council of Trent to within the second canonical degree. There was also the impediment of morality (*publica honestas*) derived from expressions in the Roman law, but not from express provision of that law, which arose from a prior betrothal—*e.g.*, a man or woman could not marry a relation in the fourth and, since the Council of Trent, in the first degree of his or her betrothed, nor could a spouse marry a relative in the fourth degree of the other spouse—where their marriage, though contracted, had not been consummated (*f*).

The impediment *crimen*, originally only penitential in character, became restricted to cases of adultery, murder of the spouse, and ravishment.

Adultery and Murder.—In the case of adultery, the civil law in the time of Augustus prohibited an adulterous wife from marrying anybody, and in the time of Justinian she could only marry under certain limitations (*g*). The canon law allowed a guilty wife to marry anyone, even a person who had committed the offence with her, except in three cases: (a) where both accomplices had successfully compassed the death of the husband, even without adultery; (b) where the wife alone had successfully compassed the death of her husband in order to get free, and committed adultery; (c) where, after having committed adultery, she had promised to marry or attempted to marry a third person; and the same rule applied to a guilty husband in like cases (*h*).

Ravishment.—In the case of ravishment, at first both in civil and in canon law, marriage with the ravisher was prohibited, but subsequently the canon law adopted the view that a man might carry off his betrothed without being guilty of ravishment, and, secondly, that any woman could afterwards marry her ravisher if she were put into a position to exercise her free will in the matter (*i*).

(*e*) For a time this was recognised by English statute law.

(*f*) See Esmein, i., 145, 146, 378, 379; Reichel, 361; Holtzendorff, Encyc. ii., Kirchenrecht, 941.

(*g*) Esmein, i., 384; Hunter, 683. See p. 6, *ante*.

(*h*) Council of Meaux, 845; Council of Tribur, 895; Reichel, 363; Holtzendorff, ii., 941; Esmein, i., 384 *et seq.*

(*i*) Esmein, i., 391.

2. **Prohibitive Impediments.**—These have been similarly summed up in the lines:

> Ecclesiæ vetitum, tempus, sponsalia, votum,
> Impediunt fieri, permittunt facta teneri.

The first named of these was an ecclesiastical injunction to a member of the Church not to marry a particular person, and the following persons were the objects of an interdict: a person guilty of incest, a husband who killed his wife, the murderer of a priest, a ravisher of some one else's wife or betrothed; and marriage with the widow of a person in holy orders, a Jew, or infidel, and clandestine marriage—*i.e.*, without banns, or not *in facie ecclesiæ* or *extra parochialem ecclesiam*—were similarly prohibited. The second referred to particular periods of the Church's year—*e.g.*, Quadragesima, or from Septuagesima to Low Sunday, which is the English rule, or from Rogation Monday to Saturday after Pentecost, or from the first Sunday in Advent to the octave of the Epiphany (*k*). The canon law did not, however, specify as an impediment the *annus luctus* of a widow, which was enjoined in the civil law and has been reproduced in the modern systems. The other impediments are betrothal (*l*) and simple vow of chastity or religion. All these impediments were disciplinary only.

3. **Ways of Impugning Marriage.**—The methods provided by the canon law for impugning or preventing marriages may be briefly noticed. They were the *accusatio* (*m*) and the *denuntiatio*, which were strictly actions *pro salute animæ*.

The *accusatio* in principle was available to any person; but in practice the general application was restricted to cases where the proposed marriage constituted a sin, where, *e.g.*, a bar arose from prohibited relationship and affinity, *publica honestas*, *votum solemne*, *ordo*, *ligamen*, *crimen*, and *disparitas cultus*; but not to cases, such as want or defect of consent, impotence, and impuberty, which were reserved to the spouses to take action upon, both spouses being on an equal footing in this respect. Ultimately accusations were restricted to near relatives only; no one who had a monetary

(*k*) Lyndwood, 273, 274.

(*l*) In England and Ireland by statute precontracts had no effect against consummated marriage (32 Hen. VIII. c. 38 (E.) and 33 Hen. VIII. c. 6 (I.).

(*m*) See Lyndwood, 277.

interest in the matter was allowed to impugn a marriage, and an action for nullity was not admitted after the death of a spouse.

The *denuntiatio* (*n*) (*de peccato committendo*) was not directly connected with a claim of nullity, but, like the modern "oppositions," it was resorted to in order to prevent a prohibited marriage from taking place, and a judicial interdict could be pronounced accordingly against proceeding with the marriage till further order. The Judge could also by *inquisitio per officium*, where the parties had no remedy available, proceed to pronounce divorce and separation. There was no time limitation applicable to actions of nullity, and the rule was consequently adopted in civil law that a judgment in a matrimonial cause never became *res judicata*, with certain limitations. Subsequently, in the fourteenth and fifteenth centuries, "oppositions" were recognised, but in practice were only available to a betrothed or person alleging a marriage or promise of marriage with a betrothed.

4. **Second Marriages and Concubinage** require brief notice. In the canon law, second and subsequent marriages were allowed, with certain restrictions as to particular persons—*e.g.*, a *digamus* was not admitted to holy orders; and ceremonies—*i.e.*, the nuptial benediction was not given at second marriages of women, though it was at the marriage of a widower with a virgin. The Eastern Church, on the other hand, imposed penalties on a second marriage, did not allow in some cases third marriages, and rejected fourth marriages altogether.

As already seen, concubinage was recognised in Imperial Roman legislation. The Church in early times (*o*), while condemning concubinage as an institution, yet showed a tendency to safeguard the position of a concubine who promised to be faithful to the man; but the canon law finally rejected it as a legal condition, though it gave to the children of concubines kept at home (not *vulgo quaesiti*) rights of succession to their father, which natural children only possessed as regards their mother (*p*).

5. **Dispensations.**—These were originally interventions by the ecclesiastical jurisdiction in particular cases, which were reserved to bishops. With the development of canon law, they became more general in character, and by the eleventh century the Popes claimed by

(*n*) See Lyndwood, 311.

(*o*) Councils of Toledo and Orleans.

(*p*) See Athon, 44, 92—95, as to the position of *concubinarii*.

this power to override the secular law (*q*). The canon law, however, only allowed dispensation to be applied to ecclesiastically-made law, such as constitutions, and not to what was regarded as natural law.

As regards marriage, the rule came to be adopted that in the *forum externum* only the Pope could dispense with impediments, whether *dirimentia* or *prohibitiva*, and bishops could only do so as his delegates. But in practice, on the ground of necessity, they were held to have such power delegated to them implicitly (if not given to them explicitly, by grants), besides having such power directly under the former general law (*r*).

Dispensation was applicable to impediments of general incapacity, such as an *impubes* marrying on the condition that the marriage should not be consummated till later, a marriage between a Christian and an infidel, vows and holy orders (very rarely), and clandestinity (though not as such); but not to *impedimenta dirimentia*, based on want of consent, or impediments of natural or divine law. The most usual cases in which dispensation was granted were relations existing between the parties before marriage—*e.g.*, *cognatio* proper, *i.e.*, as far as the second canonical degree, the other kinds of *cognatio* being dispensable but not usually dispensed in practice; affinity, but never between ascendants and descendants—*e.g.*, for collaterals in the first degree; *publica honestas* and *crimen*, though not for a spouse who had brought about the other's death. Dispensation was, however, allowed where adultery had been coupled with a promise of marriage.

Prohibitive impediments were always dispensable, except betrothals, which were impediments to subsequent marriage with another person, but could be dissolved by a Court. Dispensations for *impedimenta dirimentia* could be given before marriage, or after it, if it were null, provided that the parties had acted in good faith and there had been proclamation of banns, though this latter requirement was not essential. Such subsequent dispensations were either retrospective in effect and rendered it unnecessary to have a fresh exchange of consents, making the marriage good *ab initio*, known as *sanatio in radice*, or they were ordinary, and did not have such effect unless by express permission—*e.g.*, for legitimation of children. It was a necessary condition that the impediment should have been one of ecclesiastical law only, and

(*q*) See Athon, 27. (*r*) Athon, 41.

that there was an existing *de facto* marriage, even though it were clandestine or with a ravisher; and impediments arising from want or defect of consent could not be thus remedied, but required a new exchange of consents to remove them. In this connection, it may be observed that in the English Church at the present time the power of dispensation with ordinary conditions of marriage is only exercised, in practice, with regard to notice, place or time of the ceremony, and not with regard to capacity of parties; and dispensation is granted by licence from the bishop or his officers or delegates as regards banns, and from the Archbishop of Canterbury only as regards place and time by special licence (*s*).

6. **Canon Law since the Council of Trent.**—The Council of Trent, which met at intervals from 1536 to 1563, marks the dividing line between the old and the modern canon law, which latter is still the law in force in the Roman Catholic Church (*t*). The discussions and decrees of the Council regarding marriage were intended as an answer to the criticisms of the Reformers on the canonical rules, and it dealt especially with the recognition of clandestine marriages. The provisions of its decree with regard to the obligation of contracting marriage before the proper parish priest (*u*) does not, however, extend to a country where it has not been published, nor is it binding in countries where compliance with it is impossible and it may become obsolete.

The Council reaffirmed the sacramental character of the marriage contract, but imposed an obligatory form on the consensual contract; and the obligatory character of betrothals, if in writing, continues to the present day.

The decree also dealt with the following points:—

(1) **Marriage Ceremony.**—It laid down that the only valid ceremony of marriage was one performed in the presence of the parties' proper priest (*i.e.*, the priest of the place where either party dwells) and two witnesses; another priest could, however, take his place by his permission or delegation, and registration of the marriage was prescribed. As a result, presumptive marriages became impossible, except in places where the decree did not apply, until 1892, when, having previously tended to disappear, they were abolished by

(*s*) 25 Hen. VIII. c. 21.

(*t*) See Holtzendorff, ii., Kirchenrecht, *passim*.

(*u*) Tametsi, sess. xxiv., *de ref. matr.*, c. 1.

Pope Leo XIII. Marriages by proxy and under suspensive conditions (but not conditions for dissolving the marriage in certain events) were continued, but null or void marriages could not be rectified, and produced no effect.

The question of the validity of marriages of Protestants and mixed marriages, so far as clandestinity was concerned—*i.e.*, if they were not contracted in the presence of a Catholic priest—led to considerable difficulties. In countries where the decree was not published, such marriages were recognised as valid. In countries where it had been published, but Protestant communities had acquired a legal existence, different views were held on this point. In 1741 their validity in the latter case was recognised by Pope Benedict XIV. for the Low Countries, and this was extended afterwards to other countries. In the case of mixed marriages, in which the difference of faith still continues to be a prohibitive impediment, the decree of the Council of Trent was held to apply. A marriage between a Catholic and heretic was allowed by dispensation from the Pope or his delegates on certain conditions—*i.e.* (1) the children to be brought up as Catholics, (2) free exercise of Catholic worship, and (3) the Catholic spouse to be allowed to attempt to convert the other spouse. The parties were also required not to go before a schismatic priest, before or after being married by a Catholic one; but this last requirement was not absolute, and now they can go before a civil officer where the local law requires it. The Catholic officiating priest also performs the ceremony in a merely passive character and should not give the benediction. But in 1907 the law with regard to the marriage ceremony was modified and consolidated by a decree of the Congregation of Council, the effect of which is that all Catholic marriages must be contracted before a priest on pain of nullity, as also must be mixed marriages, except in Germany and (to some extent) in Hungary (*x*).

The decree provides: (1) Betrothals are only valid if in writing dated and signed by the two contracting parties and the parish priest and two witnesses and an additional witness if either or both of the parties cannot write, which fact is to be stated.

(2) The parish priest is only competent to take part in a marriage within his jurisdiction, but is competent with regard to

(*x*) This is only in force *in foro conscientiæ* of the parties being Catholics and has no civil effect of itself.

all points affecting the validity of the marriage: he becomes a witness "*rogatus*," so that clandestine marriages are impossible, and it is his duty to question the contracting parties and receive their replies.

(3) A delegation of his authority, though authorised, can only be made within the jurisdiction of the parish priest or the Ordinary. Marriages are valid which are contracted in cases of urgency before any priest if the parish priest or his delegate are not available, or which are contracted before two witnesses in countries where a priest is too remote to be available, and the urgency of the case has continued for a month.

(4) This law applies to all marriages between Catholics—*i.e.*, persons who belong or have belonged to the communion of the Roman Church. It does not apply to marriages between persons who are not Catholics and *a fortiori* not to marriages between persons who are not Christians.

(2) **Consents.**—The marriages of minors without consent of parents or guardians were still admitted to be valid even though no publication of banns was made, but in some countries, such as France, by the civil law the marriage may be annulled on the application of the parents within a fixed time, for want of either of these formalities.

(3) **Impediments.**—The *impedimenta dirimentia* were mostly left untouched—*e.g.*, those relating to capacity, want of consent—except in the case of ravishment, in which case the marriage was declared null while the wife was in the power of the ravisher, but when at liberty and in a position to exercise free choice she could make a valid marriage with him; as were also *disparitas cultus*, and polygamy.

The impediment of prohibited relationship was left unmodified as at the time of the Lateran Council—*i.e.*, it was confined to the fourth degree; and while that of *cognatio legalis* was left as before, that of *cognatio spiritualis* was considerably restricted. The scope of the impediment of lawful affinity remained as before; a betrothal, if actually null, ceased to be an impediment to subsequent marriage with another person; a betrothal which was valid, but was dissolved, became an impediment to marriage with persons related to the betrothed in the first degree only. The impediment of *publica honestas* or affinity resulting from a marriage valid but not

consummated, or from a marriage null for whatever impediment, extended up to the fourth degree (canon law) as before.

The only prohibitive impediments which were modified were those of certain times of festivals, and these were restricted to omission of the nuptial blessing at the religious ceremony.

Actions for nullity of marriage were reserved exclusively to the bishops, and the procedure was modified by Pope Benedict XIV., especially by the institution of the "*defensor vinculi*," and the necessity for a second judgment by a superior Court.

II. **The Effect of the Canon Law in Different Countries.—Canon Law in Catholic Countries.**—In the countries where, after the Reformation and until recent times, the former Catholic Church has continued to hold an official position, exclusively or jointly with others, the canon law modified by the Tridentine decrees is in force, but a civil character was gradually extended into the conception of the marriage status.

In **France** the canon law was superseded by the Constitution Civile du Clergé in 1790: the Secular Courts obtained jurisdiction over certain matrimonial causes, the scope of the Ecclesiastical Courts was restricted, and in 1792 civil marriage was constituted as the obligatory form.

In **Austria** the civil element of contract, as distinct from the sacramental character of marriage, was recognised in 1783, as regards non-Catholic marriages, and the provisions of the Civil Code to this effect were confirmed in 1868. Though the form of marriage contract is still ecclesiastical, marriage is regulated by the law of the State and matrimonial jurisdiction is exercised by the Civil Courts, and the canon law has ceased to have effect.

In **Hungary** an intricate system of marriage law for persons belonging to the same religious denomination or for mixed marriages prevailed until 1894, when the new marriage law (*y*) introduced obligatory civil marriage and general matrimonial jurisdiction of the State Courts except in Croatia and Slavonia, which possess autonomy in civil law and have maintained the ecclesiastical law for Roman Catholics and the Eastern Church, and the provisions of the Austrian Code for Protestants and Jews. Bosnia and Herzegovina have also retained the system of ecclesiastical marriage laws. Elsewhere the ecclesiastical law has no general effect on the marriage law.

(*y*) Law XXXI. of 1894.

In **Italy** civil marriage is obligatory as distinct from the religious ceremony.

In **Spain** the canon law was maintained till 1870, when civil marriage, in the French form, was introduced, and in 1875 a dual system, allowing civil and religious forms for non-Catholics and Catholics respectively and requiring the attendance of a civil officer at the ceremony, was established, which has been adopted in the Civil Code, and the canon law has been restricted by the civil law in certain respects—*e.g.*, betrothals do not entail a civil obligation to marry, though the present law of the Catholic Church still regards written betrothal as obligatory. In **Portugal** there is a similar state of things.

Switzerland.—In Switzerland the canon law was generally accepted until the Reformation (*a*), but was not universally obeyed by the civil power. Thus divorce by mutual consent, which still exists in Switzerland, but is to disappear under the new Federal Code, appears to have been a primitive institution and to have persisted notwithstanding the canonical rule of the indissolubility of marriage (*b*). After the Reformation many of the Protestant cantons introduced legislation of their own, the most important feature of which seems to be the importance attached to a promise of marriage (*Verlöbnis*). The first of these enactments is the *Mandat* of Zürich in 1525. The Catholic cantons continued to observe the canon law, and accepted the Tridentine modifications. Civil marriage became lawful in many cantons in the course of the nineteenth century, being introduced (except where the French Code was in force) primarily to provide for marriages between persons belonging to different Churches (*c*). After the adoption of the Constitution of 1848, the Confederation took a step in the same direction by enacting in the Law of Mixed Marriages of 1850 that no marriage should be forbidden in any canton merely on the ground of difference of religious belief between the spouses; and finally in 1874 civil marriage became the only form recognised by the State, and marriage was regulated for the whole country by Federal law (*d*).

(*a*) Huber, Schweizerisches Privatrecht, iv., 125.

(*b*) See Huber, Schweizerisches Privatrecht, iv., 340, 341.

(*c*) Apart from the French Code, the first introduction of civil marriage is to be found in a law of the Canton de Vaud of 1835: Huber, *op. cit.*, iv., 331.

(*d*) Law of Civil Status and Marriage,

III. **Canon Law in Protestant Countries.—Marriage Law of the Protestant Church** (*e*).—In the Continental countries of Europe in which the supremacy of the Roman Catholic Church was displaced and the State Churches became Protestant, such as Scandinavia, Germany, and Holland, the former ecclesiastical law continued to be a guiding force for the Protestant Churches, as it also has been seen to have been in a country like Switzerland, which has both Catholic and Protestant cantons.

The Reformation rejected the sacramental conception of marriage and treated it as within the sphere of the civil power both as regards legislation and jurisdiction ; but, nevertheless, the ecclesiastical character of the status was continued in State ordinances for the Church and ecclesiastical jurisdiction over the law of marriage, and the State law of marriage was based on the Church's rules. No general Protestant law of marriage was formed like the canon law or took its place, though in recent times in Germany a beginning has been made in this direction by the State Churches undertaking to regulate the conditions of ecclesiastical marriage. Certain points may, however, be noticed, in which the Protestant Churches adopted different principles from those of the canon law which remained the general basis of both systems (*f*).

As regards impediments, the Evangelical Church recognised as null marriage between persons who were incapable for ordinary purposes. Want of parental consent was a destructive impediment in the view of the early Reformers unless the marriage had been consummated ; in later practice this was not a fatal bar if the marriage had been celebrated in church (*g*). Other recognised impediments were error, as regards quality of the person, both by express enactment as in the case of want of virginity, condemnation to degrading punishment and impotence, and generally ; force ; *dolus* or deceit ; impotence if unknown to the other party when the marriage was contracted ; and ravishment, which was generally

December 24th, 1874. On the whole subject see Huber, *op. cit.*, iv., 314—349 ; F. von Wyss, Die Eheschliessung in ihrer geschichtlichen Entwickelung nach den Rechten der Schweiz, in Zeitschrift für Schweizerisches Recht, xx. i., 85 *et seq.* ; Winkler, Lehrbuch des Kirchenrechts mit besonderer Rücksicht auf die Schweiz (1862).

(*e*) This account is derived from Friedberg, Lehrbuch des Katholischen und Evangelischen Kirchenrechts (5th), Leipzig, 1903, B. Tauchnitz.

(*f*) *Ibid.*, pp. 385—389.

(*g*) *Ibid.*, 393.

regarded from the point of view of want of parental consent, but was an impediment *per se* in a few Churches, only distinguished from that of force, by providing in the latter case that even the woman's abiding with the man of her own free will did not deprive her of the right to claim annulment of the marriage (*h*). An existing marriage if dissolved was not a bar; nor were vows of chastity (*i*), though they have been made so in later legislations; nor Holy Orders (*j*). As regards blood relationship, the Reformers rejected the canon law extension of prohibited degrees, and at first adopted the Mosaic law and the Roman law, and finally the customs in force derived from Catholic times, *e.g.*, marriages of first cousins; but they admitted dispensations by the civil authorities where they had been previously customarily allowed (*k*). The same course was adopted with regard to the degrees of affinity: the Protestant Church law adopted the prohibition of illegitimate affinity for persons connected in the direct line, and it took over from the canon law supervening affinity (created by adulterous intercourse between one spouse and the blood relations or *affines* of the other), and from the Roman law affinity *secundi generis* and the impediment *publicæ honestatis* (*l*). The Roman law principles governing adoptive relationship were followed by the Evangelical Church (*m*), but it rejected spiritual relationship (*n*).

The *impedimentum criminis*, or bar of adultery, was at first rejected by the Reformers in principle in the sixteenth century, though they recognised the necessity of making it the object of disciplinary measures and civil punishment. In the seventeenth century the canon law view again prevailed, though not to the extent of making the marriage of an adulterer in the cases specially mentioned by the canon law a destructive impediment; but the marriage of adulterous parties was only allowed under strict limitations (*o*).

Mixed marriages, made between Christians and non-Christians, were prohibited, and until the nineteenth century marriages between Christians and Jews were forbidden, and are now denied the participation of the Church. Those made between Christians of different denominations are disfavoured, and in the German

(*h*) Friedberg, pp. 405, 406.
(*i*) *Ibid.*, 407.
(*j*) *Ibid.*, 157—159.
(*k*) *Ibid.*, 416.
(*l*) *Ibid.*, 416—419.
(*m*) *Ibid.*, 419, 420.
(*n*) *Ibid.*, 421.
(*o*) *Ibid.*, 422, 423.

Protestant Churches the Church ceremony is denied in cases where a Protestant spouse has expressly undertaken that the children shall be brought up in a non-Protestant religion (*p*).

Dispensations were taken over from the Catholic Church law, but were put in the hands of the civil authorities (*q*).

As regards the annulment of marriages, the Protestant Church law diverged from the canon law in several points, viz.: (a) giving the power of establishing the invalidity of the marriage to private persons other than the parties; (b) holding a marriage subject to a private impediment valid so long as the nullity is not judicially declared, and that it does not only rest with the person by whom the invalidity can be alleged to make the marriage declared null; (c) in the former case not requiring a renewal of the solemnities of marriage (*r*). As the existence of a private impediment does not invalidate the marriage, *a fortiori* a marriage of doubtful validity is good until it is declared null, and the Court then declares not that the marriage contracted is null *ab initio*, but that it may become invalid *ab initio* by the choice of the persons entitled to claim its invalidity.

As regards the marriage ceremony, the object of the early Reformers was not to set up a new Church law, but to establish a legal foundation for the existing practice of a public marriage ceremony, though they rejected the canon law theory of betrothals. Luther held that a public betrothal was equivalent to marriage, and a secret betrothal had the same effect if followed by intercourse, and that all betrothals which were thus marriages were *de præsenti*, the Church's ceremony being only a confirmation or recognition of an existing fact. Until the eighteenth century this view was followed, and betrothed parties were treated as married persons and subject to and capable of exercising the same legal remedies. Gradually the tendency turned against this application of the canon law to the Protestant Church, and led to the view that marriage was founded on a betrothal of the parties in church (*s*).

As regards betrothals (when distinguished from marriages) the Protestant Churches followed the practice of the canon law in not allowing an obligation to proceed to marriage to be created; but it gave the betrothed person a subsidiary right to claim the interest

(*p*) Friedberg, pp. 424—430.
(*q*) *Ibid.*, 432.
(*r*) *Ibid.*, 433, 434.
(*s*) *Ibid.*, 450—453.

which would have accrued to him or her by the marriage, and if one party had by his or her fault made it impossible to carry out the marriage a claim for damages was allowed; in some cases a stipulation for a penalty was regarded as enforceable (*t*).

Second marriages were subjected to a short interval to prevent confusion of blood, but this was only a hindering impediment. As regards second marriages of persons whose marriage with other persons had been dissolved, a distinction was drawn between the guilty and innocent party: the latter could re-marry, the former could not except by permission of the Church authorities; and this is followed by modern legislations.

Generally speaking, as the Evangelical Church regards marriage as a purely State institution, a marriage which is not good by State law is not good for that Church (*u*).

In the **Scandinavian** countries (*a*) the Evangelical Church is the State Church. In **Sweden** a civil ceremony is now obligatory in all cases, except where both parties (a) either are communicants of the State Church, or (b) are members of an acknowledged Dissenting community with clergymen authorised to celebrate marriage, when either a religious or a civil ceremony can be chosen. By the Swedish Code, if a man seduces a betrothed woman it is marriage (without ceremony); and if the man will not undertake the ceremony, the Court declares the woman to be his wife. But if a man seduces, under promise of marriage, a woman to whom he is not formally betrothed, it is not a marriage, but the woman has the right to compel him to make her his wife by ceremony (*b*).

In **Norway** members of the State Church can only be married according to its rites; a member of that Church and a Nonconformist (Christian), Jew, or Unitarian can be married either by a minister of the State Church or a Nonconformist minister or official, or civilly by a notary public; marriages of Nonconformists are performed either by their ministers or civilly by a notary public, and those of persons who are not Christians by a notary public (*c*).

(*t*) Friedberg, pp. 465, 466

(*u*) *Ibid.*, 497.

(*a*) The editors are indebted to Professor Oscar Platou, of the University of Christiania, for revision of this portion.

(*b*) 1734, Giftermals Balk (Marriage Law), iii., 9; Marriage Law of November 6th, 1908, P. P. Misc., No. 2 (1894), *ibid.*, 144.

(*c*) Laws of June 26th, 1891; July 27th, 1896; and June 22nd, 1863; P. P. Misc., No. 2 (1894), 144, 145.

In **Denmark**, marriage between members of the State Church must be celebrated by a minister of the Church, and marriage between Dissenters by their minister. Marriage can also be performed by a notary public, but only where the parties do not belong to the State Church or any other Church, or where they belong to different Churches (*d*). It may be noticed that the Church in Norway was a daughter Church of the Church of England, and had similar laws and customs. There were similarly close relations between the Church of Denmark and the Church of England, and its position is analogous as regards points of doctrine, ritual, and constitution (*e*).

Germany (*f*).—As has been already indicated (*g*), under the primitive Germanic law the marriage ceremony was a bargain by which the father of the bride, or such other person as had power over her (*muntwalt*), sold that power (*munt*) to the bridegroom. The ceremony consisted in the delivery of the bride and the payment of the *muntgeld*. It was preceded by a preliminary agreement in the nature of a betrothal; but the consent of the bride was not originally an essential element of the bargain either in its preliminary state or on its completion. Under the influences of the Roman and canon law this became gradually modified; the bride was more and more looked upon as a party whose consent was required. The *muntgeld* was applied for the benefit of the bride. Even in that later stage the blessing of the Church was not considered necessary, though it was frequently given either to the betrothal or to the proper marriage ceremony, or to both. When the Church assumed the jurisdiction in all matters relating to the validity of marriages, the participation of the clergy in the marriage ceremony assumed greater importance; but down to the decree "Tametsi" published by the Council of Trent it was never indispensable, as the Church up to that date recognised the rule derived from Roman law that the consent of the parties was as regards *sponsalia de præsenti* sufficient to constitute a valid marriage. The decree "Tametsi" did not prescribe a marriage in church; all that was necessary was the declaration of the consent of the parties in the presence of the parish priest, or some

(*d*) Law of April 13th, 1851; P. P. Misc., No. 2 (1894), 53.

(*e*) Church Quarterly Review, April, 1907, pp. 80 *et seq.*

(*f*) Friedberg, Kirchenrecht, 5th ed., pp. 441—462; Schnitzer, Katholisches Eherecht, pp. 145—201.

(*g*) See pp. 10 *et seq.*

other priest licensed by him, or by the ordinary and two or three other witnesses. The decree "Tametsi," according to the view of the canon law, is only binding in those parishes in which it has been formally published, and as it was never published in the Protestant districts of Germany, the pre-Tridentine law still applies to a large part of Germany. The Protestant Churches, soon after their formation, adopted rules similar to those of the canon law (*h*), and accordingly the indirect effect of the decree "Tametsi" was to put an end to the pre-Tridentine form of marriage in Germany.

Since 1875 civil marriage is compulsory throughout Germany, and any clergyman who (except in the case of the threatened death of one of the parties) takes part in a religious marriage ceremony without being satisfied by evidence of the previous solemnisation of a civil marriage is guilty of a criminal offence, punishable by fine or imprisonment (*i*). The compulsory nature of the civil marriage does not, of course, affect the law of the Churches. In the case of the Roman Church this leads to a strange result. According to its view, persons who have gone through a civil marriage without having added a religious marriage complying with the requirements of the decree "Tametsi" are deemed to live in concubinage if the marriage was performed in a parish in which the said decree was published. If, however, they were married in a parish in which such publication did not take place, the declarations of consent before the registrar are deemed *sponsalia de præsenti* under the pre-Tridentine law, and the marriage is therefore valid. The Protestant Churches recognise the supremacy of the State as regards all matters concerning the validity of marriages; they do not, therefore, deny the validity of civil marriages which have not been followed by any religious ceremony, but they consider persons who marry in this manner as failing in their religious duties and accordingly deserving of censure.

The Dutch Republic.—The influence of the canon law in the Low Countries did not make itself felt in so direct a way as it did elsewhere, *e.g.*, in England. The Church never held the same dominant position in the Legislative Councils and on the Bench. Its influence was an indirect one: in the first place through the power which the

(*h*) The Evangelical Confessions (Augsburg), &c.; see Holtzendorff, Encyc., ii., Kirchenrecht, tit. 2, *passim*, U. Stutz.

(*i*) Statute of 1875, s. 67, as amended by Introd. Law to Civil Code, art. 46.

Church exercised over its members, and in the second place by the guidance which it gave to the worldly powers who took over and copied the rules laid down by the Church, but made compulsory what the Church only morally enforced.

Attempts were made in the Netherlands at publication of the decrees of the Council of Trent, which would not extend to any one country unless received therein (*k*); but they only succeeded in some parts of the Dutch Provinces (*l*). The Reformation rendered them ineffectual. The Reformed Church, however, recognising the existing evil of secret marriages, itself took the matter in hand, as far as its own members were concerned, and decreed that the celebration of a marriage could not take place unless it had been preceded by previous notice thereof to the Church authorities and publication of the banns in church on three consecutive Sundays.

The Legislature, following in the footsteps of the Roman Catholic Church, instituted punishments against secret marriages and marriages entered into by minors without consent of their parents, and either fined or banished the culprits or attached disabilities of a pecuniary nature to these and such like marriages (*m*).

These measures remained ineffectual. They were not compulsory, and the prospect of future penalties which did not affect the validity of the marriage was insufficient to deter persons who wanted secrecy from following their own inclinations, or to induce those who did not belong to the Reformed Church to enter its doors for the sake only of going through the ceremony of marriage.

The inadequacy of these measures led the Province of Holland to take legislative action making the prescribed forms obligatory and essential elements of a valid marriage. After some local legislation in 1576 by the *Baljuw en mannen* (Bailiff and men) of Rynland (*n*), the States of Holland provided in their Ordinance of Policy (April 1st, 1580, pars. 1-13) a set (*o*) of rules for the whole of the Province.

In the first place persons who had already been joined together

(*k*) Cf. p. 27.

(*l*) Fock. Andr., Bijdragen, i., 72, n. 1.

(*m*) Fock. Andr., Het Oud Ned. B. R., ii., 138, and the Bijdragen quoted there.

(*n*) Fock. Andr., *ibid.*, ii., 130—140; Bijdragen, i., 127—129.

(*o*) Fock. Andr., Bijdragen, i., 129 *et seq.*; Het Oud Ned. B. R., ii., 140 *et seq.*

in matrimony—whether in church or before any other public authority or without any such ceremony—were recognised as having been validly married, unless any objection on the ground of prohibited relationship could have rendered and would render such marriage a *matrimonium dirimendum* (*p*).

Persons who wanted to marry after the publication of the Ordinance were required to give notice thereof, either to the magistrate of their place of residence, or to the Church authorities (*q*), and have the banns published by either of these officials on three consecutive market-days or Sundays. If no objection were raised against the marriage, the celebration of it had to take place before the magistrates or in church in accordance with the ordinances which were generally used in the churches (*r*). Penalties were imposed for non-observance of these rules, and any marriage which was not entered into in the prescribed manner was declared null and invalid, and not to be tolerated (*s*).

The formula used by the magistrates for the solemnisation of the marriage was the same as the one used by the Church; but after the parties had declared their will to take each other as husband and wife, no further ceremony followed. The "giving away" of the bride was abandoned, and a short benediction by the magistrate brought the marriage ceremony to an end (*t*).

This has practically remained the law in the Province of Holland as far as the formalities are concerned which were deemed necessary to constitute a valid marriage.

The betrothal (*sponsalia per verba de futuro*) followed by notice to the proper authorities of the intended marriage (the National Synod demanded that these in like manner as the *sponsalia per verba de præsenti* should be made in the presence of witnesses) formed the first of the prescribed ceremonies; then came the banns, and lastly the marriage was concluded by its celebration before the magistrates or in the church.

Subsequent legislation was introduced in order to smooth the practical working of these provisions and admit of their modification in the case of members of certain religious sects other than

(*p*) Art. 2.

(*q*) *Sponsalia per verba de præsenti*, as the National Synod of 1578 prescribed; Fock. Andr., Bijdragen, i., 130, n. 2.

(*r*) Art. 3.

(*s*) Art. 13.

(*t*) Fock. Andr., Bijdragen, i., 130 *et seq.*; Het Oud Ned. B. R., ii., 141.

those which formed part of the Reformed or Roman Catholic Church (*u*).

Similar formalities were adopted in the other provinces. Where it was not required that notice of the intended marriage should be given in solemn form and in public, the *sponsalia per verba de præsenti* took place before the proper authorities after the publication of the banns, and, in fact, constituted the marriage ceremony (*x*). The subsequent benediction did not add to the binding character of the solemn declaration by the two parties to take each other as husband and wife, which had immediately preceded it (*x*). The consensus of the parties declared in a public manner before certain public authorities constituted a valid marriage (*y*).

It was not everywhere, however, that the *concubitus* was thus superseded and rendered unnecessary to constitute a valid marriage. In Friesland consummation of the marriage was considered essential, while in the Provinces of Groningen and Utrecht marriages entered into by the parties merely living together without ceremony seem to have been recognised (*z*).

IV. **Canon Law in United Kingdom and United States.**

England.—Before the official compilations of the general law of the Church, recognised under the title of *Corpus juris Canonici*, were made, the law of the English Church was authoritatively declared by Church Councils, developed by custom, and influenced by the civil legislature and executive. After that time there was a long succession of English provincial canons issued by the Archbishops of Canterbury and occasional Papal Legates, from 1222 (Council of Oxford) to 1415.

In consequence of the Norman Conquest the English Church was brought into closer connection with the general Church law recognised in the different Continental countries at a time when that law, similarly derived from custom and practice, was taking a codified form, and receiving a general recognition; and the systematised canon law came to be regarded in England, as elsewhere, as the standard of doctrine and practice to be complied with so far as was

(*u*) Fock. Andr., Bijdragen, i., 130—132.

(*x*) Fock. Andr., Het Oud Ned. B. R., ii., 141—144; van Leeuwen, Cens. For., I., 1, ii., 2; H. Brouwer, de Jure Conn., I., 2, 4—6.

(*y*) V. d. Keessel, Thes. Sel., Thes. 87.

(*z*) Fock. Andr., Bijdragen, i., 84—86, 91—96, 120—121; U. Huber, Hedend. Regtsgel., i., 5, pars. 4, 9, 10, 21, 24, 25.

consistent with local custom and the temporal laws. But there was no express and general acceptance of the canon law as a whole. The commentaries of William Lyndwood (1375—1446) and John of Athon (died 1350) (*a*) upon the constitutions of the Archbishops of Canterbury and the canons enacted in the Councils held by the Papal Legates Otho and Othobon have always been treated by English lawyers as giving the authoritative texts of English Church law; and these were accepted as the general law for the whole of England upon their recognition by the Province of York, in 1462. Lyndwood's "Provinciale" contains abundant references to the general canon law and civil law, which are often compared together, and many allusions to the practice of the English Church, where this was not in accordance with these laws (*b*). Different views have been taken of the extent to which the general Church law, referred to in these commentaries, was actually part of the law of the English Church. The reports of the two Royal Commissions on the English Ecclesiastical Courts, in 1833 and 1883 respectively, proceed in varying degrees on the lines both previously and subsequently laid down by the Courts (*c*), that the canon law exercised a controlling influence as an expression of the doctrine of the Catholic Church in England as in the Continental countries, but that its effect was always in the last resort subordinate to the common law and liable to restriction by the jurisdiction of the common law Courts, and that only such portions of it as were not repugnant to

(*a*) Athon (also called Acton) distinguishes various kinds of constitutions, General and Papal, Legatine, and Provincial, and states that he does not intend to quote the last named kind, as being neither universal nor uniform in all parts of the country covered by the Legation (5), for his work would be thereby made liable to be considered less authoritative, though by others it would be considered as accepted; and see, generally, 13, 14, 23, 36, 53, 84, 85, 91, 94.

(*b*) See pp. 212, 213, 228, 246, 248, 256, 259, 266, 356, as also does Athon's Commentary on the Constitutions of Otho and Othobon: see pp. 37, 43, 103, 108, 113, 123, 127, 128, 141.

(*c*) See Phillimore, Eccles. Law, i., c. 4. It may be stated that in an article, entitled "National Churches and Papal Decrees," by Mr. J. Arthur Price, published in the Church Times Newspaper, March 26th, 1909, an examination is made of the details of the trial of Dame Alice Kyteler, who was prosecuted for sorcery before the Bishop of Ossory's Court in Ireland in 1324, to show that Professor Maitland's theory is not altogether borne out by the practice of the Irish Ecclesiastical Courts. Dame Alice Kyteler's trial is described in a contemporary chronicle printed in the Camden Society's publications, No. 24.

the common law or were in accordance with the local habits and customs of the country were regarded as having the force of law here for spiritual purposes. Another view, which is supported by the great authority of the late Professor Maitland, in a work issued as lately as 1898, was that the whole of the canon law as the official law of the Catholic Church governed the English Church and was strictly binding on the Ecclesiastical Courts, and that the limitations upon its full sovereign application imposed by the civil power only modified its spiritual supremacy for civil purposes(*d*). The practical result however, whichever view is adopted, is much the same. It has been stated, so long ago as 1720, that "the statute 25 Henry VIII. c. 19, providing that 'the canons, constitutions, ordinances and synodals provincial already made which are not contrariant nor repugnant to the law statutes and customs of the realm nor to the damage or hurt of the king's prerogative royal, should be used and executed as before,' was understood to refer not only to these constitutions which were consistent with the statute law and prerogative royal, but even to so much of the Pope's common law as was here commonly received—so the Lateran canon against pluralities was of as great force in the Temporal Courts as an Act of Parliament. What part of the canon law was received in England and the manner of putting that and our domestic constitutions in force is to be learned from Lyndwood, for by the common consent of lawyers what he delivers as the canon law of this Church is so to this day (1720), except where it is annulled by statute, and the Legatine constitutions of Otho (1236) and Othobon (1268) are to be reckoned among our domestic constitutions" (*e*). In support of the theory of the limited and partial acceptance only of the general canon law may also be cited the recent decisions of the Judicial Committee of the Privy Council with regard to the ritual allowed by the law of the English Church, to the effect that actual practice must be shown as well as the provisions of the general law which were recognised as valid, when any such preserving statute, as that quoted above, was passed, in order to make a particular ritual or ceremony part of the present law. A notable example of a possible difference between English canon law and the general canon law is afforded by the case of R. *v.* Millis, where the House of Lords was equally divided in opinion whether the presence

(*d*) See vol. i., p. 13. (*e*) Johnson, Canons of the Church, xxix.

of a priest was necessary for a marriage under the canon law or ecclesiastical law of England, when it was not necessary to the validity of a marriage under the general law of the Western Church previously to the decree of the Council of Trent.

It is submitted that, putting it at its highest, the position of the canon law for ecclesiastical purposes in this country before the Reformation is analogous to the position for civil purposes assigned to the common law of England in any country to which it has been transplanted, such as a British Colony or in any of the United States at the present day, in which case it is recognised as being liable to the limitations appropriate to the circumstances of the particular country and subject to the general effect of the local conditions and subsequent statutes. Temporal legislation in ecclesiastical matters was, before the Reformation as after it, recognised as legitimate and controlling—and the temporal arm has always been required to enforce ecclesiastical laws and decrees (*f*). Examples of such legislation are afforded by the Constitutions of Clarendon (1164) and the Statutes of Provisors (1351, 1368, 1391). The position of the Church of England with regard to the sources of its law has been authoritatively declared to be that, while she has adhered in all matters of importance to the general principles of the Eastern and Western Churches, yet that, before and since the Reformation, she has claimed the right of an independent Church in an independent kingdom to be governed by the laws which she has thought it expedient to adopt (*g*).

Instances of the exercise by the Church of legislation and jurisdiction concerning marriage after the Reformation are to be found in Archbishop Parker's Admonition, settling disputed questions as to affinity, and the canonical regulation of marriage and matrimonial causes effected by the Provincial Synod of Canterbury in 1585, 1597, and 1604. The existing Ecclesiastical Courts in England were also left in possession of their former jurisdiction, and down to the passing of Lord Hardwicke's Act in 1753 (*h*), to prevent clandestine

(*f*) See Lyndwood, 264, 351.

(*g*) Phillimore, Eccles. Law, i., 11. Archbishop Cranmer undertook the codification of the canon law, and the work, which was never authorised, was published in 1571, under the title of Reformatio Legum Ecclesiasticarum, in Latin: Encyc. Brit. vi., 551, tit. Canon Law; Cambridge Mod. Hist., vol. ii., pp. 508, 589.

(*h*) 26 Geo. II. c. 33.

marriages, they continued to apply the former generally accepted law (*i*).

After that date the Ecclesiastical Courts retained disciplinary jurisdiction over laymen for offences which required correction *pro salute animæ*—such as fornication and incontinence—until this was limited by statute in 1786 (*k*); and power to punish for incest has been recognised in recent decisions (*l*).

Scotland.—The canon law exercised wide influence in Scotland prior to the Reformation; and the modern Scots law as to putative marriage, as to the constitution of marriage *per verba de præsenti* or *per verba de futuro cum subsequente copula*, and by cohabitation and habit and repute (*m*), and as to the dissolution of marriage (*n*), is directly borrowed from it. The prohibited degrees recognised by the old consistorial law in Scotland were the same as those prescribed by the canon law (*m*). They can scarcely be said, however, to have been adopted strictly by the Scotch Courts from that system, as they were made the subject of express enactment by the Provincial Courts of 1242. And the better opinion seems to be that, although one of the *fontes juris Scotiæ*, the canon law was never of itself authoritative in Scotland. In the canons of her national Provincial Councils, Scotland possessed a canon law of her own, which was recognised by the Parliament and the Popes, and enforced

(*i*) The Act directly deprived the Ecclesiastical Courts of jurisdiction to compel a celebration of any marriage *in facie ecclesiæ* by reason of any contract of matrimony, whether *per verba de præsenti* or *per verba de futuro*; but it did not apply to marriages of the Royal Family, or between Quakers or Jews, nor did it extend to Scotland or beyond seas. In 1736 a prohibition was granted by the King's Bench to an Ecclesiastical Court for proceeding upon articles against a man and his wife for being married out of canonical hours (*i.e.*, not between 8 and 12 a.m.), that being a circumstance introduced by the canons of 1603, which were not binding on the laity as not having received Parliamentary sanction (Middleton *v.* Crofts, 2 Atk. 650), though no decision was given as to the other elements of clandestinity complained of in the case—namely, marrying without licence or banns and in a private house.

(*k*) 27 Geo. III. c. 44, by which no proceedings are to be brought after eight months after the offence, nor for fornication after the marriage of the parties.

(*l*) See Phillimore, Eccles. Law, ii., chapters 1 and 12.

(*m*) Encyclo. Scots Law, tit. Canon Law.

(*n*) Collins *v.* Collins (1884), *per* Lord Watson, 9 A. C., at pp. 244 *et seq.*; and 11 Rettie (H. L.), at p. 30; and see chapters III., pp. 190–193, and XVI., pp. 856, 857, *post*.

by the Courts of law; and the general canon law, while entitled to high regard as *ratio scripta*, was only part of the law of Scotland in so far as it had been expressly allowed by statute or custom, or incorporated in the decrees or acts of the Provincial Courts (*o*). Many of the rules of the canon law, which were adopted by the old Consistorial Courts, were largely modified at the Reformation. Thus divorce *a vinculo* was allowed; the eighteenth chapter of Leviticus was adopted as the law determining the degrees of relationship within which marriage should be legal; and several of the fictions of the canon law, resorted to for the purpose of creating an apparent reconciliation between equity and law, were abandoned. The Reformers, however, though they overturned all the Roman Consistorial Courts, enacted no new Consistorial Code, contenting themselves merely with declaring null all laws contrary to their religion. "In all other respects the national canon law of Scotland was left untouched; and though several of its principles have since been altered or modified it still remains the basis of the Scottish consistorial law" (*p*).

Ireland.—In the case of Ireland the position of the Church of Ireland (now disestablished) with regard to this subject was put on the same footing as the Church of England by corresponding legislation of Henry VIII., which expressly preserved "the ceremonies, uses, and other laudable and politic ordinances for discipline and decent order theretofore in that Church used, instituted, taken and accepted," and provided that "all canons, constitutions, ordinances, and synodals provincial, already made for the direction and order of spiritual and ecclesiastical causes, which were not contrariant nor repugnant to the king's laws, statutes, and customs of the land, nor to the damage or hurt of the king's prerogative shall continue in force till ordered or determined otherwise" (*q*).

Wales (*qq*).—The tenacity with which the Welsh clung to their own customs in the matter of marriage, many centuries even after the

(*o*) Fraser, Husband and Wife, pp. 28 *et seq.*, and authorities, *ad loc. cit.*; *per contra* Lord Stowell, who held in Dalrymple *v.* Dalrymple (1811), 2 Hagg. C. R., at p. 81, that the Roman canon law was the binding canon law of Scotland unless where it could be shown that the legislature or the Courts had expressly declared it otherwise.

(*p*) Encyclo. Scots Law, tit. Canon Law.

(*q*) 28 Hen. VIII., 1537, c. 13.

(*qq*) This account is contributed by Mr. A. I. Pryce, Diocesan Registrar, Bangor.

Church had been firmly established in their country, is illustrated by the Welsh mediæval laws.

The laws of Howel the Good were compiled in the tenth century, though the earliest extant MSS. date two to three centuries later.

The Codes comprising the laws supply sufficient evidence of a conflict with the laws of the Church in regard to marriage. An illustration of this is afforded by the following passage dealing with the law of inheritance: "The ecclesiastical law says that no son is to have the patrimony, but the oldest born to the father by the married wife; the law of Howel, however, adjudges it to the youngest son as well as to the oldest, and decides that sin of the father or his illegal act is not to be brought against the son as to his patrimony" (*r*).

The necessary requirements or ceremonies of marriage are not set forth in the laws, but it is clear that the formal marriage was made by gift of kindred with the consent of the lord. Marriage was treated as a contract, without reference to any religious sanction. The occasion was marked by the payment of the maiden fee, the coupling fee to the lord, with due interchange of warranties and suretyship.

We are left in doubt as to the exact meaning of the term "married wife" in the above-recited passage. Possibly it might refer to a woman married with the blessings of the Church, but the laws throw no light on this point.

A less formal type of marriage, though apparently recognised by the laws, was where a daughter went away clandestinely without the consent of kindred.

The loose character of the marriage tie is further shown by the provision that if a man should take a woman to his house for three nights he could only separate from her on payment of specified compensation, but if such connection continued seven years the woman became as a betrothed wife in regard to the sharing of property. The laws, moreover, describe a lower form of relationship when the woman gives herself up "in bush and brake."

The facility with which the marriage could be dissolved affords an equally great contrast with the ideals so steadfastly set up by the Church.

The marriage was practically voidable at the will of either party. The terms of separation, which are definitely stated, varied

(*r*) Laws, i., 178 (Ven. Cod.).

according to circumstances, giving, it should be noted, favourable protection to the woman. In actual practice the terms were such as probably checked the frequency of divorce.

The antagonism mentioned in the passage quoted above is not, in view of these facts, in any way surprising. The passage merely sums up in a concise form results arising from a conflict of different ideals. The Welsh laws in this connection picture a society still dominated by the customs of a people emerging from a transitional stage of development.

This adherence of the Welsh to their national customs is lamented by Giraldus Cambrensis. Writing towards the close of the twelfth century, in language coloured probably by his prejudices as a keen Churchman, he complains that "the crime of incest hath so much prevailed not only among the higher, but among the lower orders of this people, that, not having the fear of God before their eyes, they are not ashamed of intermarrying with their relations, even in the third degree of consanguinity. . . . They do not engage in marriage until they have tried, by previous cohabitation, the disposition, and particularly the fecundity, of the person with whom they are engaged. An ancient custom also prevails of hiring girls from their parents at a certain price and a stipulated penalty, in case of relinquishing their connection" (*s*).

In describing his tour through Wales, when accompanying Archbishop Baldwin, Giraldus describes how at Bangor they found buried before the high altar of the cathedral the body of Owen Gwynedd, Prince of North Wales. The Prince had married his first cousin, and was accordingly excommunicated by A'Becket, but in spite of such sentence he was, on his death, buried as described. Orders were given by Baldwin for the removal of the body as opportunity arose (*t*). Even among the clergy the practice of marriage continued to a late period. In the tenth century "the priests were enjoined not to marry without the leave of the Pope, on which account a great disturbance took place in the diocese of Teilaw, so that it was considered best to allow matrimony to the priests" (*u*). The Welsh laws discourage the practice, describing

(*s*) Description of Wales, bk. ii., chap. vi.

(*t*) Itinerary through Wales, chap. viii.

(*u*) Brut y Tywysog, Gwentian, A. D. 961.

a son born after ordination of the father as "begotten contrary to decree."

Other British Dominions.—Except so far as the canon law of marriage can be regarded as part of the common law of England (*a*) carried with it into English-settled or occupied countries (*b*), it only affects the law of marriage where any of its provisions have received statutory force or are part of the doctrines and practice of the particular Churches.

United States (*bb*).—The canon, or ecclesiastical law, has been described as a supplemental part of the English common law (*c*) by high judicial authority in England and the United States; but so far as marriage is concerned, it is not regarded as having been carried with the common law into the United States, and the English Ecclesiastical Courts were not reproduced there, but the Equity Courts were given jurisdiction in these matters (*d*). In Georgia it has been laid down that the "branch of the common law known as the ecclesiastical law" was the law of the State (*e*). But in Massachusetts, in a case dealing exhaustively with the law relating to celebration of marriage, it was declared that the canon law was never adopted there so far as the valid celebration of marriage was concerned (*f*), and in New York, that the law of England concerning divorces and matrimonial causes was never adopted there, was never the law of the colony, and did not become the law of the State under its constitution (*g*). The doctrine both in Massachusetts and New York, and presumably in most of the other States of the Union, appears to be that, while the Courts will not assume jurisdiction by virtue of the English ecclesiastical law over subjects which in England are administered by the Ecclesiastical Courts or under ecclesiastical law, yet, when jurisdiction by statute or otherwise has been conferred on them over such matters, in administering that law they

(*a*) See below.

(*b*) Lautour *v.* Teesdale (1816), 8 Taunt. 830; R. *v.* Brampton (1808), 10 East, 282; and see note (*c*), below.

(*bb*) This account has been revised by Mr. Charles G. Saunders, Boston, Mass.

(*c*) R. *v.* Millis (1844), 10 Cl. & F. 534, 678; Catterall *v.* Catterall (1847), 1 Rob. Ecc. 580; Barrere *v.* Barrere (1829), 4 Johns. Ch. 196, Chancellor Kent.

(*d*) Kent, Comm. ii., s. 76.

(*e*) Bishop, i., 116—124, 128, 132, 134; Kent, ii., 77.

(*f*) Com. *v.* Munson (1879), 127 Mass. 459, Gray, C.J.

(*g*) Burtis *v.* Burtis (1825), Hopkins Ch. 557, approved in Griffin *v.* Griffin, 47 N. Y. 134, where marriage was sought to be annulled on a ground of impotence.

will apply the principles derived from it, and thus they give effect to doctrines like the canonical and civil disabilities for marriage and the grounds and exceptions of divorce, such as condonation and connivance; and the decisions of the English Ecclesiastical Courts are constantly cited and followed (*h*).

The question how far the general canon law is in force in the Episcopal Church in the United States is sometimes a practical one—*e.g.*, Canon 38 of that Church forbids the marriage of divorced persons except under certain conditions, and prohibits a clergyman from solemnising such a marriage without the written consent of the ecclesiastical authority given after taking legal advice thereon. It seems that in practice the ancient canon law would be followed in the distinction between divorce and nullity of marriage, though the general law will be modified by time and circumstance.

Marriages of Nonconformists.—As regards the law of marriage, all bodies of British Nonconformists come under the provisions of the general statute law, but two special exceptions are made in the United Kingdom for marriages according to the usages of the Jews and of the Society of Friends (*i*).

The Jewish Law of Marriage (*k*).—The Jewish marriage law

(*h*) In Wightman *v.* Wightman, 4 John. Ch. 343, Chancellor Kent annulled a marriage procured by fraud, sustaining his decree by arguments from the ecclesiastical law; and in Ferlat *v.* Gojon, Hopkins, Ch. 478, he set aside a marriage on the ground of abduction, terror and fraud, basing his decision on the general jurisdiction in equity in cases of fraud, and not on ecclesiastical law. In Parton *v.* Hervey (1854), 1 Gray (Mass.), 121, the Court held that by the common law, both in England and the United States, the age of consent is fixed at twelve in females and fourteen in males, and that such is the law of Massachusetts, Bigelow, J., in the opinion saying that this rule was originally engrafted into the common law from the civil law, and not deriving it from the ecclesiastical law. See also Kelley *v.* Kelley (1894), 161 Mass. 111, 114. Rose *v.* Clark (1841), 8 Page Ch. 574, 579, established the law for New York that mutual agreement between parties followed by cohabitation constituted valid marriage; and this was the law there until changed by statute recently, the decision being anterior to R. *v.* Millis in Great Britain and being based on the common law, regarding it as founded on the general doctrine of the Western Church prior to the decree of the Council of Trent. In Massachusetts (Com. *v.* Munson, *ante*) it was stated that it was never received as common law that parties could by their own contract, without the presence of an officiating clergyman or magistrate, take each other as husband and wife and so marry themselves (Bishop, i. s. 129).

(*i*) R. *v.* Millis (1844), 10 Cl. & F. 673; Marriage Act, 1753, s. 18; 1836, s. 2; 1823, s. 31; Marriage with Foreigners Act, 1906, s. 2 (3).

(*k*) This account is derived from

is peculiar as being a confessional and racial system, which has not the position of a national or municipal law. Its sources are the Mosaic Code set forth in the Pentateuch and the later provisions of the Talmud. In the Middle Ages codes were compiled from the Talmud for practical use, of which the Shulchan Aruch (sixteenth century) in its third part (Eben Ha-Ezer) has obtained general authority on all questions of marriage and divorce. It has been modified in recent times by rabbinical conferences and synods, at least, for modern Judaists (*m*).

The Jewish law regards marriage as not only a civil contract, but as a relation between two persons involving sacred duties, and the marriage ceremony (*Kiddushim*) means a consecration of the wife to the husband. The ceremony, however, is civil rather than religious, as the expression of consent by the parties in the presence of witnesses constitutes marriage. Polygamy, which was tolerated in the Biblical and Talmudic periods, was prohibited at the beginning of the eleventh century A.D. by a rabbinical synod at Worms, and this decision was afterwards adopted in all European countries, but the Jewish system still retains provisions which originated in the polygamic period.

The ceremony consists in a betrothal (*Kiddushim*) and nuptials (*Chuppa* or *Nissu*). These were formerly separated by an interval of time, but are now generally combined in one occasion. The present requirements for the celebration of marriage according to Jewish law are: (1) The presence of two competent witnesses who are *bonâ fide* followers of Jewish discipline; (2) the betrothal, which is generally performed in the presence of a minister, and consists of the putting of the ring on the finger of the bride by the bridegroom with the words, "Thou art wedded to me according to the law of Moses and Israel"; and usual additional ceremonies are (3) the pronouncing the benediction by the minister before and after the marriage vow; (4) the publication of the marriage contract (*Ketuba*); and (5) in recent times two rings may be exchanged by the parties, but these are not essential. The giving of consent by the parties, however, if not followed by consummation or accompanied by usual ceremonies, only constitutes a betrothal,

Mielziner, Jewish Law of Marriage (1884); and Henriques, Jewish Marriages and the English Law (1909).

(*m*) Mielziner, pp. 20–22.

which may prevent the parties from marrying again until a divorce is granted, but gives the man no authority over the woman's person or fortune (*n*).

Provision is made in England for registration of Jewish marriages, but this is not the only means of proving the marriage. It may be presumed from the cohabitation of the parties and their mutual recognition of each other as husband and wife. Jewish irregular marriages, which are performed without complying with the requirements of giving notice to the registrar or obtaining a certificate from him, or having the marriage duly registered by the proper officer of a synagogue, are valid (*o*).

The age for marriage is puberty, thirteen years in the man and twelve in the woman, and under that age the marriage is void.

The impediments to marriage are as follows: (1) As regards relationship, the Levitical degrees of consanguinity and affinity as extended by the Talmud; the rabbinical law allowed a man to marry his deceased wife's sister, and marriage between uncle and niece, and between step-brothers and step-sisters; but the Levirate marriage, *i.e.*, the obligation on a brother's widow to marry his brother unless he declines it, has become obsolete; (2) as regards chastity, there are temporary impediments, *e.g.*, an interval (ninety days) is required to elapse before the marriage of a widow or divorced wife can take place, and a year for a woman in such case who is nursing her infant, and certain distinctive days, such as Sabbaths and festivals, but the disregard of them did not invalidate the union; (3) as regards religious considerations, intermarriage with persons of other religions was formerly forbidden, but in modern times marriages with Christians are not prohibited and are valid, though the religious ceremony is not available for them.

There is also a prohibition against the re-marriage of spouses of whom the husband has divorced the wife for adultery, and she has married again, and the marriage has been terminated by death or divorce of the second husband. The older law also forbids marriage between an Aaronite, or person belonging to the priestly class or descendants of Aaron, and a divorced woman or a person

(*n*) Lindo *v.* Belisario (1795), 1 Hag. Cons. 216, and Appendix, 7—24; Goldsmid *v.* Bromer (1798), 1 Hag. Cons. 324; Nathan *v.* Woolf (1899), 15 T. L. R. 250; Montefiore *v.* Guedalla, [1903] 2 Ch. 26; Henriques, 43, 48; Mielziner, *passim*.

(*o*) Henriques, 40—42, 53.

who is not a member of the house of Israel or a prostitute; but in later times this has not been insisted on, and though the Jewish ritual is not allowed for them, such marriages appear to be valid (*p*).

The Jewish law will not be taken judicial notice of in English Courts, but requires to be proved in every case in the same way as foreign law; and the recognition of Jewish usages of marriage only extends to the forms and not to the capacity of the parties for marriage (*q*).

Marriages according to Usages of Society of Friends (*a*).—There is an express provision in the English Marriage Act that the Society of Friends, commonly called Quakers, may continue to contract and solemnise marriage according to the usages of that Society. In Scotland such marriages are valid as "irregular" marriages, and also as "regular" under a recent statute (*b*), provided that both parties are members, and that notice of their intention has been given to the registrar of marriages for the district where the parties reside and a certificate has been obtained from him. In Ireland there is similar provision to that in England (but with certain differences) with regard to such marriages (*c*).

The marriage regulations of the Society have been modified from time to time. Those now in force were adopted by the London Yearly Meeting in 1906; and these regulate, for members of the Society, marriages in England and Scotland, and extend to Australia and part of New Zealand, and South Africa, but not to Canada, though any marriage legally binding on the parties is recognised by the Society. In Canada and the United States there are a number of separate Yearly Meetings which the London Yearly Meeting recognises as meetings of Friends, but which are entirely independent; and there are all over the world small collections of members of the Society meeting for worship and organised into meetings on the model of these, with established Yearly Meetings for regulating the affairs of the congregations. Outside the United Kingdom where there is statutory validity given to marriages in accordance with

(*p*) Henriques, 49—52.

(*q*) De Wilton *v.* Montefiore, [1900] 2 Ch. 481.

(*a*) This account is derived from information supplied by Mr. J. Lister Godlee, of that Society.

(*b*) 41 & 42 Vict. c. 43.

(*c*) Meetings of the Society were first established about 1650. The earliest marriage certificate known to exist is dated 1666.

the usages of the Society of Friends, the validity of a marriage does not depend on the observance of the regulations of any meeting of the Society. There are not any recognised meetings having power to deal with marriages in the other British Colonies. In the case of marriage between a member of the London Yearly Meeting and a member of a meeting recognised by the Yearly Meeting on the American continent or in the Southern Hemisphere or elsewhere abroad, within the limits of any such meeting the first-named member is at liberty to conform to the usages of such meeting. In the case of marriage between members of the London Yearly Meeting resident abroad to be solemnised abroad and beyond the limits of any meeting recognised by the Yearly Meeting, the usages of the Society are recommended for observance as far as compatible with the law of the country and English law, *e.g.*, 4 Geo. IV. c. 91, 12 & 13 Vict. c. 68, and 14 & 15 Vict. c. 40 (India).

Marriage is regarded as a religious act and not a mere civil contract, and the ceremony is a solemn contract made *in facie ecclesiæ* by mutual declaration of the parties evidenced by a certificate in writing signed on the spot. In England it is registered in special registers by a special officer in a monthly meeting, and in the Colonies it is subject to the general statutory requirements of registration of marriage. Marriage of Friends before a civil officer is regarded as inconsistent with the discipline of the Society, and the Society does not allow marriages which offend against the law of the State, *e.g.*, as to prohibited degrees.

The preliminaries of marriage include a notice of intention, in the nature of a publication of banns, and notice to the proper civil officer. The parties must be liberated by the meeting to which the woman belongs as represented by its clerk and overseer; and if they refuse to grant this permission or even without their having considered it or refused it, the meeting itself may do so. The consent of parents, not only in the case of minors, is required, but this may be waived by the monthly meeting. The marriage must be solemnised at a meeting for worship held in any meeting house, after due notice given there, without regard to the residence of the parties, provided the meeting house be one in which meeting for worship is regularly held; and meeting houses need not be registered for the solemnisation of marriage. Marriages in accordance with the usages of the Society may be solemnised between persons one or both of whom

is or are not members of the Society, with certain additional preliminaries, *e.g.*, permission from a monthly meeting; but such marriages do not confer membership on the contracting parties or their children. Marriages of members of a monthly meeting not in accordance with Friends' usages are discouraged, but when contracted are registered with the meeting of the parties.

SECTION IV.

The Canon Law of the Eastern Church.

The canon law of the Eastern or Greek Church requires separate notice from that of the Western Latin Church. Starting from a common origin in the decrees of the early general councils of the whole Church, and the writings of the early Fathers, its law became codified at an earlier date; and after the separation of the main Greek and Latin branches of the Church in the eighth century, which became definite in the eleventh century, except for the nominal reconciliation attempted in 1274—1277 and 1438—1440, the systems of these Churches became divergent as regards their organisation and governing laws. The Eastern Church admitted the principle of decentralisation and the formation of different branches for the nationalities and countries where it had spiritual supremacy, with an independent organisation for each branch, though the whole recognised a unity of faith and dogma. The Orthodox branch, which admitted the supremacy of the Patriarchate of Constantinople, has always occupied the leading position, partly as the Mother Church from which the others were originally derived, and partly from its official connection with the Greek Empire, a position which it has retained under its successor, the Turkish Empire.

Besides the Orthodox Eastern Church, there are also the Separated and the Uniate Eastern Churches.

I. **Orthodox Eastern Church.**—The Orthodox comprises: (a) the Patriarchates of Constantinople; (b) Alexandria; (c) Antioch; and (d) Jerusalem; (e) the Churches of Russia; (f) Cyprus; (g) Carlowitz, Serb Orthodox, in Hungary; (h) Czernagora (Montenegro); (i) Mount Sinai; (j) Greece; (k) Hermannstadt, Roumanian Orthodox, in Hungary; (l) Bulgaria; (m) Czernowitz, for the Grand Duchy of the Bukowina and Dalmatia, partly Serb and partly Roumanian, in Austria; (n) Servia; (o) Roumania; (p) Herzegovina

and Bosnia (*d*). All these are in communion with each other, except for some modern schisms, *e.g.*, Bulgaria and Constantinople, and with the Œcumenical Patriarch of Constantinople (*e*).

The various collections of the law of the Orthodox Church are exhaustively set out in Bishop Milasch's authoritative compilation of the law of the Eastern Church. It is sufficient for the present purpose to say that the authorities generally recognised by the whole Church are: (1) the Nomocanon in XIV. Titles of 883, containing the canons of the Apostles, the earliest collection of Church law extant, the canons of the seven Œcumenical Councils and of the ten Particular Synods, and of the thirteen Holy Fathers (*f*); (2) the Greek compilation of canons, of which the collection known as the Pedalion (*g*), compiled in the eighteenth century and published in 1800 and 1845 with the approval of the Synod of Constantinople, is regarded as the official authority for the Greek-speaking Church; (3) the Slav collection of canons, known as the "Kormtchaya Kniga" (thirteenth century), officially adopted in Russia, Servia and Bulgaria and by the Orthodox Serbs, and the Kormtchaya pravil (nineteenth century) in Russia; and (4) the "Pravile cee mare" or "Indreptaria legii" (seventeenth century), the official collection for the Orthodox Roumanian Church, which also uses the Pedalion. The most comprehensive work on the whole subject is the Athenian Syntagma (1852—1859) (*h*).

The different Particular Churches have also their individual special governing laws, recognised by or dependent on the civil law (*i*).

The general law of the Eastern Orthodox Church as regards marriage may be considered under the heads of (1) the requirements; (2) the impediments.

Requirements. — The requirements are: (a) mutual consent; (b) sufficient age, with regard to which the Church formerly followed the civil law, and now follows the different State laws, *e.g.*, for both parties in Austria, fourteen; for husband and wife in Hungary,

(*d*) Fortescue, Eastern Churches, 21.

(*e*) See The Church of Cyprus, by Rev. H. T. F. Duckworth (1900), S. P. C. K., London; The Orthodox Church in Austria-Hungary, I., Hermannstadt, by Miss M. G. Dampier (1905), Rivingtons, London, who has also given valuable information on the general subject. The editors are also indebted to the Rev. W. Sadler for revision of this section.

(*f*) Milasch, 79, 183.

(*g*) *Ibid.*, 190.

(*h*) *Ibid.*, 80, 200.

(*i*) *Ibid.*, 131—157.

eighteen and sixteen; Servia, seventeen and fifteen; Russia, eighteen and sixteen; Greece, eighteen and fourteen; Bulgaria, nineteen and seventeen; Montenegro, seventeen and fifteen, the three last being regulated by decrees of the Synods; and marriage is prohibited between a man of seventy and a woman of sixty, and in Servia and Russia a man of fifty and a woman of forty marrying for the first time must obtain the consent of the ecclesiastical authority; (c) mental capacity; (d) capacity to fulfil conjugal duties; and (e) the consent of persons to whose parental power the intending parties are subject. In this last respect the civil law was followed and the consent of the paterfamilias was required for the marriage of children *alieni juris* and daughters *sui juris* in certain cases; but a judicial authorisation superseded the need for the parental consent (*k*).

In the Eastern Church marriage has always been treated as a sacrament, but two kinds of betrothal were recognised: one ecclesiastical, which was equivalent to marriage, if performed with the Church's benediction, and the other civil, which could be entered into at the age of seven years, but was dissoluble.

The difference between ecclesiastical betrothal and marriage is not now of practical importance, as the betrothal is directed to take place at the same time as the marriage ceremony. Civil betrothal does not control an obligation to contract marriage and has no civil consequences.

Other requirements are an examination of the parties by the priest, who has to investigate whether there is any civil impediment to the union and also to satisfy himself that the parties hold proper Christian doctrine.

Banns or notice of the intended marriage are also now required in most of the Churches, except in the Patriarchates. In the Slav Orthodox the Kormtchaya requires the marriage to take place within two months of the banns.

Certain times for marriage are prohibited by the Church, *e.g.*, November 14th to January 6th; Lent and until the first Sunday after Easter; certain fast and festival days, and Wednesdays and Fridays throughout the year. But a marriage on a prohibited day is valid so far as not inconsistent with the legal requirements of marriage.

(*k*) Esmein, i., 160, 161; Milasch, 586.

The marriage ceremony must be public and before witnesses, and a clandestine marriage is void. The place must be one within the jurisdiction of the proper priest of the parties, and the marriage benediction is only rarely given out of church, and the time must not be after evening or at night. There must be two witnesses, of age and qualified as judicial witnesses, not women; and no ceremony is recognised as legal other than the priestly benediction.

Impediments.—The impediments are classified as absolute and relative, *i.e.*, for certain persons only.

Absolute. — The absolute ones include (1) destructive and (2) hindering impediments.

The former class, which does not admit of a lawful marriage taking place or renders it null if contracted, comprises: (a) abnormal mental capacity; (b) impotence for marital duties; (c) want of consent of persons having parental power over the parties; (d) a lawful existing marriage; (e) pregnancy of the bride; (f) religious vows of chastity; (g) a third widowhood; (h) higher orders (*l*).

Candidates for ordination to the priesthood, in answer to a call to a secular charge, may be married, but after ordination subdeacons (though not universally), deacons, and priests are not allowed to marry again so long as they remain in orders. This rule is akin to the law forbidding the ordination of digamists, *i.e.*, of men who have married a second time. Bishops are generally appointed only from the monks (*m*), and a person aspiring to that order must leave his family and become a monk. In practice when an Eastern priest marries again, though the marriage is not annulled, he is degraded from the priesthood.

The hindering impediments, which do not make a marriage already contracted null, but illicit only, are: (a) want of requisite age, but this impediment ceases when the right age is reached if the parties continue to be of the same mind and the other requisites are fulfilled; (b) marriage at a prohibited time, which impediment ceases if the proper Church authority confirms the marriage; (c) force and fear; (d) deceit; (e) a betrothal made by the Church, but, as above explained, this has now no practical importance; (f) actions

(*l*) Milasch, 266, 267.

(*m*) *E.g.*, in the Jerusalem Patriarchate and Russia, but there are exceptions. See Milasch, 266—268, 598.

by one betrothed party which are prejudicial to the life of the other; (g) condemnation and imprisonment for a crime; (h) the *annus luctus;* (i) military service; (j) want of publication of banns; (k) want of requisite documents.

Relative.—These impediments are those of relationship and others. Relationship may be by blood, affinity, spirituality, betrothal or adoption. The method of reckoning degrees in the Eastern Church has been already referred to—viz., in the direct line one degree for each generation between two persons; in the collateral line one degree for each generation up to the common ancestor and down to the other party, *e.g.*, brothers and sisters are in the second degree, uncle and niece in the third, first cousins in the fourth, second cousins in the sixth, and third cousins in the eighth. The Eastern Church adopted the rules in force in the Greek Empire. Between ascendants and descendants all marriages are forbidden. In the collateral line according to the common canon law marriage within the seventh degree is forbidden, and is only allowed between blood relations of the eighth degree; but in Greece and Russia the prohibition is limited to the sixth and fourth degrees respectively.

In affinity, *i.e.*, the relation created by a single marriage between two families (διγενεια), the same reckoning is followed as in blood relationship. The blood relations of one spouse are in affinity with the other. The principle of the prohibition in the Eastern Church is that such marriage is only allowed so far as confusion of names does not result. In the direct line marriage is forbidden altogether. In the collateral line the prohibition extends as far as the fifth degree inclusive, and marriage is only allowed in the sixth and seventh degrees if no confusion of names will result.

The Church also recognises affinity by two distinct marriages between three families (τριγενεια), and the same method of reckoning degrees is followed as in the preceding kind. The prohibition extended as far as the third degree.

In spiritual relationship the prohibition was extended to the same extent as blood relationship collaterally, but the present rule confines it to the third degree, as between the baptised person and the godfather receiving him or her in baptism, and the mother of the child and descendants of the godparent and godchild. In affinity by betrothal there is a prohibition of marriage between either of the parties and relations within the second degree of the other.

In adoption relationship is created between the adoptive father and his relatives on the one side, and the adoptive son and his relatives on the other. The prohibition extends to the same extent as in spiritual relationship, and the degrees are similarly reckoned.

Other relative impediments are : (a) ravishment ; (b) adultery ; (c) incitement to dissolution of marriage ; (d) guardianship ; (e) difference of religion between Christians and non-Christians, which is made the rule of civil law in such States as Austria and Servia.

The Effect of Impediments.—Marriages which have been contracted subject to a legal impediment are generally designated as unlawful. These are again distinguished as prohibited (*αθεμιτοι*), contrary to law (*παρανομοι*), and condemned (*κατακριτοι*), all of which marriages must be dissolved. Such a dissolution is absolute when concerned with a destructive impediment, but if the impediment is only hindering the declaration of invalidity is only relative, and in the latter case the marriage is suspended till the impediment is removed.

Destructive impediments are : (1) lawful existing marriage; (2) pregnancy of the bride ; (3) higher orders ; (4) vows of celibacy ; (5) fourth marriage; (6) blood relationship up to and including the fourth degree in the sense of Canon 54 of the Council of Trullo ; (7) affinity up to the same degree ; (8) affinity through two marriages between three families up to the first degree ; (9) spiritual relationship up to and including the second degree in the sense of Canon 53 of the Council of Trullo ; (10) adultery ; (11) guardianship. Such marriages can be declared null either by a proper authority *ex officio*, or on the application of a spouse.

Destructive impediments cannot be overcome except by an authority which has power to regulate them, *i.e.*, a General Council, or the authority which generally represents such a Council. Hindering impediments which are not prescribed by an Œcumenical Council, but are regulated by ecclesiastical authorities as an extension of a fundamental law according to circumstances of place and time, can be dispensed with by a bishop, or the marriage already contracted which is subject to them can be similarly confirmed ; but if the hindering impediment is imposed by civil law, the civil authority can similarly dispense or confirm.

Irregular Marriages.—The regular marriage is a first marriage. A second marriage, according to the canons, entails penance, and

there is a different ceremony, and *digami* are not admitted to higher orders. A third marriage incurs a similar penalty, and fourth marriage is prohibited. Mixed marriages are allowed between Orthodox and other Christians, but the Church has always disfavoured them, and only allows them on condition that the Orthodox character of the family, at least as regards existing persons, is maintained, and the children are brought up in the doctrine of the Orthodox Church. A difference was made between marriage of Orthodox persons and heretics and that of Orthodox and schismatics; the former was prohibited, and as regards the latter, though treated as one to be hindered in every way, if this is impracticable then it is required that the endeavour should be made to make the schismatic party accept the Orthodox belief, and failing this that he should undertake in writing not to hinder the continuance of Orthodox belief and custom in families, and that the children shall be brought up in the spirit of the Orthodox Church. Mixed marriages are dealt with by the legislation of the particular States, such as Austria and Greece.

The Church jurisprudence recognises as fully canonical marriages a marriage performed according to Church ordinances, such as a morganatic marriage, and an "axiomatic" marriage, *i.e.*, a marriage between a provincial governor or his son and a woman of the province during his tenure of office; as valid, after fulfilling prescribed requirements or removing an impediment, a marriage performed by procuration when the parties have afterwards gone through the marriage ceremony, and putative marriages; but not secret marriages, *i.e.*, without banns and in a concealed place, though before a priest and two witnesses; nor civil marriage.

Application of Orthodox Canon Law in Particular Churches.—In the countries embraced within the Particular Churches above mentioned the general law of the Church governs its adherents with regard to marriage, and Ecclesiastical Courts and Synods exercise jurisdiction over it. As regards Austria-Hungary the law of the Orthodox Church on marriage has only civil effect (as also has that of the Roman Catholic Church) in Croatia, Slavonia, Bosnia, and Herzegovina, where those Churches retain their own Ecclesiastical Courts for questions of marriage and divorce; and in Bosnia no civil marriage is recognised. In Greece the Ecclesiastical Courts have only primary jurisdiction with a recourse over to

the Civil Courts; and in Roumania the Civil Courts have sole jurisdiction. A common feature in the procedure is the appointment of a representative before the tribunal to uphold the validity of the marriage (*n*).

In States where the Orthodox is not the official religion, the canon law has only the force of a "confessional" system.

In countries where the Eastern Church is regarded as the State Church, such as Russia, Greece, Roumania, Servia, Montenegro, Bulgaria, &c., the marriage status has preserved its ecclesiastical character more definitely than elsewhere. Of these Russia may be taken as an example.

In **Russia** (*nn*), the Church at first recognised the ecclesiastical jurisdiction of Constantinople, but the independence of the Moscow Metropolitanate was established in the fifteenth century, the Patriarchate was established in the sixteenth century, and its organisation was placed on a State basis by Peter the Great. Numerically it is far the largest branch of the Orthodox. The Orthodox Churches of Poland and Little Russia were reunited to it in the seventeenth century after a separation of more than two hundred years, and in the nineteenth century the Uniate Church was incorporated in it. Since the introduction of Christianity in the year 988, marriage has been solemnised according to the ritual of the Eastern Church, and the canonical laws of that Church are collected in the Code known as the "Kormtchaya Kniga," and have been applied generally to all matters connected with matrimony. The lay authorities did not interfere at all in that domain of the national life, and without exception all questions connected with marriage were decided by the Church. This state of things continued up to the beginning of the eighteenth century, when the principle was firmly established that the Russian Tsar, as a Christian monarch, is the sovereign protector and guardian of the Orthodox Church in Russia. The Tsar, Peter the Great, was the first monarch who laid down the principle of interference of lay power in matrimonial affairs. He introduced important additions and changes into the canonical laws of the Kormtchaya Kniga, and his successors continued the policy which he had begun. All these new laws were in the nineteenth century collected

(*n*) Milasch, 486.

(*nn*) This account is chiefly contributed by Dr. David Soskice, of the Bar of the High Court of St. Petersburg.

together and formed a separate part of the Code of civil laws, divided into 118 articles, bearing the title "On Matrimonial Union."

The subservient position in which the Russian Church was placed from the beginning of the eighteenth century was naturally also reflected in the procedure followed in questions concerning the relations of spouses. One class of these questions, namely, offences against matrimonial union, or mutual personal and property rights of husband and wife, as well as of their children, arising from legal marriage, were subjected to the jurisdiction of the civil law Courts, though in many of these questions a previous decision of the Ecclesiastical Courts was required. In spite of this fact marriage is considered exclusively as a sacrament, and therefore civil marriage is entirely excluded, not only for members of the Orthodox Church, but also those of any other Churches or religions, either Russian subjects or foreigners, celebrated in Russia. A marriage in Russia between persons of the Christian faith is recognised as legal by Russian law only when celebrated according to the canonical laws and rites of that Church to which the contracting parties belong. If one of the two belong to the Orthodox Church, the marriage must be celebrated in that Church by an Orthodox priest, and the children born from such a marriage must be baptised into the Orthodox religion. The law forbids even the acceptance of petitions from the contracting parties praying for the avoidance of that rule. A marriage between two persons of a non-Christian religion, not excluding even pagans, must be celebrated according to the rites or laws of their own Church, or according to their own established customs, without any interference of the civil or ecclesiastical authorities, and marriages so concluded are recognised as legal. Marriage of a person belonging either to the Orthodox or Roman Church with a non-Christian is entirely forbidden; but members of the Protestant Church are permitted to contract marriage with Jews or Muhammadans, or followers of any other non-Christian religions except pagans, and such marriages are solemnised according to the laws established for the Evangelical Lutheran Church in Russia. Special statutory provision is made for registering marriages of Russian Nonconformists, which thus obtain legal recognition (*o*). In the Orthodox Church, parish priests are generally married before ordination, and

(*o*) Heard, The Russian Church, 24.

cannot marry or re-marry afterwards, nor may their widows. Second and third marriages are not favoured, but are allowed, but fourth marriages are forbidden (*p*). The Holy Synod has supreme jurisdiction over marriage and divorce, and Diocesan Courts exercise jurisdiction in first instance (*q*).

II. **The Separated Churches** are the Nestorian, which separated after the Council of Ephesus (431); the East Syrian or Jacobite; the Coptic (in Egypt); the Armenian and the Abyssinian, which separated themselves after the Council of Chalcedon in 451, and the Malabar Christian, which was originally Nestorian.

The Coptic Church follows generally the law of the whole Eastern Church, but slight variations have arisen with lapse of time in the custom and practice, *e.g.*, in the age for marriage; the age recognised by the Church till recently was eighteen for a man and twelve for a woman, but is now twenty and sixteen respectively. As regards the marriage of persons in Holy Orders, bishops are chosen from monks, who may, however, be widowers; priests must marry before ordination, and prospective priests can only marry virgins, and widower priests cannot re-marry. As regards degrees of relationship, marriage between cousins is not uncommon (*qq*).

The Armenian Church similarly follows the general law of the Eastern Church as regards marriage of secular priests and the prohibited degrees, and Diocesan Courts decide questions as to validity of marriages. The official head of the Church recognised in Turkish dominions is the Armenian Patriarch at Constantinople, but the Russian Government and the Church generally consider as Primate the Catholicos Patriarch of Etchmiadzine, whose supremacy has been acknowledged by the Patriarchs of Jerusalem and Constantinople (*r*). Secular priests are allowed to marry before ordination, and bishops are chosen from the monastic orders.

(*p*) Heard, *passim*, Romanoff, *passim*, and Milasch, 267.

(*q*) In Russia Orthodox marriage laws have never been imposed on the non-Orthodox inhabitants of the Empire. The marriage laws of each religious body are valid for its members, *e.g.*, neither Orthodox nor Anglicans (formerly) can marry their deceased wife's sister in Russia, while a Roman Catholic may by dispensation, and a Lutheran as a matter of course. This is in contrast with the English law as it was before the passing of the recent statute, under which all denominations had to submit to the law of the Anglican Church on this point.

(*qq*) This account is derived from information given by the Rev. Canon W. J. Oldfield, D.D.

(*r*) Fortescue, The Armenian Church (1872), London.

Marriage is forbidden between persons within seven degrees of blood relationship, except by dispensation from the Catholicos exceptionally for persons beyond great-great-grandchildren.

III. **The Uniate Churches** are those which, originally Eastern, have accepted the supremacy of the Pope. They correspond to the different separated Churches, and retain the Eastern canon law. These are the Chaldeans, corresponding to the Nestorians, the Uniate Copts, Abyssinians, Syrians, Maronites (the only Church wholly Uniate), Armenians, Uniates of Malabar, Melkites, Ruthenians, Bulgarians, Roumanians in Roumania and Transylvania and Italo-Greeks.

In Hungary, the Uniate Church or Greek Catholic Church, which is governed by the Archbishop of Blasendorf, was constituted by a union between the Roman Catholic Church and part of the Orthodox Roumanian Church in Transylvania, in 1698—1700, which followed on that principality passing under the rule of the house of Austria in 1688. The material features of the union for the present purpose were that the Roumanian Church continued the use of its own canon law, *e.g.*, its married priesthood, so far as it did not contradict the terms of the union; and the relationship between it and Constantinople is maintained by appeals being allowed from the decrees of the General Synod to the Metropolitan of Ugro-Wallachia as exarch of the Patriarchal throne, with a further reference to the final determination of the Patriarch of Constantinople and his council, according to the canons of the Council of Chalcedon.

There is also the Uniate Armenian or Latin Armenian Church in Persia and Turkey, which since the fourteenth century has admitted the supremacy of the Pope, and is governed by the Patriarch of Cilicia, the foundation of the see being due to Pope Benedict XIV. in the middle of the eighteenth century. The Latin Armenians in Austria similarly admit the Papal supremacy, but keep their original liturgy, and are governed by the Archbishop of Lemberg.

SECTION V.

Oriental Systems.

The chief provisions of the following Oriental systems may be briefly noticed, as being either in force in British dominions such as India, Burmah, Cyprus, and Gambia, or as coming within the

jurisdiction of British ex-territorial Courts, *e.g.*, in China and Siam, or lately codified on Western lines, such as Japan.

Law of India.—The marriage law of India is purely personal. It varies generally according to the religion, and sometimes according to the tribe or caste of the persons concerned. Occasionally a family custom may, amongst Hindus, have a binding effect. The bulk of the population, viz., the Hindus and Muhammadans, are polygamous, although polygamy is, in practice, rare amongst Hindus. Christians are necessarily monogamous. Polyandry is practised amongst some tribes. "There are two recognised types of polyandry—the matriarchal, where a woman forms simultaneous alliances with two or more men who are not necessarily related to each other, and succession is therefore traced through the female; and the fraternal, where she becomes the wife of several brothers. The former practice was once prevalent among the Nayar and other castes on the Malabar coast, but it has now fallen into desuetude, though the women enjoy full liberty (which, however, is seldom exercised) to change their husbands, and succession is still traced through the female—*i e.*, a Nayar's next heirs are not his own sons, who belong to their mother's family, but his sister's. The latter form of polyandry is still more or less common along the whole of the Himalayan area from Kashmir to Assam, and likewise among the Todas of the Nilgiris. It exists as a recognised institution chiefly among people of Tibetan affinities, but it occurs also, though more or less concealed, among various communities in the plains, such as the Jats of the Punjab and the Santals of Bengal" (*s*).

Hindu Law.—In prehistoric times the Hindus recognised several forms of marriage. Manu (*t*) describes eight forms, some of which, although recognised, were described by him as reprehensible, and would now be treated as either amounting to ravishment or to mere concubinage. The necessity for sons to protect the family in ancient times justified the legitimation of the issue of any form of sexual alliance; but with the growth of civilisation, and the increased appreciation of morality, the grosser forms disappeared, and only two, namely, the *Brahma* and the *Asura* (*a*), are now recognised, except where a custom (not of an immoral kind) has the force of law.

(*s*) Imperial Gazetteer of India, 1907, vol. i., p. 483.

(*t*) Ch. iii., pars. 21—41.

(*a*) *Post*, p. 216.

According to Hindu ideas marriage is necessary to every man and woman. Without it they cannot attain perfect purification. Not only is it based upon religion, but religious observances are necessary for its completion. By marriage the husband and wife become one person, and their relationship lasts at least during the lifetime of the wife, whether the husband predeceases her or not.

Muhammadan Law.—Muhammadans all over the world are governed by the same general system of law, with a few variations according to the sect or school to which they may respectively belong. Unlike most systems of law, the Muhammadan law does not attach any religious significance to marriage, or provide any necessary religious ceremonies therefor. Marriage is, according to Muhammadans, purely a civil contract. Its sole object is the legalisation of intercourse and the legitimation of children. As it is put by Mr. Amir Ali, "Regarded as a social institution, marriage under the Muhammadan law is essentially a civil contract. Its validity depends on proposal on one side and acceptance on the other. It does not insist upon any particular form in which the contractual performance should be effectuated. And though among the Sunnis the presence of witnesses is necessary to the validity of a marriage, their absence only renders it invalid, which is cured by consummation. In fact a marriage contract as a civil institution rests on the same footing as other contracts" (*b*).

According to Muhammadan law a man cannot have more than four permanent wives at the same time, but the *Shia* law permits any number of temporary marriages for a limited period which may be a term of years, a month, a day or even part of a day. As when the term of the contract is not specified the alliance is valid as a permanent marriage (*c*), the practical effect is to permit unlimited polygamy in the case of Shias. The rules as to prohibited degrees of kinship are practically the same as those ordained in the English canon law. The prohibited relationship on the ground of affinity is confined to the wife of a father or other ancestor, the mother or other ancestress of a wife, a wife's daughter or other descendant, and the wife of a son or other descendant. With certain exceptions, a marriage by a man with a woman who is so connected with him through some act of suckling that, if it had been instead an act of

(*b*) Muhammadan Law, 2nd ed., p 270. (*c*) Baillie, ii., 43.

procreation, she would have been within the prohibited degrees of consanguinity or affinity, is voidable (*d*).

A marriage can be dissolved at the pleasure of the husband, but the power of divorce is considerably controlled by the necessity for the payment of dower, for which a contract is made in nearly every Muhammadan marriage. It is generally usual to fix as dower, payable on the dissolution of the marriage by death or divorce, a sum, the payment of which would inconvenience the husband, and where no such amount is fixed, the Court can fix the amount with regard to the sums usually fixed for females marrying from the wife's family.

Parsi Marriages.—The Parsis seem to have been always monogamous, but divorce was possible on account of barrenness or impropriety. In 1818 the Parsis in Bombay resolved that no divorce should be recognised except with the leave of their *Panchayet* (a board of arbitration). This *Panchayet* decayed and finally expired in 1836. The marriage law of the Parsis was settled by Indian Act XV. of 1865 (*e*). By that Act (*f*) no Parsi can contract any marriage in the lifetime of his or her wife or husband, except after his or her lawful divorce from such wife or husband by sentence of a Parsi Matrimonial Court as established by the Act. The forms of these marriages are dealt with subsequently.

Christian Marriages.—The law for marriages of Christians follows the lines of the English law. These marriages have been regulated by Indian statutes, which provide for a religious or a civil ceremony. Statutory provision is also made for civil marriages of persons not belonging to the religions above mentioned or to other specified religious denominations.

Burmah.—Buddhist Law of Marriage (*g*).—The personal law of the Burmese in matters relating to marriage and divorce is to a great extent to be found in the customs prevalent amongst the people, though the *Dhamathats*, the Codes of former days, which contain the basis of the law, act as guides.

Marriage is entirely a civil contract and dependent for its formation like other contracts, and, with the exception that in

(*d*) Wilson's Anglo-Muhammadan Law, 3rd ed., p. 113.

(*e*) See pp. 146, 217.

(*f*) S. 4.

(*g*) This account is contributed by Moung Tun Lwin, K.S.M., barrister-at-law, and magistrate at Rangoon.

the case of minors the want of capacity may be supplied by the parent or guardian, it has no religious character. The Buddhist monks, considering such ceremonies to be worldly, remain aloof from them.

There are three modes by which marriage is created :—(a) A man and woman given in marriage by their parents, who live and eat together ; (b) a man and woman brought together through the intervention of a go-between, who live and eat together ; (c) a man and woman who come together by mutual consent, who live and eat together. Living and eating together is mentioned in the *Manukye*, but it is not an essential condition, and would be circumstances merely in proof of a marriage. The public banquet or joining of hands may be evidence of marriage, but such evidence may be over-ruled by showing the want of consent. The fact that the girl immediately after the alleged marriage quitted the man may be proved as a repudiation. The existence of force, fraud, or mistake vitiates the contract. No particular ceremony is necessary, but in most cases there is always a gathering and some kind of entertainment, so beloved of Oriental races, to evidence the wedding. When disputes arise there is always evidence available. In doubtful cases the conduct of the parties before and after the alleged event would show whether the status of husband and wife had been acquired. The surrounding circumstances incident to a Burmese marriage may be shown to have existed. Cohabitation with the required repute, as husband and wife, is the matrimonial relation. The Burmese law of marriage has been likened to the marriage law of Scotland.

Polygamy is recognised in the *Dhamathats*. There is, however, undoubtedly a very strong feeling amongst the people against such a practice, and those who have more wives than one are not regarded as respectable. The practice is not so prevalent at the present day, and may be said to have become so rare that it will in course of time disappear altogether.

In the case of minors the consent of the parent or guardian is essential. The age of majority is twenty for an unmarried woman. But the consent of the minor is also necessary.

A minor Burmese woman who is either a widow or has been divorced from her husband may, however, contract a fresh marriage without the consent of her parent or guardian.

The father has the prior right to give a daughter in marriage, and on his death the mother; when both are dead the nearest relation must act in their place. In the absence of relations the protector or guardian would exercise the rights that the parents had. When the children have been given away in adoption, the adoptive parents are those who have control over them in this respect.

The *Dhamathats* do not lay down any rules regarding the degrees within which marriage is prohibited. But custom which is held in deep respect is clear upon the point, and those who deviate from it incur social disapprobation, and deviations are not so frequent as to deserve much comment. The degrees of consanguinity and affinity within which marriage cannot take place are to a large extent the same as under the English canon law.

A man may, however, marry his wife's sister in the lifetime of his wife. Such marriage or a marriage with a brother's widow would be clearly opposed to public opinion, though not illegal. Marriage with a deceased wife's younger sister is, on the other hand, considered as a most becoming union.

A marriage between first cousins is not permissible. But among the Arakanese and the Tavoyans a marriage between the children of a brother and a sister, but not of two brothers and sisters, is not regarded with disfavour.

There is no law against incest, and there has been no decision of the highest Courts on the subject.

A suit for breach of promise of marriage lies amongst Burmese Buddhists. Such an action is decided under the Indian Law of Contract, and not by Buddhist Law, which is permitted to regulate only questions relating to succession, inheritance, marriage or religious usage. In the matter of assessment of damages the same considerations would have to be regarded as in all civilised countries.

There can be no marriage between a Muhammadan and a Burmese unless the latter embraces the former's religion. Profession with or without conversion is necessary. In the case of a Hindu there can be no valid marriage with a Burmese Buddhist woman so long as he remains a Hindu. A person cannot become a Hindu by conversion, but must be born as such. It would, therefore, be necessary for him to renounce his religion to contract a legal marriage with a Buddhist.

Law of China (*h*).—In China the family is the social unit, and the law of the family is very similar to that which prevailed at Rome in the earliest times. The Chinese family embraces all those descended from the head of the family, excepting females who have married into other families; it also includes the wives of male descendants of the *paterfamilias*, as well as persons who have been adopted into the family, and servants and slaves. Thus, as in early Rome, relationship between members of the same family can be traced only through agnates and not through cognates, and the law of *patria potestas* and *manus* holds good. The marriage law is made up partly of law in the proper sense of the word, but very largely of ancient custom.

Marriage is a purely civil status dependent on contract. The contract is concluded by the parents of the parties, and the consent of the latter is immaterial. The contract is usually, but not always, in writing, in which case it is signed by the persons in whose *potestas* the parties are. By it the amount of the presents and the latest day for concluding the marriage are fixed. It is an established custom that men marry when over twenty years of age, and that girls are rarely given in marriage before their fifteenth year. Frequently, however, children are betrothed at an early age by the heads of their respective families, but actual marriage does not take place till the character is formed. Celibacy in grown-up persons, except monks and nuns, is extremely rare, it being considered the duty of every man to beget male descendants to carry on the worship of the family ancestors. For this reason concubinage is allowed as well as adoption, as a means of increasing the family.

In the case of orphans guardians are appointed, who have the same *potestas* as the head of a family. Their consent to the marriage of the ward is necessary.

If a betrothal has been arranged by the head of the family, any other contract to marry entered into by the son is void, unless such contract has been carried out and the marriage has taken place, in which case it stands good.

If after a contract of marriage has been arranged it appear that false statements have been made by the family of the bride, then the contract is void, the presents are returned, and the head of the family of the bride is punished with eighty blows of the bamboo.

(*h*) This account is contributed by Mr. J. Bromley Eames, barrister-at-law.

If false statements have been made by the father of the bridegroom the same results follow, except that the presents are not returned. If the fraud be discovered after marriage an action for divorce lies.

In theory mixed marriages with savages are not allowed, but many Chinese settlers in Formosa have taken brides from among the savages of that island. In any case, if a man gets a girl with child the child is considered his legitimate offspring. Europeans are not specially mentioned in the law, but a Chinese would have little difficulty in repudiating a European wife.

Members of the same family may not marry each other, neither may cognates of different degrees. Cognates of the same degree who are not also agnates may intermarry. Further, marriage is forbidden with the step-daughter, with female relations within the fourth degree of relationship, with the widow of a male relation of the fourth degree, or the sister of a widowed daughter-in-law.

Marriage, except with concubines, within the legal time of mourning is prohibited, and even then it is not allowed if the mourning is for a parent or by a widow for her deceased husband. Marriage is forbidden with a woman who has committed a crime and fled for fear of punishment. Adultery is a crime in China, and the husband may kill his wife and the adulterer if taken *in flagrante delicto*.

Marriages between officials and actresses or singing girls are forbidden. Such marriages are also prohibited to the sons or grandsons of nobles with hereditary rank. Priests and nuns are not allowed to marry, but lay brethren may. Marriage between male slaves and free women is impossible. Puberty is not requisite to enable a person to marry, but if non-attainment of puberty, disease, insanity, &c., are not revealed they are considered impediments to marriage equally with the other circumstances enumerated above.

The above impediments render a marriage absolutely null and void. Ignorance exempts the parties from punishment, but does not avail to make such a marriage valid.

When the parties desire to conclude the marriage, betrothal having already taken place, presents of silk are sent to the bride's father by the bridegroom's family, together with a document containing the horoscope of the betrothed couple. This document constitutes the marriage contract and stipulates what sum is to be

paid for the bride, such sum amounting at times to some hundreds of pounds. By accepting this price the bride's father sells and manumits the bride to the bridegroom's family. Then a day for the bride to be handed to the bridegroom is fixed, and on that day she is conveyed to the bridegroom's home in an enormous red chair, and her furniture, presents, &c., are carried in procession at the same time. On arriving at her new home she kneels with her husband before his ancestral shrine. They then drink from two cups tied together with a red string, and the marriage ceremony terminates.

Law of Japan (*i*).—The law of Japan on the subject of marriage is now contained in the Civil Code. Previously there was no general written law, but the subject was regulated by custom, and the ceremony was always civil, not religious. Since the Code, owing to the introduction of Western ideas, marriages are in some cases contracted in temples, Shinto or Buddhist, though this has no juridical effect, and the ancient customary ceremony is generally still adopted. This takes place at a meeting of the families of the contracting parties, and the parties sitting opposite to each other drink together the contents of three cups of wine successively, thrice out of each, the cups being placed one upon the other. The marital status could also be constituted by the parties living together in marital relations. Since the Code it is required that the parties shall make a declaration in the presence of the proper civil officer and two witnesses of full age to the effect that they contract marriage, and the marriage thereupon takes effect. This is applicable in the case of two Japanese persons in a foreign country, the proper officer then being the minister or consul. No previous notification of intention to marry is necessary. The consent of the head of the family in all cases, and of the parents in the family for men and women who have not attained thirty to thirty-five and twenty-five years respectively, is required, as well as the consent of the parties, and minors in certain cases require the consent of the guardian or family council; but the want of the parents' consent does not invalidate the marriage, though it renders it liable to be annulled under certain conditions. If persons who have entered a family by marriage wish to re-marry and enter another family the consent of the

(*i*) The editors are indebted to Mr. H. Yokota, Judge of the Court of Cassation, Tokio, for assistance with the following account.

heads of both families is necessary. As regards the other conditions of the status, such as impediments and annulment, the Code adopts substantially the provisions of the Western law; and where the Code does not make specific provision the ordinary law of contract applies. Concubinage, formerly, though not recognised by law, was not considered criminal, but was admitted with a view to continuing the family. But it is now viewed with disfavour socially, and under the present law it is a cause for divorce by a deserted spouse if leading to desertion (*k*).

Under the Civil Code no ceremony of marriage is required. The status is created by registration, but actually takes effect by giving notice to the registrar and the existing intention of the parties to marry. The notice is given by both parties before two witnesses who are of age, and may be verbal or written, and the person entering the other's family is registered as such and taken out of the register of his or her present family.

The marriageable age for men is seventeen and women fifteen. It cannot take place between persons who are lineal blood relations or relations by marriage in the direct line, or collateral relatives of the third degree of relationship, but this prohibition does not extend to marriages between adopted persons and the relatives of the adoptive parents.

The prohibition, however, continues after the relationship has ceased by divorce or dissolution of the adoption respectively for relatives by marriage in the direct line, for adopted persons, their consorts and lineal descendants, and the adoptive parents and their lineal ascendants.

A woman whose marriage has been dissolved and annulled cannot re-marry till after expiration of six months from the date of dissolution or annulment of her previous marriage unless she was pregnant before these dates, when this provision takes effect from the date of the child's birth.

Marriages infringing the provisions above mentioned (*l*) may be annulled by a Court of law on the application of either of the parties, the head of a family, or relative or public prosecutor. Marriages which contravene provisions of the Code other than

(*k*) See Gubbins, Civil Code of Japan, part ii., Introd. xxxviii.—xl.; Civil Code, arts. 750, 765, 772, 775—777, 783, 784.

(*l*) Arts. 765—770.

degrees of relationship or registration remain valid until a Court orders their annulment.

Law of Siam (*m*).—Marriage in Siam has always been a civil contract, and most of the rules governing contracts apply also to marriage. It cannot be better expressed than in the words of the Foreigners Marriage Act, 1898:—"Marriage according to Siamese law and custom is a contract between a man and wife to which the ordinary principles which attach to other contracts are applicable, and it is consequently validly celebrated whenever it clearly results from the words exchanged or from the rites observed that both parties freely consent to take each other as man and wife, provided he or she does not labour under some particular disability."

The source of the law is mainly the common law; a collection of this was made and enacted some 128 years ago; it is known as the Laksana Phua Mia (*n*), but this is not exactly a Code. Since then there have been a few decrees regarding the law of husband and wife.

As there are many races in Siam, this law primarily only concerns the Siamese; as regards other races, the marriage contract may be to a very great extent (or even in its entirety (*o*)) governed by the habits and customs of each race.

A woman cannot marry under the age of twelve, and presumably men under that age cannot marry. In marriage, the two parties must consent (*p*) themselves, and in addition there must be the consent of the parents of the wife (*q*). A regular marriage is therefore a contract with three parties. If the wife has no parents and is not of age (twenty years), the consent of her guardian is necessary. Fraud, force and mistake (*r*) apply to marriage as to other contracts. Insanity before marriage and after promise will end the contract; for there can be no consent on the part of the insane person. Insanity after marriage does not end the marriage, nor is it a ground for divorce (*s*).

Impotence is regarded as rendering the contract null and void.

(*m*) This account is contributed by H.R.H. Prince Rajburi Direkriddhi, Minister of Justice, Bangkok. Codes of the Siamese law are now being prepared on all subjects (except a Penal Code which is already in force).

(*n*) See Prince Rajburi's edition, vol. 1.

(*o*) See, for instance, the Seven Provinces Act, R. S. 120, s. 32.

(*p*) Phua Mia, art. 130.

(*q*) The laws on Lakpha.

(*r*) Phua Mia, art. 112.

(*s*) Toh's case.

Marriage between ascendants, descendants, and brothers and sisters of full blood is forbidden; but is allowed between cousins and with deceased wife's sister (*t*).

There is no rule against mixed marriages, but the obligation of the contract must be mutual.

There is no law to prevent a man from marrying more wives than one, but there can only be one principal wife (*u*). The status of all other wives is regulated by law, and provided this law is fulfilled, all the children are legitimate.

There is no ceremony regulated by the State; any ceremony will be sufficient, provided it is according to the custom or law of the race concerned. No banns or notices are required. An action for breach of promise will lie, though the damages are confined to the forfeiture of the *kong-mun* (earnest money), and to out-of-pocket expenses, such as the cost of a feast provided (*x*).

(*t*) Phua Mia, arts. 35, 36.

(*u*) Laksana Moradok, art. 3.

(*x*) Neung *v.* Hok Lee, C. C. 128.

CHAPTER II.

CAPACITY FOR MARRIAGE.

The question of capacity for entering into a valid marriage contract is subject to certain positive and negative conditions. The former are the requirements for a valid marriage—without which no marriage is considered to exist; the latter are the circumstances which are considered prohibitions to a marriage—either absolute or relative,—and which, if contravened, form the grounds upon which a marriage once entered into can be declared void. The former class includes the requirements of (a) the proper age of the parties, (b) the consent of the parties, and (c) the consent of third persons in whose custody the parties are. The latter class may be subdivided into (1) absolute prohibitions, such as (a) the existence of a valid marriage previously entered into by one of the parties, (b) *annus luctus*, (c) incapacity of procreating children, and (2) relative prohibitions, such as (a) degrees of consanguinity and affinity, (b) difference of religion, (c) adultery, or the actual or attempted homicide of a spouse, (d) ravishment and abduction, (e) the relationship of guardian and ward, (f) spiritual or official position, (g) infectious disease.

The requirements of a valid marriage are the conditions which a marriage officer should satisfy himself are fulfilled before allowing the banns to be pronounced and the marriage to be celebrated.

The prohibitions to a marriage are grounds on which certain persons can raise an objection, and either oppose the celebration of the marriage or proceed to have the marriage, once entered into, set aside.

SECTION I.

Roman-Dutch Law.

I. **Dutch Republic.**—(A) **Requirements.**—(a) **Age.**—The age required in the Dutch Provinces for a valid marriage was not uniform. In fact, the Germanic nations do not seem to have had any fixed rules

on this subject, and custom only gradually introduced various ages. Under the influence of the Roman Catholic Church and the Roman law, most of the Dutch Provinces adopted the age of fourteen for boys and twelve for girls as the age of puberty, and, in consequence, as the age at which a valid marriage could be entered into (*a*).

A marriage entered into by either party before that age, if by mistake, became valid when the proper age was reached (*b*); if it had been entered into knowingly, the marriage might be considered invalid on account of absence of proper consent (*c*).

(b) **Consent of the Parties.**—In the Dutch Republic the parties were not considered to have given their free consent if anything had essentially interfered with their liberty of choice. They could not be married against their will, and their consent had to be given "without duress, error, or fraud" (*d*).

A distinction was, however, drawn between the promise made at the time of the betrothal and the promise made at the time of the marriage ceremony. Whilst it was considered possible that a promise to marry might be given under coercion, or in great fear, or might be fraudulently obtained, and in such circumstances could not be considered to be of a binding character, the publicity of the marriage ceremony and the obligatory character of the *sponsalia de præsenti* were held to exclude the possibility of any consent then given being extorted by duress or fraud (*e*). If the marriage ceremony were once performed, and no other impediments could be raised against it, the marriage could not under any circumstances be set aside

(*a*) Grotius, Introd., i., 5, 3; van Leeuwen, R. H. R., i., 12, 3 *in fine;* Cens. For., i., 1, 13, 4; Boey, Woordentolk, p. 339; van der Linden, Koopmanshandboek, i., 3, 6, on p. 21; Cos, Huwelyk, par. 127; Brouwer, de Jure Conn., ii., 3, 21; Fock. Andr., Bijdragen, i., 139, 142---143; J. Voet, Ad Pand., xxiii., 1, 2; Bynkershoek, Quaest. Jur. Priv., ii., 3.

(*b*) Van der Keessel, Thes. Sel., Thes. 66; Brouwer, de Jure Conn., ii., 3, 25.

(*c*) Fock. Andr., Het Oud Ned. B. R., ii., 147; Brouwer, de Jure Conn., ii., 3, 26 and 28; J. Voet, Ad Pand., xxiii., 1, 2.

(*d*) Echtreglement of the Generaliteyt, March 18th, 1656, art. 11; Fock. Andr., Bijdragen, i., 144, 145; Het Oud Ned. B. R., ii., 148; Utrechtsche Cons., i., Cons. 3 on p. 24; 52 on p. 160.

(*e*) According to the Echtreglement, the parties had to be asked before the marriage was solemnised whether they wanted to be married to each other, "zonder bedwanck, simulatie ofte bedroch": J. Voet, Ad Pand., xxiii., 2, 6; van Leeuwen, Cens. For., i., 1, 13, 5 and 7; Brouwer, de Jure Conn., i., 17, 24-25.

on the ground that the consent had been obtained by force or fear (*f*).

Force and fear were valid reasons for avoiding marriage, but not for rendering marriage void.

Error, on the other hand, had a different effect. If mistake had occurred in the person of the bride or bridegroom, or in some substantial quality or character of the same, there was no valid marriage (*g*).

Error regarding points of minor importance could not lead to a declaration that the marriage was void (*h*).

Those who, on account of unsoundness of mind, were incapable of exercising their free will, could not enter into a valid marriage. A marriage entered into by them was void (*i*).

(c) **Consent of Third Parties.**—The Germanic laws required that minors who wanted to contract a marriage should first obtain the consent of their father, or any other person who acted for them in the capacity of *mundoaldus*, and of other relatives. A marriage without such consent was, however, not considered void or voidable (*k*).

As already seen, the Catholic Church extended this requirement to the consent of both parents. A marriage of minors, however, entered into without such consent, was not considered to be void, and only carried with it pecuniary disadvantages for the married couple (*l*).

The Council of Trent did not alter this rule.

In the Dutch Provinces the consent of third persons was required

(*f*) At the marriage ceremony the person who considered that he was going to be married under coercion had a last chance to speak. This is quite obvious from the law in those provinces where the *copula carnalis* was still considered as an essential for the completion of the marriage. In those cases the person who considered himself the victim of duress, fear, or fraud could treat the marriage as invalid, even after the marriage ceremony, until the consummation had taken place: *Res adhuc est integra cum non intervenerit copula:* Utrechtsche Cons., i., Cons. 52 on p. 160, and authors quoted.

(*g*) Gr. Pl., ix., 371; Fock. Andr., Bijdragen, i., 145; Brouwer, de Jure Conn., i., 18, 8—12.

(*h*) J. Voet, Ad Pand., xxiii., 2, 6; Brouwer, de Jure Conn., i., 18, 13—37.

(*i*) Grotius, Introd., i., 5, 4. Those who could exercise a free will, though they could not express it (deaf and dumb), could enter into a valid marriage: Van Leeuwen, Cens. For., i., 1, 13, 5 n.; H. Brouwer, de Jure Conn., ii., 4, 32; J. Voet, Ad Pand., xxiii., 2, 6.

(*k*) Fock. Andr., Bijdragen, i., 66.

(*l*) Fock. Andr., Bijdragen, i., 145—147.

for marriages of minors all through the Middle Ages. In some provinces these third persons were, the father or the *mundoaldus* and the nearest male relatives (*l*); in others, the parents, or, in their absence, the guardians of the minor children, in most cases together with some of the children's relatives on either side (*m*).

Non-observance of this rule only carried pecuniary disadvantages with it, and marriages of minors entered into without the required consent were neither voidable nor void (*n*). This was provided in different statutes in the different provinces. A general rule was made in this respect by the Emperor Charles V. in his *Eeuwig Edict* of 1540 for all the Low Countries. It was provided that girls who had not yet reached their twentieth year, or men under twenty-five years of age, could not be united in holy matrimony without having previously obtained consent from their father or mother, and, if neither of them were living, from friends and relatives, or finally, from the aldermen of the town (*o*). Whosoever married a minor without such consent could not in any way derive any benefit from the property possessed by the minor, either during the marriage or after its dissolution, either on account of community of property or by marriage contract, or by will, or in any other way, not even if the necessary consent had been obtained after the marriage had been entered into (*p*).

In order to check clandestine marriages the Dutch Reformed Church introduced the nullity of marriages of minors which had been celebrated without the consent of their parents.

The civil authorities, following in the footsteps of the Church, declared marriages entered into by minors (or persons under a certain age) (*q*) without the consent of their parents, guardians, or curators, friends or relatives, to be null and void. Magistrates and Church authorities had to inquire into the age of the parties and to ascertain

(*l*) See note (*l*) on previous page.

(*m*) Fock. Andr., *ad loc. cit.*, pp. 149, 151, 152, 153, 155, 157, 158, 161—163.

(*n*) Fock. Andr., *ibid.*

(*o*) Fock. Andr., Het Oud Ned. B. R., i., 150.

(*p*) "Eeuwig Edict" of October 4th, 1540, art. 17; Grotius, Introd., i., 8, 3; ii., 5, 8; ii., 1, 8; and ii., 12, 7; Groenewegen, Leg. Abr., Cod., v., 4, 8; J. Voet, Ad Pand., xxiii., 2, 20; v. d. Keessel, Thes. Sel., Thes. 75, 218; Fock. Andr., Bijdragen, i., 147.

(*q*) The age fixed in the different statutes under which a person required his parents' consent did not always coincide with the age of majority: Fock. Andr., Bijdragen, i., 156, n. 5, and elsewhere.

whether the proper consent had been obtained, in case it appeared that the proper age had not been reached.

These provisions were—to a smaller or larger extent—gradually adopted in the different provinces (*r*). As to Holland, which did not require the consent of guardians, they were contained in the Political Ordinance of 1580 (*s*).

Such consent could be given previously to or after the marriage ceremony. If it were given after the marriage ceremony, this made the marriage valid, but did not take away the disadvantages provided by the *Eeuwig Edict* (*t*). Express consent was not necessary. If the parents had knowledge of the publication of the banns and did not intervene, it was considered that they had tacitly given their consent (*a*).

If the father and mother differed in opinion, the father's decision prevailed (*b*).

If both parents, or either of them, were incapable of expressing their, or his or her, will through unsoundness of mind, they or the person so incapacitated were considered as dead (*c*).

By "parents" were understood father and mother, not the

(*r*) In Gelderland by a Proclamation of 1597: Lamb. Goris, Tract, c. 10. For Utrecht cf. A. v. Wesel, ad Nov. Const. Ultraject., 14, 63 *et seq.*; Utr. Cons., i., 2, pars. 3—12; Echtreglement of the Generaliteyt, March 18th, 1656, art. 43. In Zeeland and Friesland the consent of guardians and curators was required in case the parents were dead: Polit. Ord. Zeeland, February 8th, 1583, art. 7; v. Sande, ii., 1, 6, 7; J. Voet, Ad Pand., xxiii., 2, 11, and authors quoted; Fock. Andr., Bijdragen, i., 160—163, and authors quoted; Het Oud Ned. B. R., ii., 150, 151.

(*s*) Art. 3 jo. 13; v. d. Keessel, Thes. Sel., Thes. 75; Holl. Cons. v. Cons. 189; Groenewegen, Leg. Abr., Cod., v., 4, 8; Matthaeus, Paroem. ii., 17, 18; J. Voet, Ad Pand., xxiii., 2, 16.

(*t*) Politic. Ordon., April 1st, 1580, art. 13; v. d. Keessel, Thes. Sel., Thes. 75; van Sande, Decis. Fris., ii., 1 Def. 2; J. Voet, Ad Pand., xxiii., 2, 19.

(*a*) J. Voet, Ad Pand., xxiii., 2, 18, and authors quoted; Brouwer, de Jure Conn., ii., 24, 43—44.

(*b*) J. Voet, Ad Pand., xxiii., 2, 13. In some provinces the decision of the judge or magistrate could be asked in case the parents differed: Fock. Andr., Het Oud. Ned. B. R., ii., 151. Similar provisions were made in the Ontwerp 1820, art. 133, which provided that in all cases of difference of opinion between husband and wife the judge should decide.

(*c*) V. d. Keessel, Thes. Sel., Thes. 82; Ontwerp 1820, art. 137. If both parents were absent for a considerable time and it was difficult to communicate with them, the judge had to decide according to circumstances, and he could give consent instead of the parents: Art. 138.

grandparents. The consent of the grandparents was never required nor was the consent of the relatives and friends (*d*).

In case both parents were dead, the consent of the guardian or guardians was—as a rule, as far as the Province of Holland was concerned—not required, unless the particular "keuren" of the towns provided otherwise (*e*). In the Province of Zeeland, on the contrary, in such case the consent of the guardian or guardians was required together with that of the nearest relatives, on pain of nullity of the marriage entered into without such consent (*f*).

If the parties had become of age—that is to say, had reached the age of twenty-five or twenty years respectively, or had passed the age at which consent of the parents was considered indispensable—the consent of their parents had no longer to be asked, but the parents were still entitled to intervene. If the parents intervened, an appeal could be made by the children to the magistrate or the judge, and a summons might be served on the parents to give their consent. If the parents did not appear to this summons, and if they did not appear before the magistrate within a fortnight after the summons had been issued, their consent was presumed to have been tacitly given. If they appeared and did not give any valid grounds for their objection, the marriage could take place notwithstanding their dissent. If the decision of the magistrate sustained the parents' objection, the marriage could not take place. The decision of the magistrate was final, but did not extend beyond the magistrate's jurisdiction (*g*).

(B) **Prohibitions to Marry.—1. Absolute Prohibitions.**—(a) **An existing valid Marriage.**—A second marriage, whilst the former husband or wife is living, and the former marriage is not legally dissolved, is *ipso facto* null and void.

In the civil law the rule was "Duas uxores eodem tempore habere non licet" (*h*).

(*d*) Plakaat Holland, July 31st, 1671; Lybreghts, Reden. Vertoog, i., 11, 12; J. Voet, Ad Pand., xxiii., 2, 15; J. v. d. Linden, Koopmanshandb., i., 3, 6 (2) on p. 23.

(*e*) Grotius, Introd., i., 8, 3; S. van Leeuwen, Cens. For., i., 1, 13, 10; v. d. Keessel, Thes. Sel., Thes. 77 and 125; J. Voet, Ad Pand., xxiii., 2, 16; v. d. Linden, Koopmansh., i., 3, 2, on p. 24 and authors quoted; Fock. Andr., Bijdragen, i., 160.

(*f*) V. d. Keessel, Thes. Sel., Thes. 77 and 126; Fock. Andr., Bijdragen, i., 163.

(*g*) Plakaat States of Holland, September 27th, 1663; J. Voet, Ad Pand., xxiii., 2, 12.

(*h*) Inst. i., 10, 6, *in fine*.

With the Germanic tribes originally bigamy was not forbidden, though it was not customary. A man could have more than one wife, though a woman could not marry more than one man (*i*). But the influence of the Catholic Church introduced the definite prohibition of marriages with more than one woman at the same time (*k*).

In the time of the Dutch Republic, bigamy (especially if followed by *concubitus*) was severely punished, as the offence was considered equal to adultery. In some cases offenders ran even the risk of capital punishment, though van Leeuwen states that death sentences for bigamy had become obsolete (*l*).

In case of uncertainty whether the husband or the wife were alive, leave might be granted to the party who was left behind to legally enter into a second marriage without waiting for the absentee's return.

By the Roman law a second marriage was legalised if the husband or wife had been captive and had continued in captivity for five years without any news having been received from the absent spouse (*m*).

In the Dutch Republic, if a married person were absent from home for a long period of years without anything having been heard of him or her, the States could grant the other party to the marriage leave to marry again. It was enacted by the States-General in the Echtreglement of March 18th, 1656, that in case a husband had left his home and an interval of five years had elapsed without the wife having received any intelligence from him and no evidence existed of his being alive, the magistrates, after proper inquiry, could grant leave to the wife to marry again (*n*).

This provision was not universally recognised, and unless specially enacted by the States of a particular Province, no length of absence of her husband could render the wife *bonâ fide* in marrying

(*i*) Fock. Andr., Annot. ad Grot. Introd., ii., 11; Bijdragen, I., 141; Het Oud Ned. B. R., ii., 152.

(*k*) Fock. Andr., *loc. cit.*, and authors quoted by him; H. Brouwer, de Jure Conn., ii., 5, 26.

(*l*) Grotius, Introd., i., 5, 2; Fock. Andr., Annot. ad Grot. Introd., ii., on p. 11; Schorer, Notes ad Grot. Introd., i., 3, 8. n. 5; Crimineele Ordonn., Philips ii., art. 60; van Leeuwen, R. H. R., i., 14, 2; Cens. For., i., 1, 13, 26; Echtreglement of the Generaliteyt, 1656, art. 84; v. d. Keessel, Thes. Sel., Thes. 62; H. Brouwer, de Jure Conn., ii., 5, 27 and 28.

(*m*) Dig. xxiv., 2, 6.

(*n*) Echtreglement, art. 90; S. van Leeuwen, R. H. R., i., 15, 4, and note; Ordon., States of Zeeland, March 18th, 1666, art. 16; Schorer, *loc. cit.*; H. Brouwer, de Jure Conn., ii., 5, 30; J. Voet, Ad Pand., xxiii., 2, 99, and authors quoted.

a second husband, for, as a general rule, the death of a person is not presumed, but has to be proved (*o*).

Regarding the consequences of a bigamous marriage, a distinction must be drawn with regard to the intention of the parties.

Putative Marriage.—A marriage may be contracted in good faith, and in ignorance of the existence of those facts which constituted a legal impediment to the intermarriage. Such a marriage is described by jurists as "matrimonium putativum, id est, quod bonâ fide et solemniter saltem opinione conjugis unius justâ contractum inter personas vetitas jungi" (*p*).

Three circumstances, it has been said (*q*), should concur to constitute this species of marriage. (1) There must be *bona fides*. It follows that the parties, or one of them, must, not only at the time of the marriage, have been ignorant of the impediment, but must also have continued ignorant of it during his or her lifetime; because if he became aware of it, he was bound to separate himself from his wife. (2) The marriage must be duly solemnised (*solemniter*). (3) The marriage must have been considered lawful in the estimation of the parties, or of that party who alleges the *bona fides* (*opinio justa*). The party cannot insist on the excuse if he has neglected the ordinary means of ascertaining its validity.

A marriage in which these three circumstances concur, although null and void, will have the effect of entitling either spouse, if acting in good faith, to enforce the rights of property, which would have been competent to him or her if the marriage had been valid, and of rendering the children born of it legitimate.

This principle is derived from the canon law, for though the Roman law granted relief in certain cases by recognising the children born from a second bigamous marriage under certain circumstances as legitimate (*r*), yet the Church was the first to grant relief to the parties themselves and to give an opportunity of recognising the second marriage as valid (*s*).

A difference was made according to whether the parties had acted *bonâ fide* or had knowingly disregarded the obstacle to their marriage.

(*o*) Utrechtsche Cons., iii., Cons. 140; Schorer, Notes ad Grot. Introd., *loc. cit.*; Fock. Andr., Het Oud Ned. B. R., ii., 152 and 153; H. Brouwer, De Jure Conn., ii., 5, 29—32.

(*p*) Hertius, de Matrim. Putat.

(*q*) Nouveau Denisart, ii., s.v. Bonne foi des contractants, s. 2, n. 1.

(*r*) Dig., xxiv., 2, 57.

(*s*) C. 14, x., *qui filii sunt legit.* iv., 13.

If both parties to the second marriage were *bonâ fide* under the impression that the former marriage had been dissolved, the second marriage was considered valid in this respect: that (a) the children born of the second marriage were legitimate, or might be declared legitimate by the States (*t*); (b) with the consent of the former husband or wife and on his or her renouncing his or her rights under the former marriage, the States might, at the request of one of the parties, declare the former marriage to have been dissolved by common consent and confirm the second marriage, granting liberty to the person who was thereby left unmarried to marry again (*a*).

If on the other hand, only the second husband or wife were *bonâ fide*, the second marriage was considered null and void, but the children born of the second marriage were considered legitimate (*b*).

(b) **Annus luctus.**—In Roman law a widow who re-married within a year after her husband's death (*annus luctus*) suffered infamy and could not benefit by the goods left to her by her former husband. The person who thus married her, was deprived of part of the *dos*, and to a certain extent of the right to benefit by her will (*c*).

As already seen the canon law did not prohibit a second marriage within the period of one year after the dissolution of the former marriage by the husband's death, though the Church refused to give its benediction to the marriage of any widows (*d*). In the Dutch Republic the requirement of such an interval was introduced at a late period from the Roman law (*e*). The principal reason of its introduction was, to prevent *confusio sanguinis*, and only secondarily from considerations of decency and the respect due to the memory of the former husband.

For that reason the period of one year was not taken over in the

(*t*) Boel-Loenius, Dec. et Obs., Dec. 78. This was in accordance with the civil law; Dig., xxiii., 2, 27; v. d. Keessel, Thes. Sel., Thes. 64.

(*a*) Boel-Loenius, *loc. cit.*, on p. 512; Van Alphen, Papegaey, i., Verbaal in Rau-actie, vi., on p. 60; ii., Request, on p. 589; Echtreglement of the Generaliteyt, 1656, art. 90; Schorer, Notes ad Grot. Introd., i., 5, 2 and authorities quoted: J Voet, Ad Pand., xxiii., 2, 99, *in fine*; v. d. Keessel, Thes. Sel., Thes. 64; H. Brouwer, de Jure Conn., ii., 5, 33—34.

(*b*) Stockmans, Decis. Brabant., 62; v. Sande, Dec. Fris., ii., 5, def., 2; v. d. Keessel, Thes. Sel., Thes. 65; Fock. Andr., Annot. ad Grot. Introd., ii., on p. 11.

(*c*) Cod. v., 9, de sec. nuptiis.

(*d*) Cod. x., de sec. nuptiis (iv., 21); Groenewegen, Leg. Abr., Cod., v., 9, 1; Fock. Andr., Bijdragen, i., 141.

(*e*) Groenewegen, *loc. cit.*; Fock. Andr., Het Oud Ned. B. R., ii., 153.

Republic. Much was left to the discretion of the Court, unless it was certain that the widow was with child (*f*).

The widower was similarly bound to observe a certain period after the death of his wife before he could enter into a second marriage.

The period to be observed by the widow varied in the different Provinces between six months and a year.

Similarly the period to be observed by the widower varied between two and six months (*g*).

In the Province of Holland this matter was not regulated by provincial statutes, but it was left to the different towns to regulate by town "keuren." In most of these "keuren" it was provided that a widow could re-marry sooner if she had given birth to a child within six months after the death of her husband. The town of Amsterdam provided that this only applied to a widow who was not yet fifty years of age (*h*).

The States-General fixed the period for a widow, over fifty years of age, at six months; for a widow who had not yet reached that age, at nine months; and for a widower, at three months, leaving discretion at the same time to the Courts to grant dispensation if circumstances required it (*i*).

The sanction of these provisions consisted in fines (in olden times even imprisonment). A marriage contracted in contravention of these rules was neither void nor voidable (*k*).

(c) **Incapacity to Procreate Children.** — Though the object of marriage is not exclusively the procreation of children, yet the incapacity of doing so on the part of either husband or wife was considered sufficient reason to render the marriage voidable, although not *ipso facto* void (*l*).

(*f*) Grotius, Introd., i., 5, 3; Regtsgel. Observ. ii., Obs. 7; J. Voet, Ad Pand., xxiii., 2, 3, 98; van Leeuwen, Censura For., i., 1, 13, 27; v. d. Keessel, Thes. Sel., Thes. 67; v. d. Linden, Koopmanshandboek, i., 3, 6, on p. 21.

(*g*) Fock. Andr., Bijdragen, i., p. 164—168.

(*h*) Fock. Andr., *ubi cit. sup.*

(*i*) Echtreglement, art. 52; Schorer, Notes ad Grot. Introd., 1, 5, 3; Zurck, Codex Bat., *voce* Houwelyck, par. xxvi.

(*k*) Groenewegen, Leg. Abrog., Cod. v., 9, 1; Coren, Cons., Cons. ll.; J. Voet, Ad Pand., xxiii., 2, 98; v. d. Keessel, Thes. Sel., Thes. 68; Fock. Andr., Het Oud Ned. B. R., i., p. 153.

(*l*) Grotius, Introd., i., 5, 4; Lybreghts, Reden. Vertoog, i., 12, 16; H. Brouwer, de Jure Conn., ii., 4, 1—19; J. Voet, Ad Pand., xxiii., 2, 28; v. d. Linden, Koopmanshandboek, i., 3, 6, on p. 21.

The marriage remained, therefore, valid unless it were set aside in the lifetime of the parties.

2. **Relative Prohibitions.**—(a) **Prohibited Degrees of Consanguinity and Affinity.**—The Germanic tribes most probably recognised no legal prohibitions against marriages between persons who were related to each other within certain degrees of consanguinity. Customary rules not to marry within certain degrees may have been strong enough to render legal provisions on that point unnecessary (*m*).

It is, however, certain that the Catholic Church found reason to object to a number of marriages, on account of too close relationship which existed between husband and wife, and it was due to the Church's influence that rules were introduced among those peoples against marriages within certain degrees of relationship (*n*).

The provisions of the Roman law and the canon law on this subject have been already referred to.

The Catholic Church not only prohibited marriages between blood relations and relatives by marriage, but also those between spiritual relatives, as godfather, godmother, and godchild (*o*).

Regarding the degrees within which such relationship was recognised, the rule laid down by Innocent III. at the Fourth Lateran Council (1215) was ultimately followed, viz.—marriages were forbidden within the fourth degree of relationship, and as regards affinity, the prohibition of intermarriage only applied to the *affines primi* and not to the *affines secundi* and *tertii generis*.

The introduction of these prohibitions among the Germanic races met with great difficulty, and, as far as the Low Provinces were concerned, the result was different in the different Provinces.

The Church was assisted and followed by the civil authorities, and several Placards of the sixteenth, seventeenth, and eighteenth centuries set out in detail the prohibitions of marriages in this respect.

Marriages entered into without observing these rules were by these Placards declared null and void, and in certain Provinces the celebration of such marriages was considered a punishable offence (*p*).

(*m*) Fock. Andr., Bijdragen, i., 141; Het Oud Ned. B. R., ii., 154.

(*n*) Fock. Andr., *loc. cit.*, and the authors quoted by him.

(*o*) Cf. p. 22; Fock. Andr., Bijdragen, i., 141, 142, and the authors quoted by him; H. Brouwer, de Jure Conn., ii., 9, 7; J. Voet, Ad Pand., xxiii., 2, 29.

(*p*) Fock. Andr., Bijdragen, i., 168—177.

Of these Placards those published in Holland, Zeeland, and Utrecht in 1580, 1583, and 1584, and the Echtreglement published by the States-General in 1656 deserve special notice.

In Holland the subject was regulated by the Politieke Ordonantie of April 1st, 1580 (*q*), ss. 5 to 11; in the Province of Zeeland by the (Zeeland) Politieke Ordonantie of February 5th, 1583, ss. 13—20, and in Utrecht by the Ordinance of 1583, ss. 15, 23.

The rules laid down by these ordinances were to the following effect. Marriage was forbidden (a) in the case of blood relations (1) in the direct line (ascendants and descendants) *ad infinitum;* (2) between collaterals, to the third degree, whether of whole or half-blood; (b) in the case of relatives by marriage within the same degrees between the husband and the relations by blood or by marriage within the prohibited degrees of his deceased wife, and between the wife and the relations by blood or by marriage within the prohibited degrees of her deceased husband.

The "Echtreglement" of March 18th, 1656 (*r*), which was in force in the Provinces and countries placed under the direct administration of the States-General, contained similar provisions (*a*).

Marriages were not only forbidden with brothers' or sisters' children, but also with their descendants *ad infinitum*, because it was said that in this respect brothers and sisters took the place of parents (*b*).

Marriages contracted in violation of these rules were considered incestuous marriages.

The marriages themselves were null and void and could be declared to be so against the will of the parties.

The persons who contracted them were punishable for the crime of incest (*c*).

(*q*) Gr. Pl., iii., col. 503.

(*r*) Gr. Pl., ii., col. 2429.

(*a*) Ss. 55—68.

(*b*) On these prohibitions generally cf. Grotius, Introd., i., v., 5—13; Regtsgel. Obs., iv., Obs. 2, 3; 30 Vragen, p. 15; Schorer, Notes ad Grot. Introd., *loc. cit.*, pars. 12 and 13; Zurck, Codex Bat. *voce* Houwelyck, pars. 20—24; van Leeuwen, R. H. R., i., 14, 12 and 13; J. Voet, Ad Pand., xxiii., 2, 29—36; H. Brouwer, de Jure Conn., ii., 10—15; Lybreghts, Reden. Vertoog, i., 11, 9; v. d. Linden, Koopmanshandb., i., 3, 6, on pp. 21, 22.

(*c*) Van Leeuwen, R. H. R., iv., 37, 9; H. Brouwer, de Jure Conn., ii., 4, 17; Lybreghts, Reden. Vertoog, i., 11, 10; J. Voet, Ad Pand., xxiii., 2, 15, 39; xlviii., 5, 19; v. d. Linden, Koopmanshandboek, ii., 7, 8; Fock. Andr., Het Oud Ned. B. R., ii., 155.

The authorities who were entitled to join couples in matrimony were bound to refuse to allow the banns to be published in cases of doubt, and refer these to the States for decision (*d*).

The States-Provincial could grant dispensations from these rules, and in cases where persons were related to each other by marriage only, the requests for dispensation were numerous. They were often granted in the case of Jews whose relationship, according to Hebrew law, would not prohibit their marriage, though it would according to the law of Rome (*e*).

The prohibition of spiritual relationship was not taken over by the Reformed Church nor by the civil authorities (*f*).

The provisions of the Political Ordinance, April 1st, 1580, were in force in the colonies of the East and West Indies (*g*).

(b) **Difference of Religion.**—As already seen, the Catholic Church prohibited marriages between Christians and non-baptised persons, *e.g.*, Jews, and, in later times, between Catholics and heretics, the former ones being null, the latter only "illicit."

In some Provinces the civil authorities legally sanctioned these prohibitions, while several more or less vexatious restrictions were enacted regarding marriages between Protestants and Catholics (*h*).

(*d*) Politieke Ord., 1580, ss. 12, 13. Difficulty arose as to the meaning of art. 12, which ran as follows, viz.: "And whereas in entering into and contracting holy matrimony special pains should be taken that it takes place in all decency and that all of the said degrees . . . be prevented. Thus . . . the said States order that if any persons asked for the banns to be published in order to be united, who nevertheless the deputies of the magistrates or Church ministers would consider that with regard to the said decency and in order to prevent confusion of degrees should not be united, that then the said deputies and Church ministers shall communicate this to the civil authorities and delay the said desired proclamations in order that in the meantime with knowledge of the case these may be allowed or refused, *as will be found necessary according to the laws of God and the civil laws.*" Some interpreters understood by the words "civil laws" the Roman laws, and deduced from the italicised words above that these and the laws of God had subsidiary power. H. Brouwer, de Jure Conn., ii., 16; J. Voet, Ad Pand., xxiii., 2, 33; Holl. Cons. ii., Cons. 256; iii.a, Cons. 107; iv., Cons. 13; v., Cons. 106. For the contrary view, see Fock. Andr., Bijdragen, i., 176.

(*e*) Fock. Andr., Bijdragen, i., 175—177; Zurek, Cod. Bat., *voce* Houwelyck, pars. 21, 24; J. Voet, Ad Pand., xxiii., 2, 37—39; H. Brouwer, de Jure Conn., ii., 16.

(*f*) H. Brouwer, de Jure Conn., ii., 8, 4; J. Voet, Ad Pand., xxiii., 2, 2, *in fin.*

(*g*) Zurek, Cod. Bat., *voce* Houwelyck, par. 39.

(*h*) Echtreglement, 1656, s. 50;

(c) **Adultery.**—It has been seen that the civil law prohibited the marriage of the person who had been convicted of adultery and his or her accomplice (*i*), but that the Catholic Church did not prohibit marriages between persons who had committed adultery, unless they had made promises of marriage to each other during the existence of the former marriage or the guilty persons had conspired against the innocent spouse (*k*).

This provision of the canon law was followed in the Low Provinces (*l*), though not everywhere to the same extent (*m*). The unsatisfactory condition thereby created and the impossibility of proof in most cases led the States of Holland and Zeeland, as well as the States-General, to prohibit all marriages between parties who had committed adultery, either after the death of the innocent party or after the dissolution of the former marriage (*n*).

Such a marriage, if contracted, would be considered null and void *ab initio* and independent of the fact when proof of the adultery was obtained, whether before or after the marriage had been entered into, during the lifetime of these spouses or after their death (*o*).

(d) **Ravishment and Abduction.**—Following the Roman and the canon laws, a man who committed the crime of ravishment or abduction of a girl was prohibited from marrying her, unless he was first pardoned and thus had expiated his crime (*p*); but an

Plakaat, 1752, in Gelderland; Plakaat, 1755, in Holland, Gr. Pl. 543; Fock. Andr., Bijdragen, i., 177—180; Het Oud Ned. B. R., ii., 156; H. Brouwer, de Jure Conn., ii., 21; J. Voet, Ad Pand., xxiii., 2, 26.

(*i*) Dig., xxxiv., 9, 13.

(*k*) See *ante*, p. 23.

(*l*) Groenewegen, Leg. Abr., Cod. ix., 9, 27; Holl. Cons., iii.a, Cons. 52, 53; iii.b, Cons. 71, 72; iv., Cons. 282.

(*m*) Boel-Loenius, Dec. en Obs., p. 60; Fock. Andr., Bijdragen, i., 180; Schrassert, Codex Geles. Zutf., i., *s.v.* Overspel, par. 1; Zurck, Cod. Bat., *voce* Houwelyck, n. 1.

(*n*) Echtreglement, 1656, s. 83; Plakaat, States of Zeeland, March 18th, 1666, s. 12; Plakaat, States of Holland, July 18th, 1674.

(*o*) J. Voet, Ad Pand., xxiii., 2, 27; Bynkershoek, Quaest. Jur. Priv., ii., c. 10; Grotius, Regtsgel. Obs. i., Obs. 11; V. d. Keessel, Thes. Sel., Thes. 70; Fock. Andr., Bijdragen, i., 180, 181; Brouwer, de Jure Conn., ii., 18, 10; Zurck, Cod. Bat., *voce* Houwelyck, par. 25; v. d. Linden, Koopmanshandboek, i., 3, 1, on p. 22.

(*p*) Cod. ix., 13, 1, 2; Polit. Ordin., Holland, April 1st, 1580, art. 18; Polit. Ordon., Zeeland, 1583, art. 33; Plakaat, States of Holland, February 25th, 1751, *in fin.*; Holl. Cons., iv., Cons. 400, *in fin.*; Groenewegen, Leg. Abr., Cod. ix., 13; J. Voet, Ad Pand., xxiii., 2, 26; H. Brouwer, de Jure Conn., ii., c. 23; v. d. Keessel, Thes. Sel., Thes. 71.

abduction of a minor or a person of full age whose parents were alive, with the girl's consent, did not render the marriage which followed null and void, as the consent of the parents could be given afterwards (*q*).

(e) **Guardian and Ward.**—The Roman law principle that a guardian could not marry his female ward unless he had first rendered the account of his administration of her property (*r*) was followed by the canon law (*s*).

It was partly taken over by the civil authorities in the Dutch Republic. In Friesland it was the common law (*t*). The "Weeskeuren van Vlissingen" (1763) and the sheriffs of Amsterdam (by decision of May 23rd, 1749) specially enacted it (*a*).

Where not specially enacted, the authorities differed in opinion. Those who were not in favour of following the rule of Roman law argued that the publicity of the marriage ceremony, which had superseded the marriage *mero consensu et usu* of the Roman Empire, was sufficient guarantee against fraud being committed by the guardian against his ward (*b*).

The opinion of those who held that this argument was by no means conclusive seems to have been the stronger one (*c*).

(f) **Infectious Disease.**— Though a marriage between healthy persons and those who had incurable disease was not forbidden in canonical law, the civil authorities prohibited marriages between lepers and healthy persons. Lepers were allowed to marry *inter se*, provided they obtained the consent of the magistrate (*d*).

II. **Roman-Dutch Law in British Dominions.**—In the colonies where the Roman-Dutch law is the common law of the country a great deal of the marriage law has been codified and laid down in Marriage Orders in Council, Marriage Ordinances and marriage laws, most

(*q*) Plakaat, February 25th, 1751; v. d. Keessel, Thes. Sel., Thes. 72.

(*r*) Cod. v., 6.

(*s*) H. Brouwer, de Jure Conn., ii., 20, ii.

(*t*) U. Huber, Hedend. Regtsgel., i., 1, 594, 595.

(*a*) Fock. Andr., Bijdragen, i., 181.

(*b*) Van Leeuwen, R. H. R., i., 14, 13, *in fin.*; Cens. For., i., 1, 13, 25; Groenewegen, Leg. Abr., Cod. v., 6; Brouwer, de Jure Conn., ii., 20, 11—12; J. Voet, Ad Pand., xxiii., 2, 25.

(*c*) Lybreghts, Rede n. Vertoog., i., 144; Bynkershoek, Quaest. Jur. Priv., ii., 3, *in fin.*; v. d. Keessel, Thes. Sel., Thes. 74; v. d. Linden, Koopmanshandb., i., 3, 5, on p. 23; Ontwerp, 1820, art. 131.

(*d*) Echtreglement of the Generaliteyt, March 18th, 1656, art. 49; J. Voet, Ad Pand., xxiii., 2, 28; Fock. Andr., Bijdragen, i., 182.

of them consolidating the common law of the country as far as their provisions go.

These laws are, for the different colonies concerned, as follows :—

South Africa.—Cape of Good Hope.—The Cape Marriage Order in Council, September 7th, 1838, Ordinance No. 4 of 1848, rendering legal certain marriages which had been contracted in parts where no ministers of religion or marriage officers could assist.

Act 12 of 1856, regulating and securing children's inheritances on second marriages of their parent by a deed of "kinderbewys."

Act 16 of 1860, amending the above-mentioned Ordinances and Act in certain respects.

Cape Act 9 of 1882, regulating the issue of licences for the solemnisation of marriages, and abolishing Matrimonial Courts.

Cape Act 40 of 1892, sanctioning the marriage of a widower with his deceased wife's sister.

Orange Free State.—Law No. 26 of 1899.

Transvaal.—Law No. 3 of 1871.

Natal.—Laws No. 7 of 1889 and No. 45 of 1898.

Ceylon.—Marriage Ordinance No. 19 of 1907, repealing Marriage Ordinance No. 2 of 1895, No. 10 of 1896, and No. 19 of 1900, without making any practical alterations. For Kandyan and Muhammadan marriages, Ordinances Nos. 3 and 9 of 1870, 139 of 1905, and Nos. 8 of 1886 and 2 of 1888 respectively.

British Guiana.—Marriage Ordinance No. 25 of 1901, amended by Ordinance No. 29 of 1902.

It remains to consider how far legislation in the particular colonies has altered or settled doubtful points in the common law.

Requirements for a valid Marriage.—(a) **Age.**—In Ceylon the age of puberty for boys is fixed at sixteen years, for girls, if daughters of European or Burgher parents, at fourteen, and, if of other descent, at twelve years (*e*).

(b) **Consent of the Parties.**—No change has been made in the general law (*f*).

(*e*) Ordinance No. 19 of 1907, s. 16; Pereira, Laws of Ceylon, ii., 97.

(*f*) Maasdorp, the Institutes of Cape Law, i., 20; Nathan, the Common Law of South Africa; Pereira, *loc. cit.*, ii., 98. Pereira here cites without comment the statement made by Burge in the first edition, vol. i., p. 137, regarding the question whether a marriage could be considered void in case of the consent being obtained by duress or fraud, and thereby commits

(c) **Consent of Third Persons.—South Africa.**—All minors, that is to say persons under the age of twenty-one years who have not been emancipated, require for a valid marriage the consent of their parents, or, if both of them be dead—of their guardian or guardians (*g*).

The consent of both parents has to be asked. In case they differ in opinion, the opinion of the father prevails (*h*).

If the parents, or the parent whose consent is required, be unable to express their or his or her will, either on account of unsoundness of mind, or on account of absence, or on account of some other incapacity in law or in fact, the consent of the magistrate, Judge, or Court, in whose jurisdiction the minor lives, shall be required instead (*i*).

If the parents or guardians unreasonably and improperly withhold their consent, application for leave to marry may be made to the magistrate, Judge, or Court, in whose jurisdiction the minor lives, and upon such leave having been obtained a valid marriage may be entered into (*i*).

This will also be the case if both parents are dead and no guardian has been appointed (*i*).

The consent may be given, either expressly or tacitly, either before or after the marriage, except in the case of a marriage by special licence when the previous consent in writing, or the order of the Court which takes its place, has to be shown to the marriage officer (*k*).

A marriage officer is prohibited from celebrating the marriage of minors unless he has ascertained that the necessary consent of the parents or guardians has been obtained (*l*).

the same error as Burge did when interpreting van Leeuwen's Censura Forensis.

(*g*) Cape Marriage Order in Council of September 7th, 1838, ss. 10, 17; O. R. C. Law, No. 26 of 1899, par. 19; Transvaal Law, No. 3 of 1871, pars. 4 (1), 16; Natal Law, No. 7 of 1889, par. 4; Lee *v.* Doxlon (1884), 5 N. L. R. 270; In re McDeeling and Brown (1884), 5 N. L. R. 88.

(*h*) Johnson *v.* McIntyre (1893), 10 S. C. R. 318; 11 C. L. J. 40; 3 C. T. R. 426.

(*i*) Cape Marriage Order in Council, 1838, s. 17; O. R. C. Law, No. 26 of 1899, pars. 9, 13, 19; Transvaal Law, No. 3 of 1871, par. 16; De Bruyn, Opinions of Grotius, pp. 20, 21; Maasdorp, Institutes of Cape Law, i., 21; Nathan, Common Law of S. A., i., par. 374.

(*k*) Cape Marriage Order in Council, 1838, s. 17; Cape Act, No. 16 of 1860, Sched. A, ss. 10, 11; Cape Act, No. 9 of 1882, s. 7; Maasdorp, *loc. cit.*, i., on p. 21.

(*l*) Cape Marriage Order in Council, 1838, s. 14; Transvaal Law, No. 3 of 1871, par. 8.

If the parents or the guardians have given notice to the minister of religion or the magistrate that they do not consent to the marriage, any publication of the banns in disregard thereof shall be null and void (*m*).

In the absence of fraud a marriage entered into by a minor after the publication of the banns, or before a magistrate without the consent of his or her parent or parents or guardians is neither void nor voidable (*m*), but the penalties attached to such marriage by the "Eeuwig Edict" of 1540 remain in force (*n*).

If, in case of a marriage by special licence, the parties by fraudulent misrepresentation that they were of age, or had obtained the consent of their parents, had induced the magistrate to grant a special licence, the parents can sue to have the marriage set aside (*o*), but until set aside the marriage is considered to be valid, as subsequent ratification by the parents will render the marriage valid, though it will not do away with the penalties above-mentioned (*o*).

Ceylon.—The Marriage Ordinance, No. 19 of 1907, provides (*p*) that the father of any person under twenty-one years of age, not being a widower, or if the father be dead or under legal incapacity or in parts beyond the Island and unable to make known his will, the mother, or if both father and mother be dead, or under legal incapacity, or in parts beyond the Island and unable to make known their will, the guardian or guardians appointed for the party so under age by the father or mother of such party or by a competent Court, have authority to give consent to the marriage of such party, and such consent is required for the marriage.

If there be no person authorised as aforesaid to give consent, or if the person so authorised unreasonably withhold or refuse his or her consent, the Judge of the District Court within whose jurisdiction the party so under age resides, may, upon the application of any

(*m*) Cape Order in Council, 1838, ss. 10, 17; Cape Act, No. 9 of 1882, s. 7.

(*n*) Cape Order in Council, 1838, ss. 10, 17; Cape Act, No. 9 of 1882, s. 7; Natal Act, No. 13 of 1883; Mostert *v.* The Master (1878), 8 Buch. 83; 3 Roscoe, 63; Mostert's Trustee *v.* Mostert (1885), 4 S. C. R. 35; Lea *v.* Doxlon (1884), 5 N. L. R. 270; De Bruyn, Opinions of Grotius, pp. 20, 21; Maasdorp, *loc. cit.*, i., 22, 23; Nathan, *loc. cit.*, i., par. 375; Ruperti *v.* Ruperti's Trustees (1885), 4 S. C. R. 22; Solomon and Solomon *v.* Hanna (1903), T. S. 460.

(*o*) Maasdorp, *loc. cit.*, i., 22.

(*p*) S. 23.

party interested in the marriage and after summary inquiry, give consent to the marriage, and such consent is required for such marriage (*q*).

British Guiana.—The Marriage Ordinance, No. 25 of 1901, provides (*r*) that the persons whose consent is required for a valid marriage of a minor shall give their consent in the following order, viz.: (1) the father, and, in the case of his being dead, (2) the guardian or guardians appointed by the father. If no such guardian or guardians have been appointed, (3) the surviving mother, if unmarried. If the mother is also dead or has re-married, (4) the guardian or guardians appointed by the competent Court.

In case the parents or the parent or the guardian or guardians whose consent is required are *non compos mentis* or are absent from the Colony, application should be made to the Chief Justice or President of the Court in whose jurisdiction the minor is living for leave to enter into a valid marriage (*s*).

Prohibitions to Marry.—1. Absolute Prohibitions.—(a) **An existing Valid Marriage.**—Bigamy is a punishable offence in all these Colonies, either with an absolute discretionary power in the Court to fix the punishment, or within certain limits (*a*).

In Ceylon and British Guiana it has been provided, however, that, in case the wife or the husband has been absent from the matrimonial domicil for seven years and has not been heard of during that time, and if the remaining party after that time, after due inquiries, had *bonâ fide* married again, believing the absent husband or wife to be dead, he or she would not be indictable for bigamy (*a*).

In Cape Colony, though there is no special provision on this point, the same rule has been applied by the Court at the same time when it was decided that no length of absence of the husband, even for over twenty years, would entitle the wife to contract a fresh marriage (*b*).

(b) **Annus luctus.—South Africa.**—The New Statutes of Batavia

(*q*) Pereira, *loc. cit.*, ii., 103, 104.
(*r*) S. 30.
(*s*) S. 31.
(*a*) Transvaal, Marriage Ordinance No. 3 of 1871, s. 10; Ceylon, Ordinance No. 19 of 1907, s. 19; British Guiana, Indictable Offences Ordinance No. 18 of 1893, s. 83.
(*b*) In re Booysen (1880), Foord, 187.

provided that a widow should observe a period of three months after her husband's death before re-marrying and, in any event, should be certain not to be with child (*c*).

An Ordinance of Governor de Mist at Cape Town in 1804 provided that a widower should not re-marry within three months after his wife's death, nor a wife within five months or within the period of probable pregnancy after her husband's death, *om der eerbaarheid wille* (*d*). No penalty is attached to the parties who contract a marriage disregarding this provision, nor is there any sanction provided against a marriage officer acting in contravention of it.

It is doubted whether this Proclamation is still in force in the Colony (*e*).

In the Orange Free State, a widower may not re-marry within three months after his wife's death, nor a widow within one hundred and eighty days after her husband's decease. No penal clause is attached to this provision, but the marriage officer who performs the marriage ceremony in contravention of it is punishable with a fine (*f*).

In the Transvaal a widower may not re-marry within three months after his wife's death, nor a widow within three hundred days after her husband's death, unless special dispensation has been obtained from the Government (*g*).

(c) **Incapacity to Procreate Children.**—No change has been made in the general law.

2. **Relative Prohibitions.**—(a) **Prohibited Decrees of Consanguinity and Affinity. — South Africa** (*h*). — **Cape Colony.** — Marriage of a widower with his deceased wife's sister has been allowed by Act 40 of 1892, provided that she is not the widow of his deceased brother. The Act only makes provision for widowers and not for bachelors, nor does it sanction the marriage of a widow with her deceased husband's brother (*i*).

(*c*) Par. 25.

(*d*) Par. 18.

(*e*) D. Ward, Handbook to the Marriage Laws of the Cape Colony, &c., pp. 6, 7; Van Zyl, Judicial Practice of the Cape Colony, 2nd ed., p. 444; Parl. Pap. (1903) Cd. 1785, 17.

(*f*) Law 26 of 1899, s. 13.

(*g*) Law 3 of 1871, s. 9.

(*h*) Regarding the common law, cf. Maasdorp, Institutes, i., 14—18; Nathan, *loc. cit.*, pars. 381, 382 on pp. 213—217.

(*i*) S. 2. Ex parte Daniel Moody (1905), 21 S. C. R. 381.

The Court has extended this provision to the same degree of relationship by affinity in other cases (*k*).

The former marriage must have been dissolved by death (*l*). In order to constitute the crime of incest greater latitude is taken in the degree of relationship by affinity (*m*).

Dispensation was sometimes granted by the Legislature acting as such and by means of a legislative act (*n*).

Orange Free State.—The prohibited degrees of consanguinity and affinity are set out in Ordinance No. 31 of 1903 (*o*), which repealed chapter xci. of the Law Book, but left the provisions unchanged. A marriage within the prohibited degrees is considered unlawful.

Transvaal.—This matter is regulated by Act 3 of 1871 (*p*).

Ceylon.—The prohibited degrees of relationship by blood or by affinity are set out in Ordinance 19 of 1907 (*q*).

There is no objection to a widower marrying his deceased wife's sister (*r*).

Carnal connection between persons who are related to each other within the prohibited degrees of relationship constitutes the crime of incest, punishable with imprisonment for a period not exceeding one year (*s*).

British Guiana.—The degrees of relationship between two persons which render a marriage between them absolutely null and void are set out in the Marriage Ordinance No. 25 of 1901 (*t*).

A marriage between a widower and his deceased wife's sister has been allowed by Ordinance No. 29 of 1902.

(b) **Difference of Religion** is no longer a bar to a marriage in the Colonies above-mentioned (*a*).

(c) **Adultery.**—The general law has been maintained, *e.g.*, in

(*k*) Queen *v.* Abraham Mentoor (1896), 11 E. D. C. 125; Mills *v.* Assistant Resident Magistrate of the Cape (1902), 18 S. C. R. 342; S. A. L. J., xix., 61.

(*l*) S. 4.

(*m*) Reg. *v.* K. (1875), 5 Buch. 98; Kotzé's translation of van Leeuwen's R. H. R., iv., 37, 9, on p. 309; Tredgold, Handbook of Colonial Criminal Law, pp. 177, 178.

(*n*) Loedolff and Smuts *v.* Robertson and others (1863), 4 Searle, 146; Maasdorp, *loc. cit.*, i., 17.

(*o*) Ss. 1, 2.

(*p*) S. 4.

(*q*) S. 17.

(*r*) Valliammai *v.* Annammai (1901), 4 N. L. R. 8; Pereira, Laws of Ceylon, ii., 97, 98.

(*s*) S. 18.

(*t*) Ss. 28, 29.

(*a*) As to Cape Colony, cf. D. Ward, *loc. cit.*, p. 6.

South Africa (*b*); in **Ceylon** though a married person who has been living in adultery can after the death of his wife lawfully marry the person with whom he so lived during the lifetime of his wife, the children procreated during such adulterous intercourse cannot be legitimated by the subsequent marriage of their parents (*c*).

(d) **Ravishment and Abduction.**—There has been no change in the general law.

(e) **Guardian and Ward. — South Africa.** — Marriages between guardians and wards are not prohibited, though the sanction of the Court is considered to be required as long as the ward is under age (*d*).

Ceylon.—Marriage between a guardian, and his son, with the ward seems to be prohibited (*e*).

SECTION II.

Law of France and the Derivative Systems of Quebec, St. Lucia, Mauritius and Seychelles, and the Modern Continental Systems.

Requirements.—(a) **The Proper Age of the Parties.**—As has been seen (*f*) by the civil law, the want of age avoided the marriage. The civil law required that the parties should be of the age of puberty, which in males was fourteen, and in females twelve years. Their cohabitation together after they had attained the age of puberty rendered the marriage valid *ab initio*. "Minorem annis duodecim nuptam, tunc legitimam uxorem fore, cum apud virum explesset duodecim annos" (*g*).

In both these respects the law of France, before the promulgation of the Code Civil, and the laws of England, Ireland, and Scotland, adopted the civil law (*h*).

(*b*) Daniel *v.* Daniel (1887), 3 S. C. R. 231; King *v.* Bezuidenhout and Lynch 18 E. D. C. 222; Van Zyl, Judicial Practice, 2nd ed., p. 446.

(*c*) Karonchihami *v.* Angohami (1897), 2 N. L. R. 276; 3 C. L. R. 93; overruled by Rabot *v.* de Silva (1905), 8 N. L. R. 82; (1909), 12 N. L. R. 140; affirmed in P. C. (1909), 12 N. L. R. 81; [1909] A. C. 376.

(*d*) Maasdorp, Institutes, i., 18, 19; Nathan, Common Law of S. A., i., par. 377. Cf. D. Ward, Marriage Laws of C. C., p. 5.

(*e*) Pereira, Laws of Ceylon, ii., 97.

(*f*) See p. 7.

(*g*) Dig. xxiii., 2, 4.

(*h*) Pothier, Traité du Marriage, s. 94; 1 Bl. Com. 424; Ersk. i., 6, s. 20; Fraser, Husband and Wife, i., 51; MacNeill *v.* M'Gregor (1828), 2 Bligh (N.S.), 393, at p. 499. The action of nullity, on the ground of non-age can be brought by either party, or by any

Code Civil.—By the present law of France and Belgium a male under the age of eighteen and a female under the age of fifteen are incapable of marrying (*i*); but by a subsequent article (*k*) dispensations may be granted by the head of the State, enabling, on weighty grounds of expediency, persons to marry who have not attained those ages.

A marriage contracted between parties, both or either of whom shall not have attained the age required by law, cannot be impeached in either of the following cases (*l*) :—

(1) If an interval of six months has been suffered to elapse without objection, after the parties, or such one of them as was at the time of the marriage under the age required by law, shall have attained the legal age of consent.

(2) Whenever the wife, being under the legal age of consent, shall conceive before the expiration of six months from the day of marriage.

If the father, the mother, the ancestors, or the family council as the case may be, shall have given consent to a marriage contracted between parties, both or either of whom shall not have attained the age required by law, the party whose consent has been so given shall not be admitted to impeach the marriage on the ground of non-age (*m*).

In **Quebec** (*n*) and **St. Lucia** (*o*) a man cannot contract marriage before the age of fourteen, nor a woman before the age of twelve years.

Mauritius.—A male person under the age of eighteen, or a female under the age of fifteen, cannot contract marriage. But the Governor may for serious reasons authorise any person under the age above required to do so (*p*).

Seychelles.—The law is the same as that of Mauritius (*q*).

Italian Law.—Under the Italian Civil Code, want of age, eighteen and fifteen for men and women respectively, renders a marriage

one who can show a pecuniary interest: Sherwood *v.* Ray (1837), 1 Moo. P. C. C. 353; Fraser, ii., 1244. See further, as to the marriage of infants, below, pp. 222—223.

(*i*) Art. 144.

(*k*) Art. 145.

(*l*) Art. 185.

(*m*) Art. 186.

(*n*) Civil Code of L.C., art. 115.

(*o*) Civil Code of St. Lucia, art. 81.

(*p*) No. 26 of 1890, s. 46. As to the procedure for obtaining such dispensations, see s. 77.

(*q*) No. 4 of 1893, ss. 41, 63.

voidable (*r*). But a marriage contracted by persons of whom only one has not attained the prescribed age cannot be impugned (a) when six months have elapsed since that person attained majority; (b) when the wife though still under age has become pregnant (*s*). A marriage contracted before the spouses or one of them has reached the requisite age cannot be impugned by ascendants or by the family council, or council of guardianship, who have given their consent to it (*t*). The consent of the King is necessary to the validity of marriages of the Royal princes and princesses (*u*).

Spanish Law.—By the Spanish Civil Code want of age is equally a ground of nullity (*a*). But the marriage of infants is considered as ratified *ipso facto* and without the necessity of any express declaration if for one day after having attained the prescribed age they continue to live together without taking proceedings to impugn the validity of their marriage, or if the wife has become pregnant before reaching the prescribed age and before having lodged a claim of nullity (*b*).

German Law.—The statutory age is twenty-one for the husband and sixteen for the wife (*c*). But a distinction must be drawn between the impediment of insufficiency of age and the impediment of the absence of the consent of the statutory agent (parent or guardian). Insufficiency of age, in so far as it produces incapacity for all legal purposes (*i.e.*, under seven years), is an absolute impediment; and in so far as it merely produces statutory incapacity to marry (which is the case as regards males above the age of seven and below the age of twenty-one, and females above the age of seven and below the age of sixteen) it is a hindering impediment. The registrar (unless in the case of the female a dispensation has been obtained) cannot allow the marriage to take place, even if the parent or guardian of the intended spouse who is under age gives his consent; but if, notwithstanding this fact, the marriage takes place, it cannot be impugned on the mere ground of insufficiency of age, and it is therefore valid if the statutory agent has given his consent. The impediment of the absence of the consent of the

(*r*) See art. 55. For the mode of avoidance generally, see art. 104.

(*s*) Art. 110. The disqualification of want of age does not apply to marriages of the Royal Family: art. 69.

(*t*) Art. 111. As to dispensation from impediments, see art. 68.

(*u*) Art. 69.

(*a*) See arts. 83 (1), 101 (1).

(*b*) Art. 83 (1).

(*c*) S. 1303.

statutory agent is an absolute impediment which applies to all persons under restricted capacity, including females above the age of sixteen and below the age of twenty-one. If any person of restricted capacity marries without the consent of his or her statutory agent or the leave of the Guardianship Court, the marriage is voidable (*d*). The necessity for the consent of a parent who is not the statutory agent and the effect of its absence are considered subsequently (*e*).

Other Foreign Countries.—In Austria the age is fourteen. The age of the man and the woman in Holland must be eighteen and sixteen; in Luxemburg eighteen and fifteen; in Spain and Argentina fourteen and twelve; and in Japan, seventeen and fifteen respectively. By Russian law the marriageable age begins for women at sixteen, for men at eighteen; and persons who have reached eighty years of age are forbidden to marry.

Hungarian Law.—The marriage of persons under twelve years is void; the marriage of persons under matrimonial age is voidable; matrimonial age begins with completed eighteen years for men and completed sixteen years for women. Dispensation from the requirement of matrimonial age may be obtained from the Minister of Justice.

Swiss Law.—By the Swiss law of 1874, marriage cannot be contracted by males under the age of eighteen or females under the age of sixteen years. An action for nullity on this ground may be brought by the parent or guardian; but it will not succeed after the spouse in question has attained the legal age, or if the wife has become pregnant, or if the parent or guardian has given consent to the marriage (*f*). The rules as to nullity in this case are in substance preserved by the Code (*g*). The Code raises the necessary ages to twenty and eighteen respectively, but gives a power of dispensation to the government of the canton of domicil for sufficient reasons, where the bridegroom is eighteen or the bride seventeen, and the parents or guardian give their consent (*h*).

(b) **The Consent of the Parties.**—The validity of marriage, like that of every other civil contract, depends on the will and capacity

(*d*) German Civil Code, ss. 1303, 1304, 1323, 1331, 1336.

(*e*) Ss. 1305, 1308, 1323, 1330; see p. 111.

(*f*) Arts. 27, 52.

(*g*) Art. 128.

(*h*) Art. 96.

of the persons to make it, and on its being made in the manner and with the solemnities required by law.

The will or free consent of the parties is the very essence of the contract (*i*).

Force or Fear.—Hence a marriage which takes place under the influence of force or fear is void (*k*). "Metum autem non vani hominis sed qui merito et in hominem constantissimum cadat" was the rule of the civil law. But the subsequent voluntary cohabitation of persons, when the fear or force no longer exists, will give validity to the marriage (*l*).

Error and Fraud.—There is also an absence of will or consent when either party marries under the influence of error or mistake, *circa substantiam;* as in respect of the person or sex, but not when it regards the name, fortune, or personal qualities (*m*).

French Law.—It seems (*n*) that in France error as to nationality, as to the condemnation of one spouse to a *peine afflictive et infamante*, as to religious belief and as to physical capacity for consummating the marriage on the part of the husband, or as to the ante-nuptial chastity of his wife, even if pregnancy has resulted from her misconduct, does not render a marriage annullable.

Fraud is not, under the Code Civil, a ground for the annulment of marriage, except when it comes under the head of error as to the person (*o*).

According to the French and Belgian Code Civil, a suit for nullity of marriage on the ground either of coercion or of error cannot be sustained, if there has been an uninterrupted cohabitation between the parties as man and wife for the space of six months, after the complete restoration of liberty of the person alleged to be under coercion; or, in the case of error of person, after the error has been discovered (*p*). So a marriage celebrated between parties, where the

(*i*) So Code Civil, art. 146, Aubry et Rau, i. 211.

(*k*) So Spanish Civil Code, art. 101 (2).

(*l*) Dig. iv., 2, l. 6; Brouwer, de Jure Connub. lib. 1, c. 17, nn. 6, 7; Perez, Cod. lib. 5, tit. 4, n. 9; Van Leeuwen, Cens. For., part 1, lib. 1, c. 13, nn. 6, 7; Harford *v.* Morris (1776), 2 Hagg. C. R. 423; Portsmouth *v.* Portsmouth (1828), 1 Hagg. E. R. 355; Christ. Dec. ii., Decis. 114.

(*m*) Perez, Cod. lib. 5, tit. 4, n. 9; Wakefield *v.* Mackay (1807), 1 Phill. 134; Brouwer, de Jure Connub. c. 18, n. 6; Code Civil, arts. 180. Cf. Civil Codes of L.C., art. 148, St. Lucia, art. 82.

(*n*) See Baudry-Lacan., ii., pp. 231 *et seq.*, where the authorities are collected.

(*o*) Baudry-Lacan., *ad loc. cit.*, p. 298.

(*p*) Art. 181. Cf. Civil Code of L.C., art. 149.

free consent (*q*) of both parties, or that of either of them, shall be wanting, or where there has been an error of the person (*r*), can only be impeached by the parties themselves, or by that one party whose consent has not been free, or on whom the imposition has been practised (*s*).

Italian Law.—The Italian Civil Code provides for the impeachment of a marriage upon grounds of absence of consent or error as to the person (*t*), but not if there has been continuous cohabitation during a month after the spouse having the right to institute proceedings recovered his or her liberty or became aware of the error (*u*).

German Law.—Under the German Civil Code the validity of a marriage may be impugned, *i.e.*, the marriage is voidable (*a*), by a spouse who either did not know that he was taking part in a marriage ceremony or knowing that it was such did not intend to declare his consent to the marriage, or by a spouse who has made a mistake as to the person or essential personal qualities of the other spouse (*b*); or by a spouse who has been induced to marry by wilful deception as to essential circumstances, excluding deception as regards property (*c*); or by the spouse who has done so under the influence of unlawful threats (*d*). Proceedings must be instituted within six months from the discovery of the error or of the fraud or of the removal of the influence of threats (*e*). The validity of the marriage cannot be contested after its dissolution unless that has been brought about by the death of the spouse not having the right to avoid a voidable marriage (*f*).

Austrian Law.—A spouse who has kept silence as to his or her incapacity to enter into marriage on account of want of business capacity or has falsely pretended to have the required consent cannot impugn the validity of the marriage; he or she also loses

(*q*) Under the French Civil Code, moral, as well as physical, violence vitiates consent: Laurent, D. C. F. ii., p. 402, s. 303; Aubry et Rau, v., p. 65, n. 3.

(*r*) According to the better opinion, though there has been much controversy on the point, the rule stated in the text applies whether the error has been as to physical identity or civil personality: see Baudry-Lacan., ii., pp. 304 *et seq.*, 1903, J. 841 (pretending to belong to a noble family).

(*s*) Code Civil, art. 180; Civil Codes of L.C., art. 148, St. Lucia, art. 82.

(*t*) Art. 105.

(*u*) Art. 106.

(*a*) S. 1330.

(*b*) S. 1333.

(*c*) S. 1334.

(*d*) S. 1335.

(*e*) S. 1339.

(*f*) Ss. 1337, 1338.

the right to impugn it if he or she has contracted the marriage after learning of the impediment. Reasonable fear, especially abduction, or mistake as to the person are also impediments (*g*).

The **Hungarian** law adopts a similar rule.

Spanish Law.—The Spanish Civil Code declares a marriage null on the grounds of error as to the person, force or serious fear (*h*); or of its being contracted by a ravisher with the person ravished while under his power (*i*). Proceedings can be instituted only by the spouse who has suffered the injury; they are barred, and the marriages become valid if the parties have lived together for six months since the discovery of the error, or since the violence or cause of fear has been removed or since the party abducted has recovered her liberty (*k*).

Swiss Law.—By the Swiss law of December 24th, 1874, no marriage is valid without the free consent of the spouses, and the presumption of consent is excluded by compulsion, fraud, or error as to the person. In such cases the marriage can be annulled at the suit of the injured party, unless three months have elapsed since he or she has acquired complete freedom or since the discovery of the error (*l*). Under the Code error, fraud and duress are grounds of relative nullity (*m*).

Mental disorder at the time of marriage is expressly recognised in many systems as an incapacity for marriage, *e.g.*, France (*n*).

German Law.—By the German Civil Code, a marriage is void when one of the spouses at the time of its celebration was under incapacity, or was in a state of unconsciousness or under temporary mental disorder. But the marriage will be regarded as valid *ab initio* if, before a declaration of nullity or of dissolution is made, the spouse whose disability was the ground of nullity ratifies it after the cessation of such ground of disability (*o*).

Austrian Law.—Persons who are insane or mentally defective cannot contract marriage, nor can persons of restricted capacity owing to minority without the consent of their lawful father or the Guardianship Court (*p*).

(*g*) C. C., arts. 119, 57—59.
(*h*) Art. 101 (2).
(*i*) Art. 101 (3).
(*k*) Art. 102.
(*l*) Arts. 26, 50.
(*m*) See arts. 124—126, the provisions of which are stated below; see p. 234.
(*n*) C. C., art. 146; Aubry et Rau, V., pp. 10—12.
(*o*) S. 1325; as to incapacity, see s. 104.
(*p*) C. C., arts. 49—53.

Italian Law.—By the Italian Civil Code, persons who are placed under guardianship on the ground of mental infirmity are prohibited from marrying (*q*), and such a marriage is voidable at the option of the person placed under guardianship or his guardian, the family council, or the public procurator (*r*). If such guardianship is revoked, and cohabitation is continued for three months after such revocation the marriage is no longer voidable (*r*).

Spanish Law.—The Spanish Civil Code disqualifies for marriage persons who at the moment of contracting marriage have not the full use of their reason (*s*). A marriage contracted in contravention of this rule may be annulled at the instance of the spouses, the procurator-fiscal, or any interested party (*t*). Mental infirmity is also a ground of opposition to a marriage (*u*).

Swiss Law.—Lunacy or imbecility is a ground of nullity, under the existing law, to be enforced by the public authority (*w*).

The Code provides that no person shall marry who is not capable of discernment, that is to say, who is deprived of the power to act reasonably by reason of immature years or of mental disease or weakness, drunkenness or similar conditions (*x*), and that persons of unsound mind shall be in every case incapable of marriage (*y*). Mental disease or permanent incapacity of discernment is a ground of absolute nullity (*Nichtigkeit*) (*z*); incapacity at the time of celebration from a temporary cause is a ground of relative nullity (*Anfechtbarkeit*) (*a*).

By the law of **Russia**, for effecting a legal marriage, the free consent of both parties entering into a matrimonial union is required. Marriages concluded by constraint, or if one or both of the parties are insane, and therefore deprived of their free will, are liable to invalidation; and persons proved to be guilty of exercising

(*q*) Art. 61.

(*r*) Art. 112; see also art. 83.

(*s*) Arts. 83—85, and see 45.

(*t*) Art. 102.

(*u*) See arts. 97, 98.

(*w*) Federal Law of Marriage, arts. 28, 51. Other persons interested have also a right of action to forbid the celebration: Hess and others *v.* Kunz and Knecht (1879), Entsch. Bundes. v. 258; Curti, No. 2381.

(*x*) Art. 16.

(*y*) Art. 97.

(*z*) The action of nullity in such cases may be brought by the competent public authority, or by any person who has an interest: art. 121.

(*a*) Arts. 120, 123; and see below, pp. 233, 234.

constraint, even if they are parents of the parties, are liable to criminal prosecution.

(c) **Consent of Third Parties.—France—Old Law.**—In France, under the Ordinance of Blois, art. 40, and the Declaration of Louis XIII., November 26th, 1639, it has been considered that the marriage of minors without the parents' consent was void (*b*).

If a son should marry before he had attained his thirtieth, or a daughter before she attained her twenty-fifth year, without the parents' consent, they were subject to be disinherited, although the marriage itself would be valid (*c*).

Code Civil.—According to the present law of France, a son and a daughter who shall not have completed their twenty-first year are incapable of contracting marriage without the consent of their father and mother; in case of disagreement, the consent of the father alone shall be sufficient (*d*).

If either parent be dead, or be so situated as to be under an impossibility of expressing consent, the consent of the other parent shall be sufficient (*e*).

The provisions in the two last paragraphs apply to natural children legally acknowledged (*f*).

If both parents be dead, or be so situated as to be under an impossibility of expressing consent, the consent of the grandfathers or grandmothers shall be substituted for that of the parents; in case of disagreement between grandfather and grandmother of the same line, the consent of the grandfather alone shall be sufficient (*g*).

If a disagreement exist between the two lines, the grandfathers and grandmothers, or either of them, as the case may be, of the one line approving, those of the other, or either of them, disapproving, such difference of opinion shall imply consent (*g*).

Between the ages of twenty-one and thirty children are obliged to obtain the consent of their father and mother; but if this is refused he or she must request it by a notice, as specified in art. 154 (*h*). If the consent is not given within thirty days the marriage

(*b*) Pothier, Traité du Mariage, s. 326. Baudry-Lacan., *ad loc. cit.*

(*c*) Pothier, *ibid.*

(*d*) Art. 148 of the Civil Code, as modified by art. 6 of the French law of June 21st, 1907.

(*e*) Art. 149.

(*f*) Art. 158, as modified by art. 13 of the law of June 21st, 1907.

(*g*) Art. 150.

(*h*) See *infra.*

may take place without it (*i*). Prior to the law of June 21st, 1907, by which the above provisions were enacted, a respectful and formal act (*acte respectueux*) was required to be drawn up and addressed to the parents in the same way, but this was necessary up to any age so long as the party requesting the consent had ascendants in the direct line (*j*).

Where there is disagreement as to a marriage between parents who have been divorced or judicially separated, the consent of the parent for whose benefit the divorce or separation has been pronounced, and who has obtained the custody of the child, is sufficient (*k*). This rule was laid down by the law of June 20th, 1896, to meet cases of hardship caused by the arbitrary refusal of consent by a father against whom a decree of divorce or separation had been pronounced (*l*).

Art. 6 of the law of June 21st, 1907, amending art. 152 as altered by the above law, provides for the possibility of both of these conditions not being fulfilled. In that case the parent who gives his or her consent can apply to the Court for the consent of the other parent.

The notification prescribed by art. 151, is, under the law of June 21st, 1907 (*m*), to be made by one notary only, without the concurrence of a second notary or of witnesses, instead of, as under the former law, either by two notaries or by one notary accompanied by two witnesses (*m*).

The act, viséd for stamp duty and registered free, is to state the Christian names, surnames, domicils, and residences of the future spouses, and of their parents, as well as the place where the

(*i*) Art. 151, as enacted by the law of June 21st, 1907.

(*j*) The original arts. 152, 153, provided that—(1) from the age of capacity to contract marriage up to the completion of the thirtieth year in the case of sons, and the twenty-fifth year in that of daughters, the marriage should not be celebrated if the consent of parents was withheld until the expiry of one month after the last of three acts of respect, separated from each other by intervals of a month (art. 152); (2) after the age of thirty years complete, both for sons and daughters, if consent were not obtained on the formal act of respect, the party was at liberty to proceed to the celebration of the marriage, at the expiration of one month from the time of presenting such act of respect: art. 153. The law of June 20th, 1896, amended art. 152 and made the giving of one *acte respectueux* sufficient as in art. 153.

(*k*) Law of June 20th, 1896.

(*l*) Lois Annotés, 1896, p. 121; Baudry-Lacan., ii., p. 104.

(*m*) Art. 9, re-enacting art. 154 of the Code.

marriage is to be celebrated (*n*). A clause is to be inserted in the act, that it is made for the purpose of obtaining the parents' consent, failing which, within thirty days, the marriage will be celebrated (*n*).

In case of the absence (*o*) of the parents to whom the notice provided for by art. 151 should be given, it shall be lawful to proceed to the celebration of the marriage, upon producing the final judgment declaratory of absence; or if there be no such judgment, on producing the interlocutory decree, directing an inquiry (*p*); or else, if there has, as yet, been pronounced no decree on the subject, either interlocutory or final, upon producing an act of notoriety, drawn up by the *juge de paix* of the place where such parents had their last known domicil (*q*). This act of notoriety shall contain the declaration of four witnesses to the fact of absence, such witnesses to be summoned under virtue of his office by the *juge de paix* (*r*).

It is not necessary to produce the acts of death of the parents of the future spouses, when the grandparents for the branch to which they belong attest that fact, in which case mention of their attestation should be made in the act of marriage (*s*). In default of such attestation, the parties, if majors, may proceed to the celebration of the marriage on their declaration and oath that the place of decease and that of the last domicil of their ascendants are unknown to them (*s*).

The consent of the *conseil de famille* (*t*) is required by orphans who would need the consent of their parents if they were alive (*u*). A natural child who has not been acknowledged, or who, having been so, has lost his parents, or whose parents are incapable of expressing their consent, cannot before completing his or her twenty-first year, marry without the consent of the *conseil de famille* (*x*).

(*n*) See note (*m*), p. 106.

(*o*) "Absence" is defined in art. 115 of the Code Civil as follows: "When a person has ceased to appear at the place of his domicil or residence, and no news has been received of that person for four years, the interested parties may apply to the Court of First Instance for a declaration of absence.

(*p*) Art. 116.

(*q*) The "domicil" of every French citizen as regards his civil rights is at the place where he has his principal establishment: art. 102.

(*r*) Art. 155. And see also, as to formalities, Law of June 20th, 1896, and June 21st, 1907.

(*s*) Art. 155.

(*t*) The *conseil de famille* is composed of a minimum of six persons of the orphan's family, three being taken from the father's and three from the mother's side, and presided over by the *juge de paix* of the locality. Code Civil, art. 407.

(*u*) Code Civil, art. 160.

(*x*) Art. 159, as modified by art. 14

Belgium.—By Belgian law (*a*), if the parties to be married are over twenty-one years of age, they must by a respectful request demand the consent of their parents to their marriage. If this consent is not given the parties have the right to marry after one month's delay, but the parents have the right to lodge an opposition to the marriage and thereby have it postponed while the children are under twenty-five years of age. After that age the parents have no right to lodge an opposition against the marriage.

Quebec.—Children who have not reached the age of twenty-one years must obtain the consent of their father or mother before contracting marriage; in case of disagreement, the consent of the father suffices (*b*). If one of them be dead, or unable to express his will, the consent of the other suffices (*c*). A natural child who has not reached the age of twenty-one years must be authorised before contracting marriage by a tutor *ad hoc*, duly appointed for the purpose (*d*). If there be neither father nor mother, or if both be unable to express their will, minor children, before contracting marriage, must obtain the consent of their tutor, or, in cases of emancipation, their curator, who is bound before giving such consent to take the advice of a family council, duly called to deliberate on the subject (*e*). Respectful requisitions to the father and mother are no longer necessary (*f*).

St. Lucia.—The law is identical with that of Quebec (*g*). When any person whose consent is necessary to a marriage is absent, insane, or otherwise incapable of consenting or refuses consent, the Judge may on petition give valid consent (*h*).

Mauritius.—A son under the age of twenty-five, or a daughter under the age of twenty-one, cannot contract a marriage without the consent of his or her father and mother; in case of disagreement between the parents, the consent of the father is sufficient (*i*). If either parent is dead, incapable of manifesting his or her will, or absent from the Island, the consent of the other is sufficient (*i*). But a person of twenty-one years or more whose father and mother

of the law of June 21st, 1907. Prior to the law of 1907, a guardian *ad hoc* had to be specially appointed.

(*a*) April 30th, 1896.

(*b*) C. C. of L.C., art. 119.

(*c*) Art. 120.

(*d*) Art. 121.

(*e*) Art. 122.

(*f*) Art. 123.

(*g*) Arts. 85—88 of C. C. of St. Lucia.

(*h*) Art. 89.

(*i*) No. 26 of 1890, s. 52.

are dead, or incapable of manifesting their will, or absent from the Island, does not require the consent of any person to contract marriage (*k*). A minor may, in such a case, marry with the consent of his or her grandfather and grandmother (*l*). When there is disagreement between the grandparents the consent of the grandfather is sufficient; if there are ancestors in both lines, and there is disagreement between the two lines, such disagreement will be equivalent to a consent, and the marriage may take place (*l*). When there is no grandfather or grandmother the marriage may take place with the consent of a family council (*m*). The above provisions (*n*) apply to legitimate children only (*o*).

A natural minor child cannot marry without the consent of the parent by whom he has been acknowledged, or of both parents if he has been acknowledged by both (*p*). In the latter case, if there is disagreement, the consent of the father is sufficient; if the father has been refused the guardianship of the natural child, the consent of the guardian is also required (*p*). When both parents have acknowledged the child and one of them is dead, or incapable of manifesting his will, or absent from the Island, the consent of the other is sufficient (*q*); or if both parents are dead, or incapable, or absent, or the child has not been acknowledged, or acknowledged only by one parent who is dead, incapable, or absent, the consent of a stipendiary or district magistrate is sufficient (*r*). A natural child who is twenty-one years of age or more does not require any consent (*s*).

The Chief Judge may sanction the marriage of a minor, where such consent is unreasonably withheld by any parent, guardian, or family council (*t*).

Seychelles.—The law is the same as that of Mauritius (*u*).

Spanish Law.—The law of Spain prohibits the marriage of any minor, without the prescribed consent (*a*), viz.: (a) In the case of

(*k*) S. 53.

(*l*) S. 54 (1).

(*m*) S. 54 (2). If the minor has not six relatives qualified to form a family council or is too poor to pay the expense of summoning one, the district magistrate of the district in which the minor resides may either authorise the marriage or appoint a guardian *ad hoc* to do so: s. 57 (1).

(*n*) *I.e.*, ss. 52—54.

(*o*) S. 54 (3)

(*p*) S. 55 (1).

(*q*) S. 55 (2).

(*r*) S. 55 (3).

(*s*) S. 55 (4). As to the marriage of minor wards and the Protector of Immigrants, see ss. 56, 59 (1).

(*t*) S. 59 (2).

(*u*) No. 4 of 1893, ss. 47—54.

(*a*) C. C., art. 45 (1).

legitimate children, of the father, or, if he is dead or under disability, of the mother, the paternal or maternal ancestors, and on their default, the family council successively; (b) in the case of natural children, acknowledged or legitimated by Royal decree, that of the person recognising or legitimating them, and of their ascendants or of the family council in the order indicated under (a); (c) in the case of an adopted child that of the adoptive father, or, on his default, of the natural family to which the child belongs; (d) in the case of other illegitimate children, the consent of the mother when legally known, and of the maternal ascendants in the same case; in default of both, of the family council; (e) in the case of foundlings, the consent of the head of the house in which they are placed (*b*). Major children are obliged to require the consent of their father, and in default of him of their mother, to their marriage. If they obtain no answer, or if the answer is unfavourable, the marriage cannot be celebrated till the expiry of a period of three months from the request (*c*). No person called upon to give his consent is bound to indicate the reasons for which he grants or refuses it, and there is no remedy in case of refusal (*d*). A marriage entered into in contravention of the above prohibition is valid; but the contracting parties subject themselves to the following rules, without prejudice to the provisions of the Penal Code:—

1. The marriage is deemed to be contracted with an absolute separation of property; each spouse preserves the property and administration of all the goods belonging to him or her, and keeps the income or revenue arising from them, subject, however, to the obligation of contributing to the household expenses.

2. Neither spouse can receive from the other anything by way of donation or testament.

3. If one of the spouses is an unemancipated minor, the right of administering his property will only pass to him on his attaining majority. Till then he has only a right to aliment not exceeding in amount the income of his property (*e*).

Italian Law.—The Italian Civil Code provides that a son who has not completed his twenty-fifth and a daughter who has not completed her twenty-first year cannot marry without the consent of the father and mother. In case of disagreement between the

(*b*) Art. 46.
(*c*) Arts. 47, 48, proof of assent.
(*d*) Art. 49.
(*e*) Art. 50.

parents, the consent of the father is sufficient. If either is dead or unable to consent, the consent of the other is sufficient. If neither parent is alive or able to consent, other persons are substituted for that purpose, but the consent is only required in the case of persons who have not attained twenty-one years. Provision is also made for the case of adopted or recognised natural children (*f*). In the case of princes and princesses of the Royal House the consent of the King is alone required (*g*).

An appeal lies against the refusal of consent to the Court of Appeal in all cases other than the one last mentioned. A son of full age must bring the appeal himself; a daughter or minor child is represented by relations by consanguinity or marriage or the Public Prosecutor. The appeal is heard without counsel or solicitor with closed doors, and no grounds are assigned for the decision (*h*).

In **Germany** a person under the age of twenty-one, though declared to be of full age, if legitimate, requires the consent of his father, and if illegitimate that of his mother, and in the case of the father's death the mother replaces him. If the parent is not the statutory agent, the consent of the statutory agent is also required. The absence of the parental consent only creates a hindering impediment, but the absence of consent of the statutory agent makes the marriage voidable. The parental consent, as well as the consent of the statutory agent, may in certain specified events be replaced by the leave of the Guardianship Court (*i*).

Hungarian Law.—Consent of parent and guardian is required for a spouse who is under full age (twenty-four years). The absence of consent makes the marriage voidable on the suit of the guardian authority, unless consent has been given subsequently.

Austrian Law.—By the Austrian law persons who are under twenty-four years of age, or are of full age but without business capacity, in order to marry, require the consent of their father, or failing him, the consent of their guardian and the Guardianship Court (*k*).

A foreign minor who desires to marry in Austria, and cannot produce the requisite authority, must obtain the appointment of a legal representative by an Austrian Court, who must declare to the

(*f*) Arts. 63—66.
(*g*) Art. 69.
(*h*) Art. 67.
(*i*) Ss. 1305, 1308—1323, 1330.
(*k*) C. C., arts. 48—50.

Court his consent or dissent from the marriage. If a minor or a person placed in another person's charge is refused consent to marry, and the marriage is thereby hindered, they have the right to apply to the Court. Consent can be refused on the grounds of want of necessary income, notorious immorality, infectious disease, or impotence (*l*).

Swiss Law.—The consent of the parent enjoying parental power is required in all cases of the marriage of minors. If the parents be dead or incapable of giving an expression to their will the consent of the guardian is required, and an appeal against the refusal of consent by a guardian lies to the competent guardianship authority.

No action for the annulment of a marriage on account of the want of a necessary consent may be brought except by the persons whose consent is necessary, or after the spouse has attained majority (*m*). Under the Code persons who are not of full age or are interdicted cannot marry without the consent of both parents, or of the one who has the parental power, or of their guardian (*n*).

Russian Law.—In order to contract a legal marriage it is necessary to obtain the permission of the parents of the contracting parties; but a marriage concluded without the permission of the parents of the parties cannot be annulled on that account alone, but the minister of religion who solemnized the marriage is liable to prosecution.

Prohibitions.—1. Absolute.—(a) An Existing Valid Marriage.

(a) **Bigamy.**—In all systems an existing marriage makes void any marriage subsequently contracted (*o*). Thus by the German Civil Code a marriage is void if contracted during the existence of a previous marriage of one of the spouses (*p*). An existing marriage is also an impediment under the Spanish Civil Code (*q*), and operates as a ground of nullity (*r*). This rule is only qualified in the case of putative marriages, or marriages contracted in good faith.

Putative Marriages.—This principle has been derived from the

(*l*) Arts. 51—53; see ss. 190—192 of the law of August 9th, 1854, R. S. Bl., No. 208.

(*m*) See Swiss Federal Law of Marriage (1874), arts. 27, 53.

(*n*) See above, Vol. II., pp. 506, 507; Civil Code, arts. 95, 99, 274, 285—287, 324—326.

(*o*) *E.g.*, France, C. C., art. 147; Italy, C. C., art. 56.

(*p*) Ss. 1309, 1326.

(*q*) Art. 83 (5).

(*r*) Art. 101 (1). A marriage, whether canonical or civil, produces no civil effects if one of the parties was at the time of its celebration already legally married: art. 51.

canon law, for though the Roman law granted relief in certain cases by recognising the children born from a second bigamous marriage under certain circumstances as legitimate (*s*), the Church was the first to grant relief to the parties themselves and to give an opportunity of recognising the second marriage as valid by the civil law.

It is unknown to the law of England or Ireland. It is admitted in France (*t*), Germany (*u*), Spain (*v*), Italy (*x*), and in other foreign Codes (*y*).

Code Civil.—The Code Civil provides that a marriage which has been declared null produces, nevertheless, civil effects, as regards both the spouses and their children, if it has been contracted in good faith (*z*). If the good faith has existed only on the part of one of the spouses, the marriage produces civil effects only in favour of that spouse and of the children (*a*). It is sufficient under French law if good faith has existed at the time of the celebration of the marriage (*b*), and the provisions apply to all annullable marriages, whether defect of form or defect of substance is the ground of nullity (*c*).

Effects of a Putative Marriage.—Children born during the marriage or conceived before its annulment, are deemed to be and have the rights of legitimate children, even if one parent only has been of good faith (*d*). It operates as a *subsequens matrimonium* for purposes of legitimating children (*e*). If both spouses have acted *bonâ fide*, the minor spouse has the benefit of the emancipation which marriage confers (*f*). The parties have all the rights conferred by the *puissance paternelle* over the person and property of their children (*g*), and their matrimonial contracts remain in force, on

(*s*) See D., xxiii., 2, 57.

(*t*) Code Civil, arts. 201, 202.

(*u*) Civil Code, ss. 1344, 1345, 1699.

(*v*) Civil Code, art. 69.

(*x*) Civil Code, art. 116.

(*y*) *E.g.*, Switzerland, C. C., arts. 133, 134.

(*z*) Art. 201. Cf. Civil Codes of L.C., art. 163; St. Lucia, art. 133.

(*a*) Art. 202. Cf. Civil Codes of L.C., art. 164; St. Lucia, art. 134.

(*b*) Baudry-Lacan., ii., p. 460; Aubry et Rau, v., p. 48, n. 6; Demolombe, iii., p. 563, s. 360; Laurent, D. C. F., ii., p. 639, s. 505.

(*c*) Baudry-Lacan., ii., p. 462; and see n. 1.

(*d*) Aubry et Rau, v., p. 49; Demolombe, iii., p. 565, s. 362.

(*e*) Aubry et Rau, v., p. 50, n. 12; Baudry-Lacan., ii., p. 472; *contra* Merlin, Rep. tit. Légitimation, s. ii., s. 2, n. 4; Toullier, i., s. 657.

(*f*) Aubry et Rau, i., p. 541, s. 129.

(*g*) Baudry-Lacan., ii., p 474.

the footing of the state of things existing at the time of the judicial declaration of nullity (*h*). The wife cannot, however, it seems (*h*), retain her husband's name. The reciprocal right of succession ceases, as between the spouses, from the declaration of nullity (*i*).

Where one spouse only has been of good faith, that spouse alone has the right to the paternal power (*k*), to the benefit of the matrimonial conventions (*l*), and of any donation received from the other spouse by the marriage contract without any correlative right on the part of that spouse, as regards donations made to him or her, even if the donations contained in the marriage contract were expressly stipulated to be reciprocal (*m*). As regards third parties, the putative marriage produces, in favour of the spouse or spouses of good faith, the same civil effects as a void marriage. Thus (*n*), the wife who is of good faith may set up, as against third parties, the legal hypothec conferred on her by art. 2121 of the Civil Code, and she, or her husband, if he is the party of good faith, may take advantage of the nullity of acts executed by her, without marital or judicial authorisation.

There are similar provisions in the other legislations (*o*).

This rule is also applied in the case of Catholic marriages which are indissoluble. Thus in Austria a non-Catholic whose marriage has been dissolved can only marry a non-Catholic, and a person who was not a Catholic at the time of his or her marriage and has afterwards become a Catholic and parted from a non-Catholic spouse cannot marry again during the lifetime of the other non-Catholic spouse (*p*).

(b) **Annus Luctus.**—Another impediment to marriage imposed on a wife is the time of mourning which must elapse after the dissolution or annulment of a preceding marriage before she can re-marry, though this is never the ground of an absolute prohibition.

French Law.—In French law a period of ten months from the

(*h*) Baudry-Lacan., ii., p. 474.

(*i*) Aubry et Rau, v., p. 52, n. 17; *contra*, Laurent, ii., p. 647, s. 511.

(*k*) Aubry et Rau, v., p. 53, n. 23.

(*l*) Baudry-Lacan., ii., p. 477.

(*m*) Aubry et Rau, v., p. 53, n. 20; Demolombe, iii., p. 576, s. 376; Laurent, ii., p. 649, s. 513.

(*n*) Baudry-Lacan., ii., pp. 483 *et seq.*, where the consequences of the rule under consideration are fully worked out.

(*o*) See Burge, vol. ii., pp. 266, 330, 354.

(*p*) Court decrees of August 4th and 26th, 1814, and July 17th, 1835.

death of the husband or dissolution of the marriage by divorce is prescribed (*q*), as it is also in the laws of **Holland** (*r*) and **Hungary** (*s*).

German Law.—In German law the period is ten months from the date of the dissolution of the previous marriage, but this prohibition is merely in the nature of a hindering impediment, and may also be removed by dispensation. It ceases if before the expiration of the period she gives birth to a child (*t*).

Austrian Law.—By the provisions of the Code on this subject, in the event of a marriage being declared null, or of the husband's death, the wife if pregnant cannot marry before the birth of the child, and if there is a doubt as to the pregnancy, not before the lapse of six months, but a dispensation may be granted, and the wife forfeits all her rights against the former husband's inheritance (*u*).

Italian Law.—The Italian Civil Code contains similar provisions (*x*) to those of the German Code, with the additional proviso that the rule as to the ten months' limit does not apply in the case of the former husband's impotence. A woman who marries within the prohibited period, as also the registrar who celebrates the civil marriage, and the new spouse incur pecuniary penalties, and the woman loses all right of inheritance and donations from the first husband (*a*).

Spanish Law.—A widow is prohibited from marrying during the three hundred and one days following the death of her husband, or before her confinement, if she was *enceinte*. The same rules apply to a woman whose marriage has been annulled, counting from the day of her legal separation from her husband (*b*). A dispensation from this prohibition may be granted (*c*). A marriage contracted in contravention of this prohibition is valid, but the marriage is deemed to have been made with an absolute separation of goods; neither spouse can take anything from the other by way of donation or testament (these two rules do not apply if an authorisation of the marriage has been obtained), and, if one of the spouses is an unemancipated minor, he or she will only have the right to the administration of his or her property on attaining majority. Until

(*q*) C. C., arts. 228, 296.
(*r*) C. C., art. 91.
(*s*) Marriage Law of 1894.
(*t*) Ss. 1313, 1322, 1323, 1330.
(*u*) Arts. 120, 121.
(*x*) Art. 57.
(*a*) Art. 128. This impediment is *dirimens* as well as *impediens*: see arts. 85, 86, 104.
(*b*) Art. 45 (2).
(*c*) Art. 85.

then the minor has merely a right to aliment, the amount of which must not exceed the revenue of his or her property (*d*).

(c) **Impotence.**—The physical impossibility of consummating the marriage, or impotence, is under some systems of law another ground for annulling the marriage contract (*e*).

From the opportunities which this cause of nullity affords for collusion between the parties the strictest proof is required. In countries adopting the canon law, suits for setting aside the marriage are not permitted to be entertained, except in those cases where the imperfection is palpable, unless the parties have been in continued cohabitation for three years; and when the proof of the defect is doubtful, a further cohabitation is enjoined (*f*).

France.—Code Civil.—In France this cause of nullity was so scandalously abused that the Code Civil does not enumerate it amongst the other impediments to a lawful marriage, and, according to the balance of modern opinion, it is not a ground of nullity, whether the impotence is natural or accidental (*g*).

Quebec.—The Civil Code of Lower Canada provides (*h*) that "impotence, natural or accidental, existing at the time of the marriage, renders it null; but only if such impotence be apparent and manifest. This nullity cannot be invoked by any one who has contracted marriage with the impotent person, nor at any time after three years from the marriage." There is a similar provision in the Code of **St. Lucia** (*i*).

This impediment renders the marriage voidable, and not *ipso facto* void. The marriage remains, therefore, valid, unless it be set aside in the lifetime of the parties.

Other Systems.—Permanent incurable impotence of one spouse proved anterior to marriage renders the marriage voidable at the instance of the other spouse under the Italian (*k*) and Spanish (*l*) Codes.

(*d*) C. C., art. 50.

(*e*) Greenstreet *v.* Cumyns (1812), 2 Phill. 10; Brown *v.* Brown (1828), 1 Hagg E. R. 523; Briggs *v.* Morgan (1820), 2 Hagg. C. R. 324.

(*f*) Burge, 1st ed., i., 139, citing Oughton, tit. 217; Ayliffe's Parergon, tit. Divorce; and see Baudry-Lacan., ii., pp. 47—49.

(*g*) D. *v.* D. (1894), C. Nimes, Sirey (1896), ii., 142. But see Sirey (1901), ii., 303. See Baudry-Lacan., ii., p. 335, and decisions cited in n. 3; *contra*, N. *v.* N. (1808), C. Treves, Sirey, An. (1808), ii., p. 214; and cf. S. C., Toullier, i., ss. 525, 526; ii., 806.

(*h*) Art. 117.

(*i*) Art. 83.

(*k*) Art. 107.

(*l*) Art. 83 (3).

German Law.—The German Civil Code does not deal with impotence as a ground of nullity or voidability, but it enables a spouse who was under a mistake as to essential personal qualities of the other spouse to obtain a declaration of nullity (*m*); and this provision has been held to be applicable to cases of impotence in so far as such impotence is proved to be of a permanent character. On the other hand, the section does not apply to a case of mere sterility unless it can be shown that the spouse wishing to avoid the marriage would not have contracted it had he been aware of such sterility (*n*).

The **Hungarian** law has a similar provision (*o*). Permanent impotence is a ground for nullity in **Austria** (*p*).

In **Switzerland** impotence does not render a marriage null, but is recognised as a cause of divorce by mutual consent (*q*). Under the Code it appears to give the injured spouse a claim to a divorce (*r*).

2. **Relative Prohibitions.** — (a) **Degrees of Consanguinity and Affinity.**—As already seen, marriages between parties related by blood or consanguinity (*cognatio*), or by affinity or relationship by marriage (*affinitas*), in the direct ascending or descending line, *in infinitum*, are prohibited by the civil and canon law (*s*). This prohibition prevents that confusion of civil duties which would be the necessary result of such marriages. The Codes of European and other countries concur in this prohibition (*t*). In the collateral line, the prohibition is confined to those who stand in certain degrees of consanguinity or affinity to each other.

French and Spanish Law.—By the canon law, which, as decreed by the Council of Trent, was adopted in Spain and in France and Austria, the intermarriage of those related to each other in the fourth degree was prohibited, but in respect of this prohibition dispensations could be obtained.

(*m*) S. 1333.

(*n*) See the decisions of the Imperial Court referred to in Neumann, Rechtsprechung des R. G., vol. ii., pp. 386, 387.

(*o*) Marriage Law of 1894, art. 54.

(*p*) C. C., art. 60; and see Anon. (1893), 1895, J. 161.

(*q*) Entscheidungen des Bundesgerichts (1877), iii. 114; Curti, No. 2385.

(*r*) Art. 142.

(*s*) Dig. xxiii. 2, l. 53; xxxviii. 10, l. 4, § 7; Baudry-Lacan., ii., pp. 41, 156; Pothier, Traité du Mariage, s. 150; Gibson, Cod. 408—415; Leviticus, xviii.; Harrison *v.* Burwell (1671), 2 Ventr. 9; Vaughan's Rep. 224.

(*t*) See Civil Codes of France, art. 161; Spain, art. 84 (1); Italy, art. 58; Germany, s. 1310; Swiss Federal Law of Marriage, art. 28.

By the law of Spain, marriage is prohibited between ascendants and descendants, collaterals by legal or natural consanguinity up to the fourth degree and legal or natural affinity up to the same degree (*u*); but dispensations can be obtained for marriages between persons related within the third and fourth degrees (lawful) and connected by lawful or natural affinity collaterally (*x*).

According to the present law of France, marriage is prohibited in the direct line between ancestors and their descendants, to the remotest degree, whether legitimate or illegitimate, as also between those related by marriage in the same degree (*a*).

In the collateral line marriage is prohibited between brothers and sisters, whether legitimate or illegitimate, as also between those related by marriage in the same degree (*b*).

Marriage is prohibited between uncle and niece, aunt and nephew (*c*).

On serious grounds of expediency, however, a dispensation from this last-mentioned prohibition and from those with regard to brothers-in-law and sisters-in-law, may be obtained (*d*).

Quebec.—In the direct line marriage is prohibited between ascendants and descendants and between persons connected by alliance, whether they are legitimate or illegitimate (*e*); in the collateral line between brother and sister, legitimate or natural, and between those connected in the same degree by alliance, whether they be legitimate or natural: but it is permitted between a man and his deceased wife's sister (*f*). Marriage is also prohibited between uncle and niece, aunt and nephew (*g*). "The other impediments recognised according to the different religious persuasions as resulting from relationship or affinity or from

(*u*) Spanish Civil Code, art. 84.

(*x*) *Ibid.*, art. 85.

(*a*) Art. 161.

(*b*) Art. 162. It has been held that the prohibition enacted by this article applies even where the marriage producing the affinity is dissolved by the divorce or death of one of the spouses: De L. C. Paris, (1897), Sirey, 1900, ii., 131.

(*c*) Art. 163. As to whether this provision extends to grand-uncles and aunts, and their grand-nieces and nephews, see Baudry-Lacan., ii., p. 161.

(*d*) Art. 164, as modified by law of April 16th, 1832. As to the principles on which such dispensations are granted, see Circulars of May 10th, 1824 (Sirey, 1829, ii., 285), and April 28th, 1832 (Sirey, 1832, ii., 219). As to the formalities, see Demolombe, iii., p. 164, s. 119.

(*e*) Civil Code of L.C., art. 124.

(*f*) Art. 125.

(*g*) Art. 126.

other causes remain subject to the rules hitherto followed in the different Churches and religious communities. The right likewise of granting dispensations from such impediments appertains, as heretofore, to those who have hitherto enjoyed it" (*h*).

St. Lucia.—The law is the same as that of Quebec (*i*), and a marriage solemnised in contravention of its provisions is null (*k*).

Mauritius.—In the direct line marriage is prohibited between all ascendants and descendants, whether legitimate or natural, and between persons related by marriage in the same line (*l*); in the collateral line between a brother and sister, whether legitimate or natural, and between persons related by marriage in the same degree (*m*). But marriage may be legally contracted between a man and the sister of his deceased wife (*m*). Marriage is further prohibited between a man and his niece, or a woman and her nephew (*n*). But the Governor may for grave causes authorise any such marriage (*n*).

Seychelles.—The law is the same as that of Mauritius (*o*).

Austrian Law.—By the law of Austria no valid marriage can be contracted between blood relations in the ascending or descending lines, brothers and sisters of the full or half-blood, first cousins, uncles and nieces, nephews and aunts, whether the relationship be legitimate or illegitimate (*p*). Affinity is also an impediment to marriage between a husband and his wife's relation or *vice versâ* (*q*).

In the case of Jews the impediment of blood relationship between collaterals extends only to marriage between brother and sister, not to marriage between a sister and the son or grandson of her brother or sister; and affinity is an impediment within the same degrees.

German Law.—By the German Code marriages between relatives in the direct line, between brothers and sisters of the whole blood or the half-blood, as well as between relatives by marriage in the direct line, are void (*r*). A marriage between persons one of whom has illegitimately cohabited with any ancestor or descendant of the

(*h*) C. C. of L.C., art. 127.

(*i*) Civil Code of St. Lucia, arts. 90—92.

(*k*) Art. 93.

(*l*) No. 26 of 1890, s. 49.

(*m*) S. 50.

(*n*) S. 51. As to the procedure for obtaining such dispensations, see s. 77.

(*o*) No. 4 of 1893, ss. 44—46, 63.

(*p*) C. C., s. 65.

(*q*) C. C., s. 66.

(*r*) Ss. 1310, 1323, 1327, 1330.

other, is prohibited, but this prohibition is merely in the nature of a hindering impediment (*s*).

Italian Law.—By the Italian Civil Code marriage is prohibited in the direct line between ascendants and descendants, whether legitimate or natural, and between relatives by marriage of the same line (*t*). In the collateral line, it is prohibited between (1) brothers and sisters, legitimate and natural; (2) relatives by marriage of the same degree; (3) uncle and niece, aunt and nephew (*u*). The King, for grave reasons, may grant a dispensation from impediments (2) and (3) above (*x*), and they are not applicable to the King or the Royal Family (*a*). A marriage contracted in contravention of the foregoing impediments may be impugned by the spouses, the nearest descendants, and all who have an actual and lawful interest (*b*).

Swiss Law.—Marriage is prohibited between ascendants and descendants, brothers and sisters of the whole or half-blood, uncle and niece, aunt and nephew, whether the relationship be legitimate or illegitimate; as also between parents-in-law and children-in-law, step-parents and step-children, adoptive parents and adoptive children (*c*). The cantons cannot extend the table of prohibited degrees (*d*). The annulment of a marriage on grounds of consanguinity or affinity is enforceable by the public authorities, but other persons interested may also sue (*e*).

The Civil Code extends the prohibitions of marriages on the ground of affinity to the case of affinity caused by an invalid marriage, and forbids marriage between an adopted child and the spouse of the adopter, and between an adopted parent and the spouse of the adopted (*f*).

Adoption.—Analogous to these impediments is the prohibition existing, in substance, in most Continental Codes, of intermarriage between persons united by the tie of adoption and their descendants (*g*).

(*s*) German C. C., s. 1310.
(*t*) Art. 58.
(*u*) Art. 59. As to adopted relatives, see art. 60.
(*x*) Art. 68.
(*a*) Art. 69.
(*b*) Art. 104.
(*c*) Federal Law of Marriage, art. 28.
(*d*) Tannaz *c.* Canton de Vaud, Entsch. Bund., ii. 29, Curti, 866.
(*e*) Federal Law of Marriage, art. 51; Entsch. Bund., xiii. 187; Curti, 2440.
(*f*) Art. 100.
(*g*) See Civil Codes of France (art. 348), Spain (art. 84 (5), (6)), Italy (art. 60), Germany (s. 1311), Swiss law of December 24th, 1874, (art. 28), Hungarian marriage law (art. 18).

(b) **Difference of Religion.**—The impediment founded on the difference of the religious creeds of the parties was adopted by the law of **Spain**, if the party was not a Christian (*h*). But no such impediment exists under the Spanish Civil Code (*i*).

In **Austria** Christians and non-Christians cannot intermarry (*k*).

(c) **Marriage of Adulterer and Adulteress.—French Law.**—In France formerly such a marriage was not void unless the adulterous intercourse had been preceded or followed by a promise of future marriage (*a*).

By the Code Civil if a divorce had been decreed on the ground of adultery the guilty party was not permitted to marry with his or her accomplice, but this disability has now been removed by the law of December 15th, 1904 (*b*).

Belgium.—The Belgian law does not allow a Belgian registrar to marry persons found guilty of adultery by judicial definitive sentences, but if such parties get married abroad or even in Belgium, the Belgian registrar can be fined, but the Courts would not, it seems, declare such marriage void.

In **Austria** a marriage between persons who have committed adultery together is void, but the adultery must be proved before the marriage is contracted (*c*). Non-Catholic spouses who have been divorced cannot contract a valid marriage with persons who have been the cause of the divorce by proof produced at the time of the divorce owing to their conduct or by a criminal act (*d*). In **Servia**, also, adultery is an impediment.

German Law.—By the German Civil Code a marriage between a spouse divorced on the ground of adultery and the person with whom that adultery has been committed, if in the decree of divorce the latter person is named as the cause of it, is void. A dispensation may be obtained from this prohibition (*e*).

Hungarian Law.—There is a similar provision (*f*).

Spanish Law.—The Spanish Civil Code prohibits the intermarriage of persons found guilty of adultery by judicial definitive

(*h*) L. 15, tit. 2, p. 4.

(*i*) See arts. 83 and 84, where the disqualifications for marriage are enumerated.

(*k*) C. C., s. 64.

(*a*) Pothier, Traité du Mar., s. 234.

(*b*) Art. 298, as defined by law of July 27th, 1884.

(*c*) C. C., s. 67.

(*d*) C. C., s. 119.

(*e*) German C. C., ss. 312, 1322, 1328.

(*f*) Marriage Law, art. 20.

sentence (*g*), and a marriage contracted between such persons is void (*h*).

Homicide of Spouse.—By the **Italian** Code a person who has been convicted of wilful homicide, committed or attempted against one spouse, cannot marry the other spouse (*i*).

The **Spanish** Code also forbids the intermarriage of persons who have been condemned as authors or as co-authors and accomplices of the homicide of the conjoint of one of the intended spouses (*j*), and a breach of this rule is a ground of nullity (*k*).

In **Austria** murder of a spouse is also an impediment (*l*).

(d) **Ravishment and Abduction.**—In **France** a marriage contracted without free consent of one party can be impugned by that person only; but where an abductor of a girl has married her, criminal proceedings can only be taken against him by persons who have the right to demand that the marriage be declared void, and he can only be condemned after the marriage has been declared null (*m*). This impediment is also recognised as absolute in **Austria**, **Servia**, and **Greece**.

(e) **Fiduciary Relations.—Guardian and Ward.**—The laws of **Hungary** and **Spain** contain a provision similar to that of the Roman law that a tutor or curator cannot marry his ward until his accounts are passed (*n*).

The **German** Civil Code provides that a person who has a legitimate child, a minor, under tutelage, cannot marry her without a certificate from the Guardianship Court (*vormundschafts gericht*), that he has complied with certain conditions as to the property of the infant (*o*). This is only an *impedimentum impediens*.

(f) **Spiritual or Official Position.—Holy Orders.**—Under the **Spanish** law persons who have received holy orders, or having made profession in a religious order canonically approved, are bound

(*g*) Art. 84 (7).
(*h*) Art. 101 (1).
(*i*) Art. 62.
(*j*) Art. 84 (8).
(*k*) Art. 101 (1).
(*l*) C. C., s. 68.
(*m*) C. C., art. 180; Code Penal, art. 357.
(*n*) Spain, Civil Code, art. 45 (2). A marriage contracted in breach of this provision is valid; but it is deemed to have been made with absolute separation of property; no spouse can take anything from the other by way of donation or testament; and the guardian has no right of administration over the property of the ward during the latter's minority: art. 50. Hungarian Marriage Law, art. 19.
(*o*) S. 1314.

by a solemn vow of chastity, cannot marry without having obtained the necessary canonical dispensations (*p*). In **Austria** this is also an impediment even if the persons have adopted another religion (*q*).

The **French** Code Civil does not deal with this question expressly, and the jurisprudence has varied in regard to it. The Court of Cassation formerly decided that orders constituted an impediment (*r*), but more recently it has adopted the contrary doctrine (*s*).

According to the **German** Civil Code, soldiers and functionaries of a German State, who, under the laws of that State, require for the purpose of marrying a special authorisation, cannot marry without such authorisation; and foreigners, who under the laws of such a State require a permit or certificate to enable them to marry, cannot marry without it (*t*). This, again, is only an *impedimentum impediens*.

By **Russian** law, if the prospective husband is a military man or is an official of the Government, the permission of his superiors is also required, but the want of such permission does not render the marriage invalid, though it makes the minister liable to prosecution.

SECTION III.

Laws of British Dominions and United States.

Requirements.—Age.—As already stated, the age fixed by the civil law, fourteen for a man and twelve for a woman, is adopted by the laws of England, Scotland and Ireland, and in the English-settled Colonies, with a few exceptions, *e.g.*, in Ontario (*u*) and Queensland (*x*), the age is fourteen for both parties.

United States.—The age for contracting marriage has been generally fixed by statute in the different States, superseding the rule adopted by the common law: for the man twenty-one years in Alaska, Delaware, Washington; eighteen in Arizona, California,

(*p*) C. C., art. 83 (4). See as to dispensation, Anon., 1893, J. 624. As to Italian law, see Cipriano *v.* Cipriano (1878), Palermo, Sirey, 1881, iv., 8.

(*q*) C. C., s. 63.

(*r*) Aupy *v.* Lemotagner (1878), Dalloz, 1878, i., 113.

(*s*) Houpin *v.* Sterlin (1888), Dalloz, 1888, i., 97.

(*t*) S. 1315.

(*u*) R. S. O. (1897), c. 162, s 16.

(*x*) Parl. Pap. No. 5 (1894), 144, 145; (1903), Cd. 1785, p. 14.

Idaho, Indiana, Massachusetts, Michigan, Minnesota, Montana, Nebraska, Nevada, New York, Ohio, Oklahoma, Oregon, South Dakota, West Virginia, Wisconsin, Wyoming; seventeen in Alabama, Arkansas, Georgia, Illinois, Indian Territory; sixteen in the District of Columbia, Iowa, North Carolina, North Dakota, Texas; fourteen in Tennessee, Virginia, New Hampshire, Kentucky, Louisiana.

For the woman, eighteen in Alaska, Delaware, Idaho, New York, Washington; sixteen in Wyoming, West Virginia, Nevada, Nebraska, Montana, Michigan, Indiana, Arizona; fifteen in California, Minnesota, New Mexico, Oklahoma, Oregon, South Dakota, Wisconsin; fourteen in Alabama, Arkansas, District of Columbia, Georgia, Illinois, Indian Territory, Iowa, North Carolina, Texas, Utah; thirteen in New Hampshire, North Dakota; twelve in Virginia, Tennessee, Louisiana, Kentucky.

There is no statutory provision in Colorado, Connecticut, Florida, Kansas, Maine, Maryland, Mississippi, Missouri, New Jersey, Pennsylvania, Rhode Island, South Carolina, Vermont (*a*).

Non-age (*b*) renders a marriage void in Alabama, Arkansas, Arizona, Georgia, Kentucky, New Mexico (*c*), North Carolina (*d*), Massachusetts, Michigan, Minnesota, Texas, and Virginia; but, for the most part, only where the parties separate during non-age and do not cohabit afterwards. In California, Idaho, Indiana, Iowa, Kansas, Kentucky, Michigan, New York (*e*), Utah, and many other States, non-age renders a marriage voidable only; and in most cases such marriages cannot be avoided if the parties have voluntarily cohabited after attaining a marriageable age (*f*).

Consent.—English Law.—The English law adopts the principles of the civil law already stated (*g*), that the free consent of the parties is necessary, and thus force, fraud or fear, or lunacy will avoid the marriage. According to English law, concealment by a woman from her husband at the time of her marriage that she is

(*a*) Parl. Paper, Misc., No. 2 (1894); No. 2 (1903), Cd. 1468.

(*b*) Bishop, Marriage and Divorce, ss. 561 *et seq.*

(*c*) But only from the time of the decree of nullity.

(*d*) If followed by birth of issue, the marriage cannot be annulled after the death of either party.

(*e*) But only when the marriage was contracted without the consent of parents.

(*f*) Stimson, American Statute Law, s. 6113.

(*g*) See p. 101.

then pregnant by another man does not render the marriage null and void (*h*).

According to the modern authorities (*i*), whenever from natural weakness of intellect or fear—whether reasonably entertained or not—either party is actually in a state of mental incompetence to resist pressure improperly brought to bear, such party cannot enter into a valid contract of marriage, there being no more consent here than in the case of a person of stronger intellect and more robust courage yielding to stronger pressure or more serious danger.

The statute 15 Geo. II. c. 30, provided that the marriages of lunatics, so found by inquisition (not superseded) should be void without any proceedings for nullity (*k*), even although they were contracted during a lucid interval (*l*). This statute was repealed by the Statute Law Revision Act, 1873 (*m*). But the Act 51 Geo. III. c. 37—the especial object of which was to extend its provisions to Ireland—is not affected by that repeal, and, as it is perfectly general in its provisions, it is conceived that the marriage of a lunatic so found is still in England, as well as in Ireland, null and void. Except, however, where this statutory bar applies, unsoundness of mind does not prevent the formation of a valid marriage if the party whose capacity is questioned knew at the time of the marriage the nature of the engagement into which he was entering (*n*).

Scots Law.—Error, force and fraud (besides insanity and intoxication) are grounds of nullity; but the error must be substantial, and it

(*h*) Moss *v.* Moss, [1897] P. 263, in which the judgment of Sir Francis Jeune contains an exhaustive analysis of the English authorities and interesting comments on comparative jurisprudence relative to the question: "The fraud which will invalidate a marriage does not include such fraud as induces a consent, but is limited to such fraud as procures the appearance without the reality of consent" (*ubi supra*, at p. 269).

According to Bankton, it is a ground of nullity if a man ignorantly marries a woman who is with child to another at the time. But there appears to be no other Scotch authority for this proposition. See More's notes to Stair, i., 4, 6; Fraser, Husband and Wife, i., 451; Encyclo. Scots Law, tit. Marriage, viii., pp. 254, 255.

(*i*) Scott *v.* Sebright (1886), 12 P. D. 21; Cooper *v.* Crane, [1891] P. 369; Ford *v.* Stier, [1896] P. 1. In none of these cases had the marriage been consummated.

(*k*) Cf. Ex parte Turing (1812), 1 V. & B. 140.

(*l*) Turner *v.* Meyers (1808), 1 Hagg. C. R. 414, per Sir Wm. Scott, at p. 417.

(*m*) 36 & 37 Vict. c. 91.

(*n*) Durham *v.* Durham (1885), 10 P. D. 80; B. *v.* A. (1891), 27 L. R. Ir. 587.

seems that only identity of person is such : and error of name or circumstances or personal qualities (such as virginity) is not such (*o*).

Law of the United States.—Fraud or force (*oo*) avoid a marriage in Georgia (*p*) and Michigan if the parties separate and do not voluntarily cohabit together afterwards (*q*). Fraud makes a marriage voidable in Arkansas (*a*), California, Dakota, Idaho (*a*), Kentucky, Louisiana (*b*), New York (*a*), Minnesota (*a*), Nebraska, Nevada (*a*), North Carolina, Oregon (*a*), Utah, Vermont, Washington (*a*), Wisconsin (*a*) and Wyoming; but not in several of these States (*c*), if at any time before suit (and in Oregon after the discovery of the fraud) the parties have voluntarily cohabited as husband and wife, nor in any case where the marriage has been consummated (*d*).

Insanity (*e*) makes a marriage voidable in Arkansas, California, Dakota, Delaware, Indiana, Iowa, Kansas, Kentucky, Nebraska, Nevada, New York, North Carolina, Oregon, Vermont, Washington ; and avoids it in Georgia, Illinois, Indiana, Maine, Massachusetts, Michigan, Minnesota, Rhode Island, South Carolina, Virginia, Wisconsin, Wyoming (*f*).

The laws of Michigan provide that insane persons, idiots, and persons affected with syphilis or gonorrhœa, and not cured, shall be incapable of contracting marriage. In Michigan a law of 1905, c. 136, prohibited the marriage of one who has been confined in any public institution or asylum as epileptic, feeble-minded, imbecile, or insane, except upon a verified certificate of complete cure, and of there being no probability of the transmission of such person's defects to the issue of the proposed marriage. The marriage of any such person without such certificate or the procuring of such a marriage

(*o*) Encyc. of Scots Law, tit. Marriage, viii. 247, 253, 254.

(*oo*) Bishop, ss. 452 *et seq.*

(*p*) Drunkenness brought about by art or contrivance to induce assent is held fraud : Stimson, Amer. Stat. Law, s. 6112.

(*q*) Forced marriage is punishable by death, in the case of the male participant : Parl. Rep. of 1894, p. 156.

(*a*) But (i.) only as from the decree of nullity; (ii.) the suit must be brought in the lifetime of at least one of the parties; and (iii.) only the injured party can sue. (i.) holds good also in Wisconsin, Minnesota, Arkansas, Oregon, Nevada, Washington, Idaho and Louisiana; (iii.) also in Washington, Idaho and Louisiana.

(*b*) In Louisiana, mistake as to the person is a ground of avoidance.

(*c*) Vermont, New York, Wisconsin, Minnesota, Nebraska, California, Nevada, Dakota, Louisiana, Arizona.

(*d*) Stimson, *ad loc. cit.*, s. 6113.

(*e*) Bishop, ss. 588.

(*f*) Parl. Pap., Misc., No. 2 (1894), 155, 156; Bishop, Marriage and Divorce, book iii., ch. xx.

is made a felony (*g*). In Minnesota marriage is prohibited between persons either or both of whom is, or are, epileptic, feeble-minded, or insane, if the woman, whether sound or not, be under the age of forty-five (*h*).

At the time of the settlement of the United States, all matrimonial jurisdiction in England was in the Ecclesiastical Courts, which have had no existence in America. In the absence, therefore, of statutory authority, no common law Court in the United States possesses matrimonial jurisdiction. But some of the American Courts of Equity have claimed the right (*i*) to annul marriages on the ground of fraud, mistake, duress (*k*), lunacy, and even polygamy. This jurisdiction does not extend to any purely canonical defects, such as impotence. Nor (*semble*) would it be claimed in any case in which the Legislature had expressly conferred competent matrimonial jurisdiction on another tribunal (*a*).

Jurisdiction for nullity is now generally statutory in the American States, and is included in jurisdiction for divorce (*aa*).

Consent of Third Parties.—English Law.—By the common law of England, if the parties themselves were of the age of consent, the concurrence of their parents was not required to render their marriage valid. Such was the canon law (*b*), and this still continues to be the law of **Scotland** (*c*).

It was deemed expedient to alter the common law of England in this respect by the celebrated Marriage Act, 26 Geo. II. c. 33. By that statute it was required that all marriages celebrated by licence (for banns suppose notice) where either of the parties is under twenty-one (not being a widow or widower, who are supposed emancipated), without the consent of the father, or, if he be not living, of the mother or guardians, shall be absolutely void.

This statute, and a subsequent statute (the 3 Geo. IV. c. 75) were repealed by the 4 Geo. IV. c. 76. The great distinction which exists between these two statutes is, that the latter reverts to the old principle of punishing clandestine marriages by loss of

(*g*) Similar laws were enacted in New Jersey and Ohio in 1903.

(*h*) See Hirsh's Tables (1901).

(*i*) Bishop, Law of Marriage and Divorce, ii., ss. 802—804, 806.

(*k*) See, *e.g.*, Avakian *v.* Avakian 1905), 60 A. 521; Hawkins *v.* Hawkins (1905), 38 So. 640.

(*a*) See Selby *v.* Selby (1905) 61 A. 142.

(*aa*) Bishop, ii., ss. 807, 808.

(*b*) See pp. 18, 29.

(*c*) See p. 128; Encyc. of Scots Law, tit. Marriage.

property, &c., but does not violently make void a contract actually entered into. It therefore abounds in provisions for securing an assurance before marriage that the parties are of proper age, and have proper consent, and with punishments where such provisions are broken through; but these irregularities are not allowed to avoid the marriage when solemnised (*d*). By s. 14, a person applying for a licence to marry, where either of the parties, not being a widower or widow, shall be under the age of twenty-one years, shall swear that the consent of the person or persons whose consent to such marriage is required by the Act, has been obtained thereto, or that there is no such person or persons. And by s. 16, the father, if living, or if the father shall be dead, the guardian or guardians lawfully appointed, or one of them, and in case there shall be none such, then the mother, if unmarried, and if there shall be no mother unmarried, then the guardian or guardians appointed by the Court of Chancery, or one of them, shall have authority to consent to the marriage.

If a marriage take place under 6 & 7 Will. IV. c. 85, by a registrar's certificate, then, by s. 10 of that Act, the same consent is required as is necessary under the Act of 4 Geo. IV. c. 76. When the marriage of an infant has, by a false oath, or by fraud, been obtained without the necessary consent, the Court has power to forfeit all the property which the offending party or parties have obtained by the marriage, and to settle it in the manner directed by the Act (*e*).

A person *in loco parentis*, whose consent is necessary, under a testamentary disposition, to a marriage, and who has given such consent, is justified in altering his mind, and in withdrawing his consent to the marriage, if circumstances subsequently come to his knowledge, which if they had been known at the time, would have justified him in withholding it. This power of retractation, however, is not unlimited, and cannot be exercised for mere caprice or without just and exceptional reasons (*f*).

The statute did not extend to the British Colonies (*g*), or to Scotland or Ireland.

(*d*) R. *v.* Inhabitants of Birmingham (1828), 8 B. & C. 29.

(*e*) 4 Geo. IV. c. 76, s. 23; 6 & 7 Will. IV. c. 85, s. 43.

(*f*) In re Brown, Ingall *v.* Brown, [1904] 1 Ch. 120, discussing and applying Merry *v.* Ryves (1757), 1 Eden. 1; and Dashwood *v.* Bulkeley (Lord) (1804), 10 Ves. 230.

(*g*) But see *post*, pp. 129—130.

Ireland.—In the latter kingdom the consent of the parents was not by the common law necessary to render the marriage valid. But in the case of all legitimate children (not being widowers or widows) under twenty-one years of age, the consent of the father or guardian, or, in case of their disability, that of the Lord Chancellor, is now necessary (*h*), except in the case of a marriage by banns, where a clergyman may celebrate the marriage if he has not received notice of objection.

The Colonies.—In most of the Colonies also, provision has now been made, on the lines of English legislation, for the consent of parents or guardians being given to the marriage of minors. The absence of such consent does not, generally, avoid the marriage; but penalties are imposed on marriage officers solemnising marriages with knowledge that consent has been withheld, and in some cases property acquired by a major spouse in virtue of the marriage may be forfeited by judicial decree for the benefit of the minor spouse and the issue of the marriage (*i*).

Canada.—With unessential local variations, the model of the later English statute has been uniformly followed by the Legislatures of the several Provinces, and precautions have been imposed to prevent the marriage of young persons without the consent of parents or guardians, but without enacting that the want of such consent should render the marriage void (*k*).

Law of Ontario.—The question whether the earlier Imperial Act (26 Geo. II. c. 33) was brought into force in the Province of Ontario, either in whole or in part, by the Provincial statute (32 Geo. III. c. 1), providing that in all matters of controversy relative to property and civil rights resort should be had to the laws of England as the same stood on October 15th, 1792, as the rule for the decision of the same, has been discussed in several cases in that Province and in the original Province of Upper Canada without ever having been definitely settled (*l*). Judicial opinion,

(*h*) See 7 & 8 Vict. c. 81, ss. 19, 20; 26 & 27 Vict. c. 27, s. 4; 33 & 34 Vict. c. 110, s. 35; Steele *v.* Braddell (1838), Milw. Eccl. Rep. 1; Brook *v.* Brook (1861), 9 H. L. C. 193.

(*i*) See Burge, ii., 443.

(*k*) The law of British India contains a similar provision, referred to subsequently in the case of Christian and other marriages.

(*l*) Lawless *v.* Chamberlain (1889), 18 O. R. 296; O'Connor *v.* Kennedy (1887), 15 O. R. 20; R. *v.* Secker (1857), 14 U. C. R. 604; R. *v.* Bell (1857), 15 U. C. R. 287; R. *v.* Roblin (1862), 21 U. C. R. 352.

however, is against the view that the 11th section, which rendered the marriage of minors absolutely null and void to all intents and purposes whatsoever, if by licence and without the consent of parents and guardians, was ever in force, and that section and the 8th section have now been finally declared to be no longer operative in Ontario by their express repeal in the Statute Law Revision Act of 1902 (2 Edw. VII. (Ont.) c. 1). As it was expressly provided by the Imperial Act that it should not extend "to any marriages solemnised beyond the seas," it could have no operation in those Provinces which had adopted English law as of a date prior to the Act or subsequent to its repeal by the Imperial Parliament; and there is no similar local legislation, either Dominion or Provincial, in **Canada**, or in **Newfoundland.**

By the present marriage law of **Ontario**, where a form of marriage has been gone through between two persons either of whom is under the age of eighteen, without consent, the High Court shall have jurisdiction, in an action brought by the party who at the time of the ceremony was under eighteen, to declare and adjudge that a valid marriage was not effected, provided, however, that such persons have not after the ceremony cohabited, and that the action is brought by the plaintiff before he or she has attained the age of nineteen. The Court is not bound to grant relief where carnal intercourse has taken place between the parties before the ceremony (*m*).

Australia.—New South Wales.—The marriage of a minor under twenty-one, not being a widower or widow, is not to take place without production to the minister or registrar about to celebrate the same: (a) of the written consent of the father, if within New South Wales, or, if not, then of a guardian appointed by the father; or (b) if there be no such guardian in New South Wales, then the written consent of the mother, if within New South Wales; or (c), where there is no such parent or guardian in New South Wales, or he or she is incapable of duly consenting by reason of distance, habitual intoxication, or mental incapacity, then the written consent of a justice of the peace appointed for that purpose, after an inquiry on oath into the facts or circumstances of the case (*n*). Penalties are imposed on a marriage officer knowingly celebrating the marriage

(*m*) Act 23 of 1907, s. 23, amended by Act 62 of 1909.

(*n*) Act No. 15 of 1899, s. 9.

of (*o*) and on any person knowingly marrying (*p*), a minor, without such consent. But such marriages do not appear to be themselves voidable (*q*).

Victoria.—The Marriage Act, 1890 (*r*), contains similar provisions (*s*), and it has been held (*t*) that the marriage of a minor without the required consent is valid.

Queensland.—The law is similar to that of New South Wales (*u*). The Queensland Acts are in force in **Papua.**

South Australia.—The Marriage Act, 1867 (*v*), proceeds on the same lines (*w*).

A similar observation applies as regards **Western Australia** (*x*), **Tasmania** (*y*), and **New Zealand** (*z*).

Other Colonies.—Minors, not being widows or widowers, require the consent of parents or guardians to their marriage also in Jersey (*a*), Guernsey (*b*), Gibraltar (*c*), Cyprus (*d*), Ceylon (*e*), Straits Settlements (*f*) and Federated Malay States (*g*), Labuan and North Borneo (*h*), Hong Kong (*i*), Gambia (*j*), Sierra Leone (*k*), and Sierra

(*o*) S. 25.

(*p*) S. 26.

(*q*) See ss. 5 (1), 15.

(*r*) 54 Vict., No. 1166.

(*s*) Ss. 14, 23, 24.

(*t*) R. *v.* Griffin (1877), 3 V. L. R. (L.) 278. *Semble*, even if the marriage took place, not only without consent, but upon a false declaration: Gullifer *v.* Gullifer and Foley (1880), 6 V. L. R. (I. P. & M.) 109.

(*u*) 28 Vict., No. 15 (1864), ss. 18, 20, 25, 27.

(*v*) 31 Vict., No. 15.

(*w*) See ss. 25, 39, 41.

(*x*) Marriage Act, 1894 (58 Vict., No. 11), ss. 9, 21 (2) (c), 25 (1).

(*y*) 59 Vict., No. 23 (1895), ss. 27, 28, 41—44 (forfeiture of property acquired on marriage of minors without consent), 49, 50.

(*z*) No. 19 of 1904, ss. 19, 20, 24, 57. In case there is no person in the Colony capable of giving consent, a certificate cannot issue until fourteen days after receipt of notice (s. 27).

(*a*) Canon Law and Stat. of November 1st, 1841, arts. 31—33 (minors under twenty).

(*b*) Canon Law and Order in Council of October 3rd, 1840, art. 21 (minors under twenty); and the person giving consent (father, mother, or guardian) must appear before the registrar.

(*c*) Ordinances 1 of 1861, s. 4, 7 of 1902, and as to marriages between British subjects and foreigners, 8 of 1907.

(*d*) Law 2 of 1889, s. 8.

(*e*) No. 19 of 1907, s. 23.

(*f*) Ordinance 3 of 1898, s. 7.

(*g*) Negri Sembilan, No. 4 of 1902, ss. 8, 9; Pahang, No. 7 of 1902, ss. 8, 9; Perak, No. 3 of 1902, ss. 8, 9; Selangor, No. 7 of 1902, ss. 8, 9.

(*h*) Ordinances 10 of 1891, 2 of 1892, and 1 of 1904 (Labuan); Proclamation 7 of 1891 (North Borneo).

(*i*) Ordinance 7 of 1875, s. 13.

(*j*) No. 9 of 1862, ss. 6, 10.

(*k*) No. 22 of 1906, s. 6 (2). But the minister is not responsible unless the parents or guardian notify him that they forbid the marriage: s. 14.

Leone Protectorate (*k*), Gold Coast Colony (*l*), Northern Nigeria (*m*), Southern Nigeria (*n*), St. Helena (*o*), African Protectorates (*p*), Bermuda (*q*), Jamaica (*r*), Antigua (*s*), St. Kitts-Nevis (*t*) (if there is no person having authority to give consent, the marriage may take place upon oath made to that effect by the party requiring a marriage licence (*t*)), Montserrat (*u*), Virgin Islands (*x*), Grenada (*y*), Trinidad and Tobago (*z*), British Honduras (*a*), Falkland Islands (*b*), Fiji (*c*), and the Western Pacific Islands (*d*). In Barbados, consent does not appear to be necessary in the case of minors married by banns, but by s. 4 of No. 15 of 1891 any person "whose consent is required by law" may forbid the marriage and so render publication of banns void. In the case of civil marriage, the restrictions on the issue of licences enforce consent, while notice can only be given by minors with consent (*e*). Provision is made for consent being

If parents or guardians are *non compos mentis*, or absent, or unreasonable in withholding consent, a Judge of the Supreme Court or District Commissioner may declare the marriage proper: s. 7.

(*k*) See note (*k*) on previous page.

(*l*) No. 14 of 1884, s. 11 (b).

(*m*) No. 1 of 1907, s. 9 (b).

(*n*) No. 14 of 1884, s. 20.

(*o*) Ordinances 3 of 1851 and 4 of 1886.

(*p*) British Central Africa, Ordinance 3 of 1902, ss. 18—20; North-Eastern Rhodesia, North-Eastern Rhodesia Marriage Regulations, No. 2 of 1903, ss. 18—20; Uganda, Uganda Marriage Ordinance, 1902, ss. 18—20; East Africa, Ordinance 30 of 1902, ss. 18—20; Somaliland, Regulation 3 of 1902, ss. 18—20.

(*q*) Act 19 of 1847, s. 1, for marriage by licence; but, in the case of banns, the banns can only be voided by some authorised person forbidding the marriage: Act 20 of 1847, s. 4.

(*r*) No. 25 of 1897, s. 26. Non-observance of this rule does not avoid the marriage: s. 7. Where one party is under twenty-one, the Supreme Court may declare a forfeiture in favour of such party and of the issue of the marriage of all interest in any property acquired by the other party by virtue of the marriage: s. 26. There are similar provisions in the law of the Bahama Islands: No. 4 of 1908, ss. 5, 20.

(*s*) Act 89 of 1844.

(*t*) Act 63 of 1845, ss. 8, 10, 11; Act 57 of 1843 (Dissenters).

(*u*) Act 146 of 1839, ss. 3, 6.

(*x*) In case of a marriage by licence; while in case of marriage by banns, the publication is voided by their being forbidden by "any person whose consent is required by law": Marriage Act of 1839, s. 3; and see Ordinance 4 of 1907. So in St. Vincent: Act 10 of 1841, s. 3.

(*y*) No. 12 of 1900, s. 18.

(*z*) Rev. Ord. 59, s. 15.

(*a*) No. 18 of 1889, s. 12.

(*b*) No. 8 of 1902, s. 15.

(*c*) No. 4 of 1892, s. 17.

(*d*) Order in Council of 1893, ss. 121, 124; Stat. R. & O., Rev., ii., Foreign Jurisdiction, p. 523. See also Pacific Islands Civil Marriages Order in Council, 1907, ss. 17 *et seq.*; Stat. R. & O., 1907, p. 206.

(*e*) No. 1 of 1905, s. 3.

judicially supplied by the Chief Justice in case of the insanity, absence from the Colony, and incapability of, or of the unreasonable or improper withholding of consent by, a parent or guardian whose consent to a marriage is necessary or of there being no person capable of consent (*f*). Similar provision for the judicial authorisation of marriage, in case of incapacity or of consent being unreasonably withheld, is made by most of the other laws above cited.

Law of the United States.—By the common law of the United States the marriage of minors without parental consent is good (*g*). The legal position as regards such marriages is regulated, for the most part, by State legislation. Statutes requiring parental consent, yet not expressly declaring a marriage celebrated without it to be void, are construed as directory only (*h*). The consent of parents or guardians to the marriage of minors is generally required (*i*). In some States (New York) it is required only in case the minor is under the age of legal consent (*k*). There does not, however, appear to be any provision on the point in New Hampshire, Oklahoma, South Carolina, or Tennessee. In Louisiana, marriage without parental consent is a good ground for disinherison. In Kansas, a law of 1906 forbids the issue of a licence for the marriage of a male under twenty-one, or of a female under eighteen, except with the consent of the parent or guardian; and if the male is under seventeen, or the female is under fifteen, the consent of the Probate Judge must also be obtained.

Prohibitions.—Prior Marriage.—Law of England.—By the law of England, the offence of bigamy consists in the felonious contracting of a second marriage during the subsistence of a prior one (*l*), and the offence is committed whether the second marriage shall have taken place in England, Ireland, or elsewhere (*m*). The

(*f*) No. 15 of 1891, s. 6.

(*g*) Bishop, Law of Marr. & Div., i., s. 555.

(*h*) *Ibid.*, s. 554. Cf. Sturgis *v.* Sturgis (1908), 93 P. 696.

(*i*) Parl. Pap., Misc., No. 2 (1894); No. 2 (1903).

(*k*) N. Y. Consol. Laws (1909), c. 14, s. 25.

(*l*) See Offences against the Person Act, 1861 (24 & 25 Vict. c. 100), s. 57. The law of Scotland is practically identical, as to bigamy, with that of England. See Encyclo. Scots Law, tit. Bigamy, ii., p. 64.

(*m*) See as to the construction of this provision, Trial of Earl Russell before the King in Parliament, [1901] A. C. 446. Colonial tribunals have no jurisdiction over bigamy under Colonial Acts, except where the second marriage was celebrated within the Colony: Macleod *v.* Att.-Gen. for New South Wales, [1891] A. C. 455; but such

punishment of bigamy is penal servitude not exceeding seven years, or imprisonment, with or without hard labour, for not more than two years. A statutory defence to a charge of bigamy is given to "a person marrying a second time whose husband or wife shall have been continually absent from such person for the space of seven years then last past (at the date of the second marriage), and shall not have been known by such person to have been living" (*n*) at any period during the seven years (*o*). Honest belief, based on reasonable grounds, in the death of the other spouse within the seven years is a good defence (*p*).

Scots Law.—It seems that in Scots law, although *bona fides* will not validate a marriage entered into during the subsistence of a prior marriage, *bona fides* on the part of either parent will be effectual to legitimate the children (*q*). The error must be a *justus error* (*r*), and an error of fact, not of law (*s*). The same rule formerly held good in England, but no longer does so (*t*).

Law of the United States.—The law throughout the States and Territories and the District of Columbia is generally uniform in prohibiting bigamous marriages, in treating them as criminal, and in declaring them void (*u*). In some localities such marriages are void *ab initio*, and the children are illegitimate (*a*). In others they are also void, but the children are legitimate if (1) both or (2) one of the parents were ignorant that the former marriage existed. In other States the marriage stands until judicially annulled. In Tennessee it is declared that if a person has been absent two years and reported dead and the spouse has married again, the latter on reappearance of the former husband or wife may choose which marriage he or she elects to abide by (*b*). In

cases can be punished under s. 57 of 24 & 25 Vict. c. 100, which permits of the trial of the offender in any county of England or Ireland in which he is arrested or is in custody.

(*n*) Reg. *v.* Jones (1842) C. & M. 614.

(*o*) S. 57 of 24 & 25 Vict. c. 100.

(*p*) Reg. *v.* Tolson (1889), 23 Q. B. D. 168.

(*q*) See Craig, ii., 18, 19; Bankton, i., 5, 51; Purves' Trustees *v.* Purves (1895), 22 Rettie, 513; and cf. Lapsley *v.* Grierson (1848), 1 H. L. C. 498.

(*r*) Craig, *ubi supra*.

(*s*) Purves' Trustees, *ubi supra*, at p. 536.

(*t*) Pollock & Maitland, Hist. Eng. Law, ii., 374. See, however, Whitworth *v.* Whitworth, [1893] P. 85, as to *bona fides* in connection with the discretionary power of the Court as to divorce.

(*u*) Parl. Rep. of 1903; Bishop, Law of Marr. and Div., i., ss. 712 *et seq.*

(*a*) So, in Wisconsin, Rev. St., 1898, s. 2349; In re Geith's Estate (1906), 109 N. W. 552; 129 Wisc. 498.

(*b*) Parl. Rep. of 1894, p. 158.

New York and Arkansas, if a husband abandons his wife, or a wife her husband, and resides out of the State for five years, without being known to the other party to be living during that time, his or her death is presumed, and a subsequent marriage entered into by such wife or husband is valid, though voidable (*c*). Ten years' absence, without news of the absentee, creates a similar right in Louisiana. If either spouse has been continuously absent for thirteen years in Missouri, five years in Alabama, and seven years in Maryland, the other, not knowing such party to be living, may marry without being subject to indictment for bigamy; and in Maryland the spouse abandoning the other forfeits all claim to the real or personal estate of the other; and if he be the husband the wife has her dower and intestate share in personalty as if he were dead.

Impotence.—English Law.—A party contracting a marriage with knowledge of his impotence cannot annul his contract (*d*).

The suit must be brought in the lifetime of both parties, and the validity of a marriage cannot be impeached, on the ground of impotence, after the death of one of them (*e*). Nor can third parties institute such a suit, although both parties are alive.

Rule of Triennial Cohabitation (*f*).—The canon law rule of triennial cohabitation has not been recognised in England beyond this point, that where a husband or a wife seeks a decree of nullity *propter impotentiam*, if there is no more evidence than that they have for a period of three years lived together in the same house and with ordinary opportunities of intercourse, and it is clearly proved that there has been no consummation, then if that is the whole state of the evidence, inability on the part of one or the other will be presumed. On the other hand, the presumption to be drawn from the fact of non-consummation after three years' cohabitation is capable of being rebutted. And also, every case need not be fortified with the presumption; for, although no presumption can be raised from the absence of consummation within a less period than three years, yet positive evidence may be given from which the same inference of inability may be drawn (*g*).

(*c*) N. Y. Cons. Laws (1909), c. 14, s. 7.

(*d*) Norton *v.* Seton (1819), 3 Phillim. 147.

(*e*) A. *v.* B. (1868), L. R. 1 P. & D. 559.

(*f*) See p. 20.

(*g*) G. *v.* M. (1885), 10 A. C. 171.

Scots Law.—This rule would probably be followed in Scotland (*h*). The complaining spouse may be estopped by his or her conduct from obtaining a decree (*i*); and it seems that in Scotland the age of the spouses might constitute a bar (*k*).

Law of the United States.—Marriages are void on the ground of impotence in Georgia, Kentucky, North Carolina, New Jersey, and in Virginia, but only from the time when a decree is pronounced to that effect. On the other hand, impotence merely makes a marriage voidable in many States, *e.g.*, in Arkansas, California, Dakota, Idaho, Michigan, New York, Vermont, and Virginia (*l*).

Prohibited Degrees.—British Dominions.—English Law.—According to the law of England, lineal consanguinity (*a*), however remote, is a bar to marriage. Collateral consanguinity is a bar only to the third degree, reckoning in the way adopted by the civil law (*b*). Thus, first cousins, who are in the fourth degree, may intermarry. Direct affinity, or the relationship subsisting between the husband and the wife's blood relations, or between the wife and the husband's blood relations, is also a bar to marriage wherever such relationship, if it were consanguine, would constitute such a bar. All marriages within the prohibited degrees of consanguinity or affinity, as they are set out in the "Table of Kindred and Affinity," prepared by Archbishop Parker in 1563, and generally printed with the Book of Common Prayer (*c*), are now absolutely null and void by the Marriage Act, 1835 (*d*); *e.g.*, the marriage of a man with a sister

(*h*) Per Lord Watson, in G. *v.* M., *ubi supra*, at p. 198: followed as to impotence *quoad hanc* and practical impossibility of consummation in S. *v.* B. (1892), I. L. R. 16 Bom. 639.

(*i*) As to this "doctrine of sincerity," as it has been called, though it is in fact merely a form of estoppel, or, in Scots law, of "approbate and reprobate," see G. *v.* M., *ubi supra*, and L. *v.* B., [1895] P. 27.

(*k*) Stair, i., 4, 6, 4; Ersk., i., 6, 7; Fraser, Husband and Wife, i., 93.

(*l*) Stimson, ss. 6112—3. As to what constitutes impotence, the law of the United States is, generally, similar to that of England: Bishop, *ad loc. cit.*, ss. 758 *et seq.*

(*a*) Gibson, Codex, 412; Blackstone, Comm., ii., s. 206; Ersk., i., 6, 8.

(*b*) See Lock *v.* Lake (1757), 2 Lee, 420.

(*c*) This Table has received synodal authority from canon 99 of 1603, which orders it to be publicly set up in churches, and it has always been regarded by the temporal Courts as part of the statute law of England: see Hill *v.* Good (1673), Vaugh. 302; Reg. *v.* Chadwick (1847), 11 Q. B. 205; Sherwood *v.* Ray (1837), 1 Moo. P. C. 353.

(*d*) 5 & 6 Will. IV. c. 54. In spite of this statute, however, a decree of

of his deceased wife (*e*) (until the recent Act) or with the daughter of the sister of a deceased wife (*f*); half blood relationships, equally with those of the whole blood, constitute consanguinity, and a marriage of persons within the prohibited degrees is void under the Act of 1835, although one of the parties is illegitimate (*f*).

Marriage with Deceased Wife's Sister.—Marriage with a deceased wife's sister has now been legalised in the United Kingdom as a civil contract, and previously in many of the Colonies (*g*) enactments abolishing this impediment to marriage have passed into law.

The Imperial Act provides that a marriage contracted between a man and his deceased wife's sister within the realm or without is not to be deemed void or voidable as a civil contract by reason only of such affinity, with provisoes: (1) That no clergyman in holy orders of the Church of England is to be liable to any suit, penalty or censure, civil or ecclesiastical, for anything done or omitted to be done by him in the performance of the duties of his office to which he would not have been liable before this Act; (2) that if any minister of any church or chapel of that Church refuse to perform such marriage service between persons who, but for such refusal, would be entitled to have the service performed in such church or chapel, such minister may permit another clergyman of the Church of England entitled to officiate in the diocese where such church or chapel is situate to perform such marriage service

nullity will be granted on the application of one of the parties, even where, at the time of the celebration of the marriage, both were cognisant of the impediment: Andrews *v.* Ross (1888), 14 P. D. 15.

(*e*) Brook *v.* Brook (1861), 9 H. L. C. 193; 5 Rul. Cas. 783.

(*f*) Reg. *v.* Brighton (1861), 1 B. & S. 447; 12 Rul. Cas. 738. Affinity cannot be created by illegitimate intercourse under the present law of England, though it was for a time under stat. 28 Hen. VIII. c. 7: Wing *v.* Taylor (1861), 30 L. J. P. & M. 258. For the purposes of criminal punishment of incest it is not necessary that the relationship be traced through lawful wedlock: 8 Edw. VII. c. 45, s. 3.

(*g*) *E.g.*, Cape Colony, No. 40 of 1892; Natal, No. 15 of 1897, which is retrospective in operation and applies to "any marriage heretofore or hereafter contracted within this Colony or without": but no minister of religion is to be liable to any pains or penalties for refusing to solemnise any marriage made valid by the Act. This Act was amended by No. 45 of 1898, which added a saving clause as to property already inherited, and as to any *lis pendens*: New Zealand, No. 72 of 1900, legalising the marriage of a woman with her deceased husband's brother; Jersey, Act of 1896; New South Wales, 1899, No. 15, s. 18; Tasmania, 37 Vict., No. 7; Western Australia, Marriage Act, 1894.

in it; and (3) that if before the Act any such marriage had been annulled, and either party thereto after the marriage and during the life of the other had lawfully married another person, such marriage shall be deemed to have become void on the day on which it was so annulled or on which either party thereto lawfully married another person as aforesaid. The Act saves existing rights and interests; it leaves wives' sisters in the class of persons adultery with whom constitutes a right of the wife to sue for divorce under the Divorce Act, 1857 (*h*); it forbids a man to marry the sister of his divorced wife during her lifetime; and it leaves a clergyman of the Church of England liable to any ecclesiastical censure to which he would have been liable before the Act for contracting marriage with his deceased wife's sister, and the word "sister" includes a sister of the half-blood (*i*).

With regard to this Act, it has been held in the case of a domiciled Englishman who had gone through the form of marriage with his deceased wife's sister, a domiciled Englishwoman, in a Presbyterian church in Canada, after the passing of the Colonial Marriages (Deceased Wife's Sister) Bill, 1906, but before the Imperial Act above mentioned had come into force, and who after the marriage had returned to reside in England, that lay members of the Church of England who have been baptized and confirmed and married under the circumstances stated, are not by reason of such marriage or by their afterwards living together as husband and wife "open and notorious livers, so that the congregation be thereby offended" within the terms of the notice in the Communion Service, nor do these circumstances justify the incumbent of the parish in which they reside in excluding them from receiving the Holy Communion (*k*).

The law of **Scotland** (*l*) and **Ireland** (*a*) is similar to that of England in regard to the prohibited degrees.

Laws of the Colonies.—The prohibited degrees according to English law, with the exception (formerly) of the deceased wife's sister, are generally recognised in British Dominions, *e.g.*, New South Wales and Queensland.

(*h*) S. 27.

(*i*) 7 Edw. VII. c. 47.

(*k*) Banister *v.* Thompson, [1908] P. 362, Arches Court of Canterbury; R. *v.* Dibdin, [1910] P. 57 (Court of Appeal).

(*l*) See Encyclo. Scots Law, tit. Marriage, viii., pp. 248—250.

(*a*) See 5 & 6 Will. IV. c. 54, s. 3.

In Ontario there is a statutory Table of Affinity similar to that of the United Kingdom except for allowing marriage with a deceased wife's sister (*b*).

Law of Canada.—The better opinion would appear to be that, apart from local legislation, a marriage within the prohibited Levitical degrees of consanguinity is illegal in the Provinces of Canada which have adopted English law (*c*). It has been held in Ontario, however, with respect to a marriage prior to 1882, that by English law, as adopted in that Province, a marriage with a deceased wife's sister was not *ipso facto* void, but was to be esteemed valid for all civil purposes unless annulled during the lifetime of the parties (*d*). By federal legislation of the Dominion Parliament of that year, "all laws prohibiting marriage between a man and the sister of his deceased wife are hereby repealed, both as to past and future marriages, and as regards past marriages as if such laws had never existed" (*e*). Vested rights acquired by the issue of the first marriage are protected by a saving clause, which also provides that the Act is not to affect any such marriage when either of the parties has afterwards, during the life of the other, lawfully intermarried with any other person. A statute of 1890 provides in similar terms for the marriage of a man to the daughter of his deceased wife's sister when no law relating to consanguinity is violated (*f*); and this is accordingly the law as to such marriages throughout the whole Dominion of Canada (*g*).

Law of the United States.—In the United States generally "the written law of void or voidable within the prohibited degrees is . . . what the English unwritten law, modified by the written (*h*), was before the enactment of 5 & 6 Will. IV. c. 54" (*i*). Unless a statute defining the forbidden degrees declares the marriages it prohibits void, such marriages are only voidable (*i*).

(*b*) 2 Edw. VII. c. 23.

(*c*) Hodgins *v.* McNeill (1862), 9 Gr. 305; article in 38 Can. Law Jour., p. 99; 2 Edw. VII. (Ont.), c. 23; but see Armour's Real Property, p. 115, and article in 1 Can. Law Times, pp. 509, 569, 617, 664.

(*d*) Hodgins *v.* McNeill (1862), 9 Gr. 305; In re Murray Canal (1884), 6 O. R. 685; Kidd *v.* Harris (1901), 3 O. L. R. 60.

(*e*) 45 Vict. c. 42, Can.

(*f*) 53 Vict. c. 36, Can.

(*g*) R. S. Can. (1906), Cd. 105, s. 1.

(*h*) 32 Hen. VII. c. 38.

(*i*) Bishop, Law of Marriage and Divorce, i., s. 289; Stimson, American Statute Law, s. 6111; Parl. Rep. 1903, Cd. 1468.

Consanguinity.—In most States of the Union marriage is prohibited between parent and child, grandparent and grandchild, brother and sister of the half as well as the whole blood, uncle and niece, aunt and nephew of the half as well as the whole blood; and this prohibition extends to illegitimate as well as legitimate kindred. Marriages within the above limits are in many States declared absolutely void. Both the propositions just stated apply in Alabama, Arizona, Arkansas, California, Colorado, Idaho, Illinois, Indian Territory, Kansas, Louisiana (*k*), Montana, Nebraska, New Mexico (*l*), North Dakota, South Dakota, Utah, and Wyoming. In New Jersey marriage within the prohibited degrees is not declared void, but incestuous, and punishable as such. In North Carolina marriage within the prohibited degrees is void, but is not to be so declared after the birth of issue and the death of either party. In Virginia such marriages are void from the time of a decree of nullity or of a conviction under the criminal statutes which punish the contracting of them. Marriage between first cousins is prohibited and void in Arizona (*m*) (*n*), Arkansas (*o*), Illinois (*n*), Indian Territory (*n*), Louisiana (*n*), Missouri, Nebraska (*p*), North Dakota (*n*), Oklahoma, Pennsylvania, South Dakota (*n*), and Wyoming (*n*). In Minnesota, North Carolina, Oregon, and Wisconsin marriages are prohibited and void between persons nearer of kin than first cousins of the whole or half-blood computed by the rules of the civil law. In Colorado the provisions of the Civil Code relating to marriage do not extend the prohibited degrees of consanguinity to cousins, while the Criminal Code includes that relationship within the prohibition, and declares marriage between first cousins void.

Affinity.—There are no provisions as regards affinity in Alaska,

(*k*) In Louisiana, by a law of 1901, c. 180, a marriage thereafter contracted out of the State will not be valid in the State if the parties return to permanently reside there.

(*l*) But a judicial decree is necessary to annul the marriage.

(*m*) And also incestuous.

(*n*) The prohibition extends to illegitimate as well as legitimate relatives.

(*o*) Marriages within the prohibited degrees are absolutely void, and the prohibition continues even if the marriage on which the affinity is founded has been dissolved by death or divorce, unless it was originally void. So also in Massachusetts, Vermont, and Virginia. In Virginia, a law of 1904 prohibits the marriage of a woman with the husband of her brother's or sister's daughter.

(*p*) Law of 1905, c. 94. The prohibition extends only to first cousins of the whole blood.

Arizona, Arkansas, California, Colorado, Florida, Idaho, Illinois, Indiana, Indian Territory, Kansas, Louisiana, Minnesota, Missouri, Montana, Nebraska, Nevada, New Mexico, New York, North Carolina, North Dakota, Ohio, Oregon, Texas, and Wisconsin. In Alabama marriage is prohibited between step-parents and grandparents, and step-children and grandchildren, father-in-law and daughter-in-law, mother-in-law and son-in-law, nephew and uncle's widow, niece and aunt's widower. Such marriages are incestuous, and by s. 4889 of the Penal Code are declared absolutely void. By s. 4890 of the Penal Code it is provided that upon conviction of incest for marrying within the prohibited degrees the Court must declare the marriage null and void. Under the Civil Code, however, the issue of an incestuous marriage before annulment is legitimate. There are similar prohibitions in the Districts of Columbia, Georgia, Iowa, Kentucky (*q*), Maine, Maryland, Massachusetts (*q*), Michigan, Mississippi, New Hampshire, New Jersey (*r*), Pennsylvania, Rhode Island, South Carolina, Vermont (*q*), Virginia (*q*), and West Virginia. In Connecticut and South Dakota only marriages between step-parents and step-children are expressly prohibited, and such marriages are void. In Oklahoma and Texas there is an express prohibition only of marriages between step-parents and step-children, father-in-law and daughter-in-law, mother-in-law and son-in-law. The statute is in each case silent as to the effect of marriage within these degrees. In Wyoming there is a curious conflict between the civil and the criminal law. The former in regulating the degrees of relationship within which marriages are valid extends the prohibition no further than first cousins, and expressly enacts that prohibition against marriage shall not extend to persons related by affinity only. The latter in punishing the crime of incest includes persons related by affinity only, such as step-parent and step-child. Marriage with a deceased wife's sister was formerly invalid in Virginia (*s*), but is so no longer (*t*); and such marriages are generally lawful throughout the United States.

Re-marriage of Divorced Persons.—Under the English Divorce Act,

(*q*) See note (*o*) on previous page.

(*r*) The statute does not declare marriage within the prohibited degrees void, but incestuous and punishable as such.

(*s*) Bishop, *ad loc. cit.*, s. 752.

(*t*) Code of 1887, s. 2224.

1857 (*a*), no Anglican clergyman is bound to celebrate the marriage of any divorced person, although, if an incumbent, he must give the use of his church for such a marriage to any other clergyman willing to celebrate it. Many of the Anglican Bishops have, however, prohibited their Chancellors from issuing licences for the marriage of divorced persons, and such marriages are now generally effected before a registrar.

In many of the United States after divorce an interval is prescribed varying from six months to three years, or even for the life of the innocent party, before the guilty party can re-marry, except with the former spouse, and in some cases the Court is given a discretion to make a similar order.

Miscogenous Marriages.—In the United States marriages between white and black persons are prohibited by certain States. Thus, in Alabama, marriage between a white person and a negro, or descendant of a negro to the third generation inclusive, though one ancestor of each generation was a white person, is prohibited, null, and void (*a*). There are similar provisions in Arizona (*b*), Arkansas, California, Colorado, Delaware, Florida (*c*), Georgia, Idaho, Indiana (*d*), Indian Territory, Kentucky (*e*), Louisiana, Maryland, Mississippi, Missouri, Nebraska, North Carolina, Oklahoma, Oregon, South Carolina, Tennessee, Texas, Utah, Virginia, and West Virginia. In Nevada, marriage is prohibited between white persons and negroes or mulattoes, Chinese or Indians. Such marriages are punishable as misdemeanours, but are not declared void. There is no legislation of this character in the Districts of Columbia, Illinois, Iowa, Kansas, Maine, Massachusetts, Montana, New Hampshire, New Mexico, New York, North Dakota, Ohio, Pennsylvania, Rhode Island, South Dakota, Vermont, Washington, and Wyoming.

Slave Marriages (*f*).—In the United States slave marriages were treated by the Courts as void, when compared with the marriages of

(*a*) 20 & 21 Vict. c. 85, ss. 57, 58.

(*a*) Hoover *v.* State (1878), 59 Ala. 59. And cf. Green *v.* State (1877), 58 Ala. 190, overruling Burns *v.* State (1872), 48 Ala. 195.

(*b*) See Moore *v.* Moore (1907), 98 S. W. 1027.

(*c*) The marriage of a white person with any person having one-eighth or more negro blood is null and void. The children are bastards and incapable of taking real or personal property by inheritance.

(*d*) Marriages within the prohibition are void without legal proceedings.

(*e*) The prohibition applies to persons of Caucasian blood, or their descendants, and negroes, Mongolians, or Indians, and their descendants.

(*f*) Bishop, Law of Marr. and Div., ii., ss. 646—679.

free men. They produced no civil effects until ratified by cohabitation after emancipation (*g*). Thus the slave wife was compelled to obey her master and not her slave husband, and slaves cohabiting as husband and wife might be witnesses for and against each other. But the marriages of slaves were recognised by universal custom, and had in law every effect which could be given to them without interfering with the rights of the master.

Law of British India.—The impediments to capacity for marriage by reason of age, consanguinity, affinity, polygamy, and want of proper consent are recognised in the various systems in force in British India.

Impediments to Marriage.—Hindu Law.—Capacity.—According to Hindu ideas, marriage has for its object the performance of religious duties. It is a *sanskar*, that is an essential ceremony, held indispensable to constitute the perfect purification of a Hindu. It is the last of the ten *sanskars* necessary for the regeneration of males of the twice-born classes, and is the only one prescribed for women and for Sudras (*h*). Although the ancient authorities permitted the marriage of a eunuch on the ground that his wife would raise up a son to him by a man legally appointed for that purpose (*i*), the better opinion now is that the Courts can set aside the marriage of an impotent person (*k*). Unsoundness of mind does not invalidate a marriage (*l*). Except that in the case of the twice-born classes marriage cannot take place before investiture with the sacred thread, a male Hindu of any age can marry (*m*). A girl can marry at any age. The main restrictions on intermarriage are: (1) That the spouses must belong to the same primary caste (*n*); (2) if they are members of the twice-born classes they must not belong to the same *Gotra* (family), *i.e.*, not be connected with a common ancestor entirely through males (*o*). There are also rules with regard to

(*g*) Cf. In re Raphael (1906), 117 Louis. 967.

(*h*) Colebrooke's Digest, iii., 95, 104, n. See Venkatacharyulu *v.* Rangacharyulu (1890), I. L. R. 14 Mad., at p. 318.

(*i*) Manu, chap. ix., par. 203; Daya Bhaga, chap. v., par. 18.

(*k*) See Banerjee's Hindu Law of Marriage, 2nd ed., pp. 38, 39; Kanahi Ram *v.* Biddya Ram (1878), I. L. R. 1 All., at p. 551.

(*l*) Venkatacharyulu *v.* Rangacharyulu (1890), I. L. R. 14 Mad., at p. 318.

(*m*) Banerjee's Hindu Law of Marriage, 2nd ed., p. 35.

(*n*) Padam Kumari *v.* Suraj Kumari (1906), I. L. R. 28 All. 458.

(*o*) Banerjee's Hindu Law of Marriage, 2nd ed., pp. 54, 55.

prohibited degrees (*p*), which, although in theory extending to seven degrees on the father's side and five degrees on the mother's side, in practice prevent marriage with a girl who is nearer than the fifth degree of affinity on the father's side or the third degree on the mother's side (*q*). Polygamy is permissible to a Hindu (*r*), but a convert to Christianity cannot marry again while the earlier marriage subsists (*s*).

Except in the case of a special custom, the Hindu law did not permit the re-marriage of widows. Indian Act XV. of 1856 makes such marriage lawful, but excludes the re-marrying widow from all rights and interests in the property of her deceased husband.

The right and duty of giving a boy or girl in marriage devolves in succession upon the father (*a*), the paternal grandfather, the brother (*b*), and other paternal relations up to the tenth degree of affinity (*c*). The right then devolves according to the Mitakshara upon the mother and her male relations, but according to the Bengal School the right of the mother is postponed to that of the maternal grandfather and maternal uncle (*d*). A marriage otherwise legally contracted, and performed with the necessary ceremonies, is not rendered invalid by the mere absence of the consent of the guardian (*e*). The exercise of fraud or force upon the minor would, however, justify a Court in declaring the marriage void (*f*).

Madras Act IV. of 1896 provides for the marriages of certain Hindus in the Madras Presidency.

Marriage.—Muhammadan Law.—The Muhammadan law permits a father, or a male paternal ancestor in the male line, to contract a minor in marriage (*g*), and gives similar power to the other agnate

(*p*) See rules in Mayne's Hindu Law, 7th ed., par. 86; Banerjee's Law of Marriage, 2nd ed., pp. 64—66.

(*q*) Bhattacharya's Hindu Law, 2nd ed., p. 91.

(*r*) Thapita Peter *v.* Thapita Lakshmi (1894), I. L. R. 17 Mad., at p. 239.

(*s*) Indian Act V. of 1872, s. 60.

(*a*) Nanabhai Ganpatrav Dhairyavan *v.* Janardhan Vasudev (1886), I. L. R. 12 Bom., at p. 118.

(*b*) Ex parte Jankypersaud Agarwallah (1859), 2 Boulnois, 28, 114.

(*c*) Strange's Hindu Law, i., 36; see Brindabun Chandra Kurmokar *v.* Chundra Kurmokar (1885), I. L. R. 12 Calc., at p. 142.

(*d*) Banerjee's Hindu Law of Marriage, 2nd ed., pp. 43, 44.

(*e*) Mulchand Kuber *v.* Bhudhia (1897), I. L. R. 22 Bom. 812.

(*f*) See Venkatacharyulu *v.* Rangacharyulu (1890), I. L. R. 14 Mad., at p. 320.

(*g*) Baillie's Digest, i., 45.

relations in the order in which they would be entitled to inherit the estate of the minor. In the latter case only the marriage can be repudiated by the minor on attaining puberty (*h*). Polygamy is allowed within the limit of four wives, but among Shiahs it is practically unrestricted, as according to their doctrine a man may enter into a temporary marriage for any period, however short, with any number of women (*i*).

A Muhammadan may marry a woman of any race, but a marriage by him with a woman who does not believe in a revealed religion is voidable (*k*). A marriage of a Muhammadan female with any one but a Muhammadan is also voidable (*l*). The Courts will not recognise a marriage in India between a Muhammadan and a Christian unless it be solemnised in accordance with the Christian Marriage Act, 1872, *i.e.*, by a minister of religion, a marriage registrar, or a person licensed to grant certificates of marriage between native Christians (*m*).

The following blood relations are prohibited to a Muhammadan in marriage: (1) His mother or other ascendant; (2) his daughter or other descendant; (3) his sister or step-sister; (4) his niece or other descendant of his brother or sister; and (5) the sister of any ascendant. He is also prohibited from marrying the following relations by affinity, viz., his wife's mother, grandmother, daughter, or granddaughter, and the wife of his father's paternal grandfather, son or grandson, or a woman with whom one of those relations has had an opportunity of having intercourse (*n*). A marriage between a foster brother or sister is voidable if there was an interval of not more than two years, or according to some authorities two and a half years, between the birth of the one and the suckling of the other (*o*).

The last rule as to intermarriage is stated by Sir Roland Wilson (*p*) in the following words: "A man is also forbidden to have two wives at the same time, so related to each other by consanguinity, affinity, or fosterage that if either of them had been a male they would have been prohibited from intermarrying, but there is no objection to marrying two such women successively, so that, for instance, a man

(*h*) Baillie's Digest, i., 45, 46.
(*i*) *Ibid.*, ii., 39.
(*k*) Wilson's Digest, ss. 39, 39 (a).
(*l*) *Ibid.*
(*m*) Indian Act XV. of 1872, ss. 4, 5.
(*n*) Wilson's Digest, ss. 35, 36.
(*o*) *Ibid.*, s. 37.
(*p*) *Ibid.*, s. 38.

may marry his deceased, or divorced, wife's sisters" (*q*). A widow, or divorced woman, can re-marry, but she is bound to observe an interval of from three months to four months and ten days or till delivery in case of pregnancy, between the termination of one marriage by divorce or death and the contracting of the other. This interval is termed *Iddat* (*r*).

Under Muhammadan law a wife may obtain a judicial divorce on the ground of her husband's impotence anterior to marriage if she was unaware of the fact (*s*). The divorce is suspended for a year after decree in order to ascertain whether the defect is removable (*s*).

Christian Marriages.—There are Acts of the Indian Legislature relating to the marriage of other members of the community. Indian Act XV. of 1872 provides for the marriage of persons professing the Christian religion by ministers of religion or by marriage registrars. The consent of the father or guardian or mother is necessary to the marriage of a minor, and a marriage cannot take place between native Christians unless the man is over sixteen and the woman over thirteen years of age.

Parsee Marriages.—Indian Act XV. of 1865 provides for the marriage and divorce of Parsees. A list of the degrees of consanguinity and affinity prohibited among Parsees is to be found in the *Gazette of India*, September 9th, 1865, pp. 981, 982. The marriage must be solemnised according to the Parsee form or ceremony called "Asirvad," by a Parsee priest, in the presence of two Parsee witnesses, and the consent of the father or guardian must be given to the marriage of a Parsee who has not completed twenty-one years of age.

(*q*) A marriage with a living wife's sister was held to be void in Aizunnissa Khatoon *v.* Karimunnissa Khatoon (1895), I. L. R. 23 Calc. 130.

(*r*) Wilson's Digest, s. 31.

(*s*) *Ibid.*, s. 73.

CHAPTER III.

THE MARRIAGE CEREMONY.

Solemnities Essential to the Validity of Marriage.—Marriage contracts may relate to: (a) Betrothals, which were formerly distinguished as *de futuro* or *de præsenti*; (b) marriages (*a*). The former are now generally religious only, and the law only regulates the latter class, except so far as the former fall under the head of Promise of Marriage (*b*).

Three main classes of marriage ceremonies are required: First, the purely civil, such as those celebrated in Argentina, Belgium, France, Germany, Holland, Italy, Mexico, Roumania, and Switzerland; second, the purely religious, such as those celebrated in Austria (except for persons not belonging to any religious denomination), and in countries acknowledging the spiritual jurisdiction of one or other of the branches of the Eastern Church, such as Russia, Greece, and Servia; third, the mixed, civil, and religious, such as those in Great Britain.

To make a marriage contract valid as a civil contract it must be celebrated in the manner and with the formalities which the law requires.

Civil Law.—It has been seen that no particular ceremony was necessary to constitute the status under the civil law.

Canon Law.—The solemnities required by the canon law to constitute the contract of marriage have been already mentioned. While the ancient canon law of Europe reverenced marriage as a sacrament, yet it still so far respected its natural and civil origin as to consider that where the natural and civil contract was formed, it had the full essence of matrimony without the intervention of a priest. But by the decree adopted at the twenty-fourth session of the Council of Trent, the intervention of a priest was required by the Church of Rome as positively essential to the validity of marriage.

(*a*) See pp. 14, 15, 17, 18, 44. (*b*) See pp. 69, 156 *et seq.*, 174 *et seq.*

This decree, like others of this Council, was not admitted as of authority either in England or in some other States of Europe; but the ancient canon law continued to form the basis of their matrimonial law (*c*).

SECTION I.

Roman-Dutch Law.

Betrothals (*d*) **or Sponsalia de Futuro.**—In the Roman-Dutch law betrothals were recognised as promises of marriage binding upon the persons making them.

Once the betrothal had become a binding contract (*vinculum juris*) between the bridegroom and the bride (*e*), the parties to that contract were mutually bound to fulfil their obligations, in the same way as formerly the *mundoaldus* and the bridegroom had been mutually bound, each to carry out his part of their contract. In the same way as the bridegroom had been entitled to compel the *mundoaldus* to hand over his ward, so the parties to the later contract were mutually entitled—since it had become a rule that the marriage ceremony should be performed before the magistrate or the priest—to compel each other to go through it and complete the marriage contract (*f*).

The bride was obliged to remain faithful to her bridegroom. If she were unfaithful, she and her accomplice might even be condemned to death, or the death sentence might be commuted into the payment of a *weergeld* to the bridegroom.

In order to make a betrothal binding it was not necessary in the time of the Republic that in entering into the contract a particular form should be observed. The solemnities of former times had become obsolete, and *sponsalia* might be entered into in any way in which an ordinary contract might be legally concluded, either verbally or in writing, or even by message through a third party (*g*).

(*c*) Dalrymple *v.* Dalrymple (1811), 2 Hagg. C. R. 54, per Lord Stowell, at p. 64; 17 Rul. Cas. 10.

(*d*) Cf. J. Cos, Verhandeling over het huwelyk, pars. 1—122; H. Brouwer, de Jure Conn., lib. 1; J. Voet, ad Pand., xxiii. l. 1; V. d. Keessel, Thes. Sel., Thes. 47—61, 85, 86, and his Dictata to the same.

(*e*) For the history, cf. Chap. I., s. 2.

(*f*) Fock. Andr., Het Oud Ned. B. R., ii., p. 145.

(*g*) J. Voet, ad Pand., xxiii., l. 1; Fock. Andr., Annot. ad Grot. Introd., i., 5, 1, on p. 9; Het Oud Ned. B. R., ii., p. 146.

The principal requirement was the consent of the parties. The parties should (a) be capable of giving their consent; (b) they should give their consent freely, and (c) should do so beyond doubt.

(a) All persons who were capable of being united in lawful marriage were capable of contracting *sponsalia*. Minors under the age of puberty could not validly bind themselves by *sponsalia* (*h*). A widow was considered to be able to give a valid promise of marriage within the three months required for her widowhood after the death of her husband (*i*). Minors below the age of twenty-five in the case of men, and twenty in the case of women, could only validly bind themselves with the consent of those of whom they required the consent for the contracting of a valid marriage (*k*). The consent might be given after the *sponsalia* had been entered into (*l*). Women between twenty and twenty-five years of age could validly enter into a betrothal without the previous consent of their parents, but could, if their parents were dead and they were under guardianship, obtain a *restitutio in integrum* and thus rescind the contract (*m*). This right to obtain a *restitutio in integrum*, as a general remedy of minors who had (even with their parents' consent) entered into a contract which turned out to be to their detriment, equally applied to betrothals (*n*). If one and the same person entered into two successive betrothals, either of them valid by itself, the former one prevailed, except if the latter one had been followed by marriage (*o*).

(b) The *sponsalia* were subject to the rules of ordinary contracts. If the consent had not been given freely and they had been entered into through fraud, or under duress or even in some cases under mistake, they could be rescinded, unless they were renewed after the fraud or error had been detected, or the duress had

(*h*) H. Brouwer, de Jure Conn., i., 3, 21; V. d. Keessel, Thes. Sel., Thes. 52; to the contrary, J. Voet, ad Pand.. xxiii., l. 2.

(*i*) J. Voet, ad Pand., xxiii., l. 2.

(*k*) H. Brouwer, de Jure Conn., i., 15, 2; V. d. Keessel, Thes. Sel., Thes. 50, 53, and authors quoted; V. d. Linden, Koopmansh., i., 3, on p. 16; Fock. Andr., Annot. ad Grot. Introd., ii., p. 10.

(*l*) V. d. Keessel, Thes. Sel., Thes. 50.

(*m*) V. d. Keessel, Thes. Sel., Thes. 54; Fock. Andr., Annot. ad Grot. Introd., ii., on p. 10.

(*n*) V. d. Keessel, Thes. Sel., Thes. 61.

(*o*) H. Brouwer, de Jure Conn., i., 3, 21; V. d. Keessel, Thes. Sel., Thes. 58, 59; J. Voet, ad Pand., xxiii., l. 20, and authors quoted; Fock. Andr., Annot. ad Grot. Introd., ii., on p. 10.

ceased (*p*). They could be made subject to a condition, and in that case they only became binding on the fulfilment of the condition. The condition could be waived by subsequent *concubitus*, provided that the conditions were such as were not considered essential to a valid marriage (*q*). Impossible conditions and conditions *contra bonos mores* vitiated betrothals (*r*).

(c) *Sponsalia* were not presumed. They must be proved by the person who alleged that they had taken place, and the proof must be conclusive (*s*).

Dissolution of Sponsalia.—This took place: (1) By mutual consent. According to the rules of the Roman Catholic Church the *sponsalia publica* (the publication of the banns) could not be dissolved by mutual consent. Under the influence of the *jus canonicum* this rule was taken over by the Dutch lawyers of the sixteenth century (*t*). But, with the diminution of the influence of the Roman Catholic Church the difference between *sponsalia de præsenti* and *de futuro* disappeared, and this rule became obsolete (*u*).

(2) By either party. As a general rule, neither party could at his or her own will rescind the contract and free himself or herself from its obligations by returning the *arrha*. The other party could, nevertheless, insist on the marriage taking place (*v*). Betrothals might, however, be broken off by either party if anything occurred or arose after the contract had been entered into, which, if it had been known to the rescinding party previously to the betrothal, would have deterred him or her from entering into the *sponsalia*.

(*p*) H. Brouwer, de Jure Conn., i., cc. 17—19; J. Voet, ad Pand., xxiii., l. 4.

(*q*) H. Brouwer, de Jure Conn., i., c. 21; J. Voet, ad Pand., xxiii., l. 6; V. d. Keessel, Thes. Sel., Thes. 47.

(*r*) H. Brouwer, de Jure Conn., i., 21, 13—27; V. d. Keessel, Thes. Sel., Thes. 48; J. Voet, ad Pand., xxiii., l. 8; V. d. Linden, Koopmansh., i., 2, on p. 15.

(*s*) Grotius, Introd., i., 5, 16; Holl. Cons., iii., b., Cons. 90, pars. 5—8; v., Cons. 84; Utr. Cons., iii., Cons. 2, par. 3; S. van Leeuwen, Cens. For., i., l. 11, 10; Lybreghts, Reden. Vertoog., i., 6, 10—16; H. Brouwer, de Jure Conn., i., c. 23; J. Voet, ad Pand., xxiii., l. 11; V. d. Keessel, Thes. Sel., Thes. 51, 86; V. d. Linden, Koopmansh., i., 2, on p. 15; Fock. Andr., Annot. ad Grot. Introd., ii., on p. 11.

(*t*) Holl. Cons., iv., Cons. 32 (1558); J. Voet, ad Pand., xxiii., l. 18.

(*u*) Boel-Loenius, Dec. en Obs., Cas. 42 (1629); J. Voet, ad Pand., xxiii., l. 20 *in fin.*; V. d. Keessel, Thes. Sel., Thes. 49; Fock. Andr., Annot. ad Grot. Introd., ii., on p. 10.

(*v*) V. d. Keessel, Dictata at Thes. 57 *in fin.*; V. d. Linden, Koopmansh., i., 3, 2, on p. 16.

Such reason would have to be proved by the party alleging it, under oath (*x*).

Besides this general reason for rescinding the contract there were certain special circumstances which were considered to constitute lawful reasons for either party to dissolve the contract.

Causes of Dissolution.—These were the following (*a*):

(1) Incurable insanity of one of the parties; (2) contagious disease contracted by one of the parties which was either incurable, or even, if cured, dishonourable (*lues venerea*); (3) unchastity of either party, if voluntarily committed; rape did not constitute such a reason; (4) change of religion of either party, from Protestantism to Roman Catholicism or Judaism; (5) deadly and irreconcilable hatred between the parties; (6) impotence, either through an incipient cause or by forcible accident; (7) if either party were maimed for some dishonourable reason, *e.g.*, the loss of a hand by way of criminal execution; (8) loss of honour, respect, or good name by either party through a criminal offence of which he or she was found guilty, bankruptcy, or *cessio bonorum*; (9) loss of property on the part of the bridegroom, if it incapacitated him to give the promised *dos* (*b*); (10) if a betrothed minor obtained *restitutio in integrum* (*c*); (11) absence of one of the parties for a period of some two or three years without any news being heard of him or her (*d*).

In all other cases a one-sided withdrawal from the contract entitled the other party to an action for the payment of damages on account of breach of contract. The breach might in this sense be an open act or a formal withdrawal, or necessarily form part of the party's action in rendering it impossible for himself or herself to perform the contract, *e.g.*, by a marriage with another person (*e*). If, in that case, the first betrothed had known of the intended second

(*x*) J. Voet, ad Pand., xxiii., l. 15; Fock. Andr., Annot. ad Grot. Introd., ii., on p. 10.

(*a*) S. van Leeuwen, Cens. For., i., l. 11, 27, and 31; J. Brouwer, de Jure Conn., i., c. 25; J. Voet, ad Pand., xxiii., i., 13—15; Schrassert, Codex Gelr. Zutf., i., 478; V. d. Linden, Koopmansh., i., 3, 2, on p. 16; Fock. Andr., Annot. ad Grot. Introd., ii., pp. 10, 11; Het Oud Ned. B. R., ii., 146.

(*b*) S. van Leeuwen, Cens. For., i., l. 11, 31.

(*c*) V. d. Keessel, Thes. Sel., Thes. 61.

(*d*) Schorer, Notes ad Grot. Introd., i., ss. 2 *in fin.*

(*e*) J. Voet, ad Pand., xxiii., l. 12.

marriage, and had not intervened after the banns had been published and before the marriage had been celebrated, he or she lost his or her claim for damages (*f*).

The amount of the damages had to be assessed by the Court. Parties might, in entering into their contract of betrothal, stipulate between themselves a certain sum by way of a fine for breach of contract, *e.g.*, that the guilty party would have to pay as damages four times the amount of the *arrha* (*g*).

Each party could insist that the contract should be specifically performed. A refractory party could be compelled to complete the contract at any moment after the required formalities for the marriage had been observed, although no particular time had been stipulated for its performance (*h*).

The disappointed party could bring an action to enforce the contract, and the Court could either (1) condemn the recalcitrant party to remain in prison until he or she had consented, or (2) solemnly declare that the marriage would be considered as having been solemnised; or (3) appoint a third person to represent the refusing party, and to go through the marriage ceremony in his or her name. In the last case (3) the party who was willing to perform the contract appeared, together with the representative, before the magistrate or the Church dignitary, and there made the vows which were binding for the absentee. The consent of the absentee was considered to have been sufficiently expressed by the betrothal. This method was often resorted to when the bride was pregnant or in order to constitute community of property (*i*).

Marriage: Formal Requirements. — It has been pointed out above (*k*), that mainly through the influence of the Church, the

(*f*) V. d. Keessel, Thes. Sel., Thes. 85.

(*g*) Groenewegen, Leg. Abr., Cod. v., l. 9, 10; V. d. Keessel, Thes. Sel., Thes. 57 and Dictata *ad loc. cit.*, and Thes. 85; H. Brouwer, de Jure Conn., i., 24, 26; J. Voet, ad Pand., xxiii., l. 12.

(*h*) Holl. Cons., iv., Cons. 368; Echtreglement of the States-General, March 18th, 1656, art. 22; Wessels, History of the R. D. Law, pp. 342—433.

(*i*) Fock. Andr., Het Oud Ned. B. R., ii., 146; S. van Leeuwen, Cens. For., i., l. 11, 26, and i., l. 14, 8, and 9; Boel-Loenius, Decis., Cas. lv., pp. 357 *et seq.*; J. Cos, Verhandeling over het huwelyk, par. 122; H. Brouwer, de Jure Cons., i., 24, 20—25; J. Voet, ad Pand., xxiii., l. 12; Kersteman, Regtsgel. Woordenboek, *voce* Trouwbeloften; V. d. Keessel, Thes. Sel., Thes. 57; V. d. Linden Koopmanshandb., i., 3, 2, on p. 16.

(*k*) Chap. I., pp. 14—15, 38—40.

observation of certain formalities became essential to a valid marriage in the Low Provinces. It was also stated that these formalities were partly of a civil, partly of a religious character, according to the religious feelings of the parties.

These formalities consisted of the publication of the banns in the church or at a public place, and the solemnisation of the marriage within a certain period thereafter.

As soon as the publication of the intended marriage had become essential to the validity of the marriage, it was necessary that a civic authority or a minister of religion—before he was allowed to solemnise a marriage—should have proof that such publication had taken place on three consecutive Sundays or market-days without any intervention by third parties on account of any prohibition which might be alleged to exist against such marriages on any of the grounds set out in the preceding chapter.

On these general lines the formalities were similar in the different Provinces, but they were for each Province contained in a separate *Ordonnantie* or *Echtreglement* which contained provisions in accordance with local customs and historical requirements (*l*).

It would lead too far to set out all these different laws and customs in this respect. It will be sufficient here to give the general rules which prevailed in the Provinces of Holland and Zeeland, and the so-called possessions of the Generaliteyt.

The publication took place in the church, or from the *puie* of the town hall, or from any other place which was assigned for this purpose in the parish where the parties, or either of them, had had their last fixed residence within a year and a day, and in case they had moved within that or some longer period also in the parish or parishes where they or either of them had had their fixed residence previously (*m*).

Leave for the publication of the banns had to be granted by the civic or Church authorities of the place where the publication had to take place and be applied for by the parties in person. Leave was not granted if these authorities were of opinion that objections

(*l*) Fock. Andr., Bijdragen, i., 65 – 136.

(*m*) Polit. Ordonn. (Holland), April 1st, 1580, art. 3; Polit. Ordonn. (Zeeland), February 8th, 1583, art. 6, providing that the publication should be made by the Church authorities exclusively; Grotius, Introd., i., 5, 16; V. d. Keessel, Thes. Sel., Thes. 83; V. Leeuwen, R. H. R., i., 14, 3.

existed to the marriage, either on account of absence of consent or on account of any other disqualification (*n*).

In case of doubt they could refer the questions to be settled by the Judge or such other authority as might be provided in any particular place (*o*), and against their decision an appeal lay to those authorities.

From the first publication until the solemnisation of the marriage any third person who was entitled to intervene could do so by registering his or her opposition and by issuing a writ of summons in accordance with the custom of the place (*p*). The dispute was heard by the Judge or the States (*q*).

The right to intervene was granted to those whose interests were directly affected by the marriage or who had to guard the interests of the contracting parties.

Dispensation from the provisions regarding the publication of the banns could be granted by the States, who had the power, which they did not seldom exercise—to delegate their authority or part thereof to other (civic) authorities (*r*).

All marriages solemnised without the due publication of the banns were void and the children born from such marriages were illegitimate (*s*).

The celebration of the marriage had to take place, in the Provinces of Holland, during the time of the Republic, either in church before the minister of religion or before the civic authorities (*t*). In 1795, the solemnisation of the marriage by the civil marriage officer became essential and obligatory (*a*).

In case the solemn celebration of the marriage (*verba de præsenti*)

(*n*) Polit. Ordon. (Holland), April 1st, 1580, art. 3; Polit. Ordon. (Zeeland), February 8th, 1583, arts. 6, 21, with the above-mentioned restriction as to Church authorities; Grotius, Introd., i., 5, 16.

(*o*) Fock. Andr., Bijdragen, i., 182—184.

(*p*) Polit. Ordon. (Holland), April 1st, 1580, art. 3 jo., 12; Polit. Ordon. (Zeeland), February 8th, 1583, art. 6, 21; Fock. Andr., Bijdragen, i., 184.

(*q*) Grotius, Introd., i., 5, 16; Fock. Andr., *loc. cit.* 184; Arntzenius, Inst. J. C. Belg., ii., 3, 61.

(*r*) Fock. Andr., Bijdragen, i., 131—132.

(*s*) Polit. Ordon. (Holland), April 1st, 1580, arts. 3, 16; Grotius, Introd., i., 5, 16; in the Polit. Ordon. of Zeeland (February 8th, 1583), the nullity is not specially mentioned anywhere, but seems to be intended.

(*t*) Polit. Ordon. (Holland), April 1st, 1580, art. 3; Plakaat, July 6th, 1580, Gr. Pl., viii., 529; Arntzenius, Inst. Jur. Belg. Civ. d., i., pars. 64 *et seq.*; Fock. Andr., Bijdragen, i., 130.

(*a*) Plakaat, May 7th, 1795; V. d. Keessel, Thes. Sel., Thes. 84; V. d.

were not duly observed, the marriage was considered to be null and void in the Province of Holland (*b*). According to the laws of the Province of Zeeland the contracting parties were considered liable to punishment, but the marriage was nevertheless considered a valid one (*c*).

South Africa.—Cape Colony.—In Cape Colony this matter is regulated by Order in Council of September 7th, 1838 (*d*) ; Order in Council of April 3rd, 1840; Act 4 of 1848 ; Act 12 of 1856 ; Act 16 of 1860 ; Act 21 of 1878 ; Act 9 of 1882 ; Act 40 of 1892 ; Act 28 of 1897 ; Act 27 of 1902 ; Act 11 of 1906.

The publication of the banns is essential to the validity of a marriage unless the parties have obtained licence to be married without them.

The publication takes place either : (a) in the parish church of either of the contracting parties by the minister on three consecutive Sundays during divine service, or (b) by the resident magistrate, in case no religious ceremony is contemplated, of the district where either of the contracting parties is residing, to be published in some conspicuous place near the Court House and to be read by the resident magistrate on three consecutive Court days, or (c) by a marriage officer to be appointed by the Governor. Whenever a marriage officer other than the resident magistrate is appointed, the mode of the publication of the banns is laid down by the Governor at the same time (*e*).

Notice of the contemplated marriage must be given to the parish minister or the resident magistrate or marriage officer.

Objections must be lodged with either of these authorities. From their decisions an appeal lies to the Supreme Court.

Unless the marriage is celebrated within three months after the publication of the banns, the publication becomes void.

The celebration or solemnisation of the marriage has to take place in either of the churches where the banns have been published, or in the Court House or office of the magistrate. Each of these authorities has to keep a register (*f*).

Linden, Koopmansh., i., 3, 6, on p. 26.

(*b*) Polit. Ordon. (Holland), April 1st, 1580, art. 13.

(c) Polit. Ordon. (Zeeland), February 8th, 1583, art. 6 in fine jo. art. 22.

(*d*) Cf. the Ordinances and Acts mentioned on p. 91, and Maasdorp, Inst. of Cape Law, pp. 25, 26, 27.

(*e*) *Ibid.*

(*f*) Maasdorp, Inst. of Cape Law, i., ch. 5, and authorities quoted.

In the case of a widower or widow no banns are allowed to be published, nor a marriage to be celebrated, unless it is proved to the minister, magistrate, or marriage officer that the inheritance of the minor children of the former marriage has been duly secured by deed of *kinderbewys* (*g*).

The publication of the banns may be avoided by obtaining a special marriage licence, to be granted by the resident magistrate on the fulfilment of certain statutory requirements for suspending the publication of the banns or of the marriage notices. The marriage has to take place within three months after the date of the licence, and can be celebrated in any church or before any resident magistrate in the Colony (*h*).

Natal.—The governing statutes are considered below (*hh*).

Transvaal.—The governing statutes are stated below (*hh*).

Orange Free State.—The marriage formalities are regulated by Act 26 of 1899.

In **Ceylon**, Ordinance No. 19 of 1907; and in **British Guiana**, Ordinance No. 25 of 1901 and No. 29 of 1902, are the ruling statutes, and are considered below (*i*).

SECTION II.

Laws of France, Belgium, Germany, Austria, Hungary, Italy, Spain, and Switzerland.

Promise of Marriage.—In the modern Continental Codes a promise of marriage is no longer an obligation enforceable *in specie*, but its breach founds a claim for damages.

The provisions of the chief Continental Codes on this subject may be shortly stated.

Law of France.—In France (and Belgium) a promise of marriage creates no legal obligation to contract the marriage (*j*), and a penal clause designed to secure such fulfilment is null. But failure without just reason to execute a promise of marriage gives rise to a claim for damages, not only for the material but also for the moral prejudice resulting from it, particularly where the promise has been followed by sexual relations (*k*).

(*g*) Act 12 of 1856 and other Acts quoted by Maasdorp, *loc. cit.*, n. 23.

(*h*) Act 9 of 1882, ss. 3, 4.

(*hh*) See pp. 211, 212.

(*i*) See pp. 206, 210.

(*j*) Aubry et Rau, v., p. 33, n. 26; Laurent, ii., s. 306; D. O. N. (1869), p. 408; C. Lyon, Dalloz, 1870, v., 290.

(*k*) Dalloz, Suppl. *s.v.* Mariage, nn. 49 *et seq.*; Huc, ii., n. 6; M. *v.*

In some of the Continental Codes the matter is dealt with in the same sense by express provision.

German Law.—Specific performance of a promise of marriage cannot be enforced, although this was the law formerly in some parts of Germany; the breach only gives a right to damages, and no claim for damages arises where a party withdraws for good reason (*l*). The party causing the withdrawal of the other is liable to the other in damages (*m*), and damages can be recovered in case of seduction. If the marriage does not take place each party can reclaim the gifts given to the other, except in case of death (*n*).

The **Austrian** and **Hungarian** laws on this point have similar provisions to those of the German Code (*o*).

Italian and Spanish Law.—The Italian (*p*) and Spanish (*q*) Civil Codes provide that while breach of promise of marriage gives rise to no legal obligation to contract the marriage, yet if the promise has been made by public act or by act under private signature by a person who had attained the age of majority, or by a minor authorised by the persons whose consent is necessary for the celebration of marriage, or if it results from publication made by the registrar, the person who refuses to execute the promise without just reason is bound to indemnify the other party for expenses incurred in view of the promised marriage. Under both Codes the prescriptive period for the action is one year.

Swiss Law.—The Swiss Code also forbids the specific enforcement of promises of marriage, and does not allow contractual penalties for a breach of such a promise to be legally enforced (*r*). Actions may, however, be brought for the repayment of expenses incurred in good faith in expectation of the marriage, or for damages for any severe injury to personal conditions, as well as for the return of presents (*s*).

B. (1892), C. Dijon, Sirey, 1892, ii., 197; and cf. N. *v.* L. (1892), C. Dijon, *ibid.*, ii., 198; Dalle *v.* P. (1901), C. Nimes, Sirey, 1902, ii., 206.

(*l*) Code Civil, ss. 1297, 1298.

(*m*) S. 1299.

(*n*) Ss. 1300, 1301.

(*o*) Austrian Civil Code, arts. 45, 46, 1247; Hungarian Law, XXXI. of 1894, arts. 1—5.

(*p*) Arts. 53, 54.

(*q*) Arts. 43, 44.

(*r*) Art. 91. Specific performance of a promise to marry is forbidden also by the existing Federal law of civil status and marriage, art. 26.

(*s*) Arts. 92—94.

Until the coming into force of the Code the matter is governed by cantonal law (*t*).

Formalities of Marriage.—The rules of the Continental Codes for the forms governing the constitution of the marriage contract and the rights of interested parties to oppose its celebration do not differ materially from each other.

Law of France.—Old French Law.—Celebration of Marriage.—The decrees of the Council of Trent were never admitted as of authority in France. The Ordinance of Blois, art. 40, the Edict of Henry IV., of December, 1606, and the Declaration of Louis XIII., 1639, art. 1, constituted the marriage law of that kingdom before the Revolution. It was required that at the celebration of the marriage, four witnesses should assist with the *curé*, who was to receive the consent of the parties, and join them together in wedlock according to the form practised in the church. The priest was prohibited from celebrating the marriage of any other persons than those who were his own parishioners, unless with the written permission of the *curé* or Bishop. There must have been a previous publication of banns for three successive days in the church of the parish in which the parties resided, or in the churches of both their parishes, if they resided in different parishes (*a*).

The law of France, until 1787, made no distinction between Protestants and Roman Catholics. The former, if their religious scruples restrained them from submitting to a marriage by a Roman Catholic priest, were unable to give to their issue the civil rights of a legitimate marriage. Louis XVI., by an edict of November 16th, 1787, rendered valid the marriage of Protestants, if it were celebrated before certain judicial functionaries. Thus, as regarded Protestants, marriage was considered as a civil contract, but with Catholics it continued to derive its sanction from religion, until 1791, when, by the constitution of that year, it was declared, "that the law regarded marriage only as a civil contract" (*b*).

Code Civil.—Publication of Banns.—The Code Civil has adopted the

(*t*) See Der Verlöbnisbruch im modernen Recht, mit besonderer Berücksichtigung des Schweizerischen Privatrechts, by Dr. Hans Zihlmann (Zürich, 1902); Huber, Schweizerisches Privatrecht, i., 188—201.

(*a*) Pothier, Traité du Mariage, ss. 349, 362; D'Aguesseau, tom. 5.

(*b*) Esmein, Le Mariage en droit Canonique, p. 46; The French Revolution, Cambridge Modern History, vol. viii., 734.

principle of the old law. It requires that the marriage should be celebrated in public, before the civil officer of the commune where one of the spouses had his or her domicil or residence at the date of the publication, provided for by art. 63(*c*), and in case of public notification being dispensed with under art. 169(*d*), at the date of such dispensation (*e*).

Before the celebration of any intended marriage the civil officer was formerly required to make two public notifications, at an interval of eight days, the one from the other, but each on a Sunday, before the door of the Mairie (town-hall). Art. 1 of the law of June 21st, 1907 (*f*)—a law of which the *motif* was thus described by its author, the Abbé Lemire (*g*), "Il importe que la famille ne soit pas une sompteuse demeure, d'accès difficile, ouverte seulement a ceux qui ne reculent ni devant les formalités ni devant les dépenses"—has, however, suppressed the second of these two public notifications of marriage, and the provision that the notification must be made on a Sunday. The notification must specify the Christian names, surnames, profession, and domicil and residence of the intended husband and wife, their civil quality, whether minors or adults, and the Christian names, surnames, profession, and domicil of the father and mother of each. The notification must also set forth the day and hour on which, and the place where, it has been made (*h*).

The notification is required to be affixed to the door of the Mairie, and to be continued so affixed during ten days, which must include two Sundays. The marriage is not to be celebrated sooner than the tenth day after the notification, exclusive of the day of such notification (*i*).

If the marriage be not celebrated within a year from the expiration of the period of delay imposed by the notification it cannot be celebrated at all, until a new notification shall have been made in the manner above directed (*k*).

(*c*) *Infra*.

(*d*) *Infra*.

(*e*) Art. 165, as enacted by art. 15 of the law of June 21st, 1907.

(*f*) This law is applicable to Algeria, as well as to the Colonies of Guadaloupe, Martinique, and Réunion: art. 23.

(*g*) Ann. de Lég. Fran., 1908, p. 156.

(*h*) Art. 63, as modified by the law of June 21st, 1907, art. 1.

(*i*) Art. 64, as modified by art. 2 of the law of June 21st, 1907.

(*k*) Art. 65, as modified by art. 3 of the law of June 21st, 1907.

It is required that the notification prescribed by the preceding art. 63 be made at the municipality of the place where each of the contracting parties is domiciled or resident (*l*).

When the actual domicil or actual residence has not been of longer continuous duration than six months the publication must also be made at the municipality of the last place of domicil, and, in default of domicil, at the last place of residence; where such residence has not lasted continuously for six months, the notification must also be made at the place of birth (*m*).

If the parties contracting marriage, or either of them, be, in relation to marriage, subject to the power of another person, such notification must be moreover made at the municipality of the place of domicil of those to whose control such party or parties contracting marriage may be subject (*n*).

A dispensation from the notification and from all delay may be obtained on serious grounds of expediency from the Procureur de la République for the arrondissement in which the marriage is to be celebrated (*o*).

A marriage contracted in a foreign country between two natural-born French subjects, or between a French subject and a foreigner, is valid, if celebrated according to the established form of such foreign country, provided that it has been preceded by the notification thereof in France, prescribed by art. 63 (*p*); and provided that such French subject shall not have contravened any of the provisions referred to in the preceding chapter of the Code (*q*). It

(*l*) Art. 166, as enacted by art. 16 of the law of June 21st, 1907.

(*m*) Art. 167, as enacted by art. 17 of the law of June 21st, 1907.

(*n*) Art. 168, as modified by art. 18 of the law of June 21st, 1907. See Circular of March 14th, 1831; Sirey, 1836, 2, 342; Demolombe, iii., p. 347, s. 224; Baudry-Lacan., ii., p. 194. In practice, where one of the parties is a foreigner, the Maire, before proceeding to the celebration, requires that the foreigner should produce, in addition to his birth certificate, a *certificat de coutume* from the authorities of his nationality, attesting that he has capacity to contract marriage, and that due publications have been made in the country of his nationality, or that for some reason they cannot take place. In the case of a British subject this certificate is given either by the Consul or by an English legal practitioner whose signature is legalised by the Consul.

(*o*) Art. 169, as enacted by art. 22 of the law of June 21st, 1907. As to the grounds of dispensation, see Baudry-Lacan., ii., p. 191.

(*p*) See as to this proviso, Demolombe, iii., p. 339, s. 220; Laurent, iii., pp. 35, 36, ss. 21, 22.

(*q*) Art. 170, as modified by art. 19 of the law of June 21st, 1907; Toullier, n. 1, i., s. 578.

follows that the Frenchman must satisfy the conditions of capacity prescribed by his national law, irrespective of the rules of the territorial law on that point (*r*).

But the omission to publish the banns in France will not necessarily render the marriage null. The earlier cases under art. 170, which interpreted it as obliging the Courts to declare the invalidity of the marriage for want of publication, have not been followed in recent years, and the current of the present decisions is now definitely settled in favour of allowing a discretion to the Judges, who will pronounce the nullity only where they find proof of a fraudulent intention to evade the law. There must be clandestinity (*a*).

A French subject may be married abroad (*b*) before French consular or diplomatic agents. Provision has been made by a law of June 8th, 1893 (*c*), for the marriage of French soldiers and sailors abroad, whether to French subjects or not (*d*).

Within three months after the return (*e*) into the Republic of a French subject who shall have contracted marriage in a foreign country, the act of the celebration of marriage so contracted in a foreign country shall be inscribed on the public register of marriages of his place of domicil (*f*).

Belgium.—Before the marriage is performed banns have to be published (*g*). The marriage cannot be celebrated before the tenth

(*r*) See Baudry-Lacan., ii., p. 219.

(*a*) Cass., March 8th, 1875, Sirey, 75, i., 171; Cass., June 15th, 1887; Droit, June 27th, 1887; and see the cases collected in Vincent and Pénaud, Dict. de Droit Int. Privé, p. 518; 1898, J. 138; 1900, J. 350, 592; 1901, J. 153; 1893, J. 412, 1170; 1899, J. 799; 1900, J. 148; 1901, J. 357; Glasgow Conference of Int. Law Ass., 1901, p. 235. Penalties for failure to comply with the statutory requirements as to notification are enacted by art. 192 of the Code Civil, as modified by art. 21 of the law of June 21st, 1907.

(*b*) See Code Civil, art. 48, and Ordinance of October 23rd, 1833.

(*c*) Lois Annotées, 1893.

(*d*) See Baudry-Lacan., ii., p. 223.

(*e*) Where the French subject remains abroad, the matter may be dealt with under the diplomatic convention for the communication of acts of civil status: Fuzier-Herman on art. 171, n. 20.

(*f*) Code Civil, art. 171; but this provision is not essential to the validity of the marriage, and an order of the Court (*en chambre de conseil*) may easily be obtained *ex parte* at any later date, ordering the inscription of the marriage at the Mairie of the residence: Vincent and Pénaud, Dict. de Droit Int. Privé, 519.

(*g*) Art. 1 of the law of December 26th, 1891.

day after posting the publication of banns on the town-hall of the parish where each of the future husband and wife has been domiciled or resident.

France.—Proof of Celebration of Marriage.—This consists of the act of marriage (*h*). Possession of status (*possession d'état*) will not relieve the alleged spouses from the necessity for its production (*i*). When there is *possession d'état* and the act of marriage is produced, the spouses cannot set up the nullity of that act (*j*). To the general rule that the only competent proof of marriage is the act of marriage there are, however, certain exceptions: (a) When the registers have been destroyed or do not exist, a marriage may be proved either by *titres* or by witnesses (*k*); (b) where two persons who have publicly lived together as man and wife have both died leaving children, the legitimacy of the children cannot be contested simply on the ground of default in the production of the act of marriage of their parents, when such legitimacy is established by *possession d'état*, not contradicted by their act of birth (*l*); (c) where an act of birth cannot be produced owing to its suppression or destruction by an officer under circumstances amounting to a criminal offence, the marriage may be established by the inscription of the judgment in criminal or civil proceedings against that officer, or, if he be dead at the time of the discovery of the fraud, by civil proceedings against his heirs (*m*).

Oppositions.—The power of opposing the celebration of any intended marriage belongs as of right to the person united by previous marriage with either of the contracting parties (*n*).

The right of opposition belongs next, concurrently with the spouses, but in a successive order fixed by the Code as amongst themselves, to ascendants. The father, and on his default the mother, failing whom the grandfather and grandmother, may oppose the marriage of their children and descendants until they have attained the full age of twenty-one (*o*). The right of opposition on the

(*h*) Art. 194.

(*i*) Art. 195.

(*j*) Art. 196.

(*k*) Art. 46. This article has been repeatedly acted on in Mauritius in cases relating to births and marriages in India, where in many towns there are no registers. See vol. ii., p. 307, n.

(*l*) Art. 197.

(*m*) Arts. 199—200.

(*n*) Art. 172.

(*o*) Art. 173, as modified by art. 20 of the law of June 21st, 1907.

part of ascendants of the maternal line is subsidiary to that of the paternal line (*p*).

In default of ascendants the right of opposition passes, concurrently, to the brother or sister, uncle or aunt, male or female cousin-german, being majors, in two cases (*q*): (a) When the consent of the family council, required (*r*) on default of parents and ascendants, has not been obtained; (b) when the opposition is founded on the alleged insanity of the intending spouse. The opposition, which the tribunal may set aside purely and simply, is only to be received on condition that the collateral presenting it applies for the interdiction of the spouse and obtains it within the period fixed by the judgment (*s*). In these two cases the guardian or curator has also a right of opposition during the course of the guardianship or *curatelle*, provided that he has the authorisation of the family council, which he may convoke for the purpose (*t*).

The act of opposition must state the quality which gives the opposer the right of presenting it; it must contain the election of a domicil in the place where the marriage is to be celebrated, and must also, unless made at the request of an ascendant, contain the grounds of opposition. These provisions are enacted on pain of nullity and of the interdiction of the ministerial officer who has signed the act (*u*).

After the lodging of an opposition, and till it has been superseded, the officer is prohibited from celebrating the marriage under penalty (*x*). The tribunal of first instance decides on the issue within ten days from the application for the withdrawal of the opposition (*y*), and if there is an appeal, it is to be disposed of

(*p*) Aubry et Rau, v., p. 29, n. 6; Demolombe, iii., p. 224, s. 140; Laurent, ii., p. 488, s. 379. As to whether one line may exercise its right of opposition in spite of the consent of the other line, there is some controversy. See Baudry-Lacan., ii., p. 239, s. 1634.

(*q*) Art. 174.

(*r*) Art. 160.

(*s*) Art. 174.

(*t*) Art. 175. There is controversy as to whether the Ministère Public (*i.e.*, Procureur of the Republic) has a right of opposition either as involved in his right of applying for the annulment of a marriage (art. 190) or by virtue of the general power of superintending the execution of the laws given to him by art. 46 of the law of April 20th, 1810. The authorities are collected in Baudry-Lacan., ii., p. 250, s. 1647.

(*u*) Art. 176.

(*x*) Art. 68; and see arts. 66, 67, as to procedure.

(*y*) Art. 177.

within ten days from the citation (*z*). On the rejection of an opposition opposers other than ascendants may be made liable in damages (*a*). Judgments and decrees rejecting opposition, if made by default, are not susceptible of opposition (*b*). This last provision was added by a law of June 20th, 1896, to art. 179, to prevent parties from allowing such judgments and decrees to go by default and then challenging them simply in order to gain time (*c*).

Belgium.—Opposition can be lodged against a marriage on the same conditions as in France.

It has been held by the Belgian Courts that Belgians marrying in a foreign country without clandestinity, and not having had the banns published in Belgium, are validly married, the default of publication of banns not being an essential condition of the validity of marriage.

German Civil Code.—The German Civil Code recognises civil marriage alone.

The celebration of the marriage has to be preceded by publication, which is of no effect if the marriage is not celebrated within six months after it has been made. The publication may be omitted when one of the parties is suffering from a malady which may entail danger of death and which does not permit of the marriage being postponed. Publication may also be dispensed with (*d*). This publication must be made within the districts where the spouses are domiciled, and if one of the parties resides outside the place of his domicil, also in the place of his residence, and if the domicil has been changed within the last six months, also within the old domicil. The notice containing the publication must be affixed at the door of the town-hall or other similar building, and if the place at which the publication must be made is outside the German Empire the notice must instead be published in one of the newspapers published in such place. The publication must continue for two weeks. Before publication can take place certain

(*z*) Art. 178.

(*a*) Art. 179.

(*b*) Opposition is a term used in French law in various senses. When used in reference to a judgment by default it means a notice given by the defendant, which compels the plaintiff to reopen the case. As to the history of the right of opposition in French law, see Baudry-Lacan., ii., p. 69, s. 1409, and p. 234, s. 1628.

(*c*) Lois Annotées, 1896, p. 121.

(*d*) Ss. 1316, 1322.

documents must be produced to the registrar (*e*). The marriage ceremony is performed by means of an unconditional declaration made by both spouses before the registrar to the effect that they wish to be married to each other (*f*). These declarations are made in answer to questions put to each spouse separately by the registrar in the presence of two witnesses, and after the declarations are made the registrar declares that the spouses are man and wife according to law, and an entry is then made of the marriage in the marriage register (*g*). Any person who publicly acts as registrar is deemed to be a competent registrar, notwithstanding the fact that he is not qualified as such, unless he was so to the knowledge of the parties (*h*), and the registrar competent to perform the marriage is the registrar of the district in which one of the spouses is domiciled or usually resident, or the registrar of another district appointed by him (*i*). If neither of the parties has his domicil or habitual residence in Germany, and at least one of them is a German, the competent registrar for the purpose is designated by official authority. If neither of the parties is a German subject, nor is domiciled or usually resident in the German Empire, a marriage between them is impossible (*k*).

Austrian Law.—In Austria both religious and civil forms of celebration of marriage are recognised, the latter being confined to persons who do not belong to any legally recognised religious denomination. The former consists of a solemn declaration before the usual minister of the bridegroom or bride or his representative and in the presence of two witnesses (*l*), the latter of a like declaration before the civil authorities in the presence of two witnesses and a registrar (*schrift führer*) (*m*). The ceremony must be preceded by publication (*aufgebot*), which consists of an announcement of the intended marriage (*n*); in the former case this is made verbally on three Sundays or festivals in the churches which the parties attend (*o*), in the latter by public notice to the authorities of the domicil of each party at least three weeks before the ceremony (*p*).

(*e*) Statute of 1875 on Personal Status, ss. 44—50.
(*f*) S. 1317.
(*g*) S. 1318.
(*h*) S. 1319.
(*i*) S. 1321.
(*k*) Ss. 1320, 1321.
(*l*) Austrian Civil Code, art. 75.
(*m*) Law of May 25th, 1868, arts. 2, 7; Reichsgesetz Blatt, n. 47.
(*n*) Civil Code, art. 70.
(*o*) *Ibid.*, art. 71.
(*p*) Law of May 25th, 1868, art. 5.

A publication is valid for six months, and must be renewed if the marriage is not concluded within that time (*q*). In the former case the second and third publications can be dispensed with by the civil authorities, and in the latter the prescribed period can be similarly shortened, and in urgent circumstances publication can be foregone entirely (*r*). The publication requires information to be given of any impediment to the marriage known to any person.

Hungarian Law.—By the Marriage Law (No. XXXI.) of the year 1894, obligatory civil marriage was introduced into Hungary (except in Croatia, where the system of ecclesiastical marriage laws remained in vigour). The principles of this law are similar to the system of the German Code as laid down above. The Hungarian law makes detailed provisions for marriages celebrated by foreigners in Hungary or by Hungarians abroad (*s*).

Italian Law.—Civil marriage was abolished in Italy on the fall of Napoleon. In 1848 a measure establishing civil marriage was adopted by the Chamber of Deputies of Turin, but rejected by the Sardinian Senate (*t*). The Italian Civil Code, like the German and French Codes, secularises marriage. As a general rule, the marriage must take place in the town-hall of the commune where one of the future spouses is domiciled or resident, but if reasons of necessity or convenience require it, the registrar of the proper district may request the registrar of another to officiate. If, however, one of the spouses is prevented from attending at the town-hall by illness or otherwise, then the registrar with his secretary attends at the residence of such disabled spouse, and there in the presence of two witnesses performs the marriage. The ceremony consists in the registrar's reading to the parties certain sections of the Code which define the principal reciprocal rights and duties of husband and wife, and of his receiving from each an unconditional declaration that they desire to become husband and wife; whereupon he, in the name of the law, declares them to be man and wife, and the marriage is then entered in the marriage register (*u*).

(*q*) Civil Code, art. 73.

(*r*) *Ibid.*, arts. 85—87; Law of May 25th, 1868, art. 5.

(*s*) Ferenczy, Le droit international privé du mariage en Hongrie (Revue de droit intern. privé, 1909, No. 1); Schwartz, Ungarns Anschluss an die Haager Familienrechts Conventionen (Zeitschr. f. Intern. Privat. u. Öff. Recht, Bd. xviii.).

(*t*) Prudhomme, Code Civil, Ital., p. xxxvi., n. 2.

(*u*) Arts. 93—97.

The celebration of the marriage has to be preceded by two publications to be made by the registrars of the districts in which the spouses respectively reside; in the case of such residence having lasted less than one year the publications must also be made in the last preceding place of residence. The formalities relating to publication are similar to those of the French and German laws (*a*). A formal promise of marriage justifies an application for publication (*b*). The registrar cannot proceed to publication without the necessary consents. If he declines to proceed he is required to give a certificate stating the grounds of his refusal, and an appeal lies to the civil tribunal, which decides the case on the report of the Public Procurator. The marriage cannot be celebrated before the fourth day from the last publication, and the publications will be considered as of no effect unless the marriage takes place within 180 days, reckoned from the date of the last publication (*c*). Provision is made for dispensation (*d*).

The future spouses are required to produce to the registrar of the district in which they propose to be married certificates of birth, and, in the case of second marriages, certificates of the death of the former spouse or of the dissolution or nullity of the previous marriage, and the documents proving the requisite consents and the certificate as to publication and of dispensation and such documents as may be deemed necessary according to the circumstances of the case (*e*).

Opposition.—The celebration of a marriage may be opposed on any ground recognised by the law as an obstacle to it by the father and mother, or in default of them by the grandparents, even when the contracting parties have completed their twenty-fifth year in case of a male, and twenty-first year in case of a female. Where there are no ascendants certain other specified relatives may oppose the marriage on the ground of want of the consent required by art. 65, or mental disorder. The existing spouse of a person proposing marriage can also oppose it (*f*). Where a widow is proposing to marry within ten months of the dissolution of the marriage the right of opposition belongs to the nearest of the ascendants and to

(*a*) Arts. 70—73.
(*b*) Art. 73.
(*c*) Arts. 74—77.
(*d*) See art. 78.
(*e*) Arts. 78—81.
(*f*) Arts. 82—85.

all the relatives of the first husband (*g*). In the case of a preceding marriage having been annulled the person with whom that marriage had been contracted can equally oppose. The Public Procurator must oppose a marriage if he has knowledge of any impediment. Every act of opposition must state the *locus standi* of the opposer as well as the grounds of opposition, and must contain the opposer's election of domicil within the jurisdiction of the Court of the district where the marriage is to be celebrated. Notice of opposition is to be served in the same manner as a writ on the future spouses and the registrar before whom the marriage is to take place (*h*). A duly formulated and authorised opposition suspends the celebration of a marriage till it has been definitively disposed of. When it is rejected, any opposer, other than an ascendant or the Public Procurator, may be cast in damages. The above rules do not apply to the King or the Royal Family (*i*).

The registrar cannot refuse to proceed to the celebration of a marriage unless for some cause recognised by the law. In case of refusal he is required to give a certificate stating his reasons, and if the parties think the refusal unjust, the tribunal will decide the question, the Public Procurator being heard, and a right of recourse to the Court of Appeal being reserved. In the case of the marriage of the King or any member of the Royal Family the registrar is the President of the Senate (*k*).

Spanish Law.—The law of Spain recognises two forms of marriage:—

I. Canonical Marriage, reserved for persons professing the Roman Catholic religion.

II. Civil Marriage, contracted in the form prescribed by the Code (*l*).

The provisions of the Code with reference to promises of marriage (*m*) and impediments to marriage (*n*) and the civil effects of marriage are common to both forms (*o*).

I. **The Canonical Marriage.**—The conditions, forms, and solemnities are regulated by the constitutions of the Roman Catholic Church

(*g*) Art. 86.
(*h*) Art. 89.
(*i*) Art. 92.
(*k*) Arts. 98, 99.
(*l*) Art. 42.
(*m*) Arts. 43, 44; and p. 157, *supra*.
(*n*) Arts. 45—52, *supra*.
(*o*) Art. 76.

and of the Council of Trent (*b*), which are received as laws of the kingdom. The municipal judge or other State functionary is required to be present for the sole purpose of assuring the immediate inscription of the marriage on the civil register. For this purpose, the contracting parties are bound to intimate to the municipal council, twenty-four hours before, the day, hour, and place of marriage, under a penalty of from five to eighty pesetas. The municipal judge is bound, under a penalty of from twenty to a hundred pesetas, to give the contracting parties a receipt of this notice, and the marriage cannot be proceeded with till this receipt has been presented to the *cura* of the parish. If the marriage is celebrated without the presence of the municipal judge or his delegate, although the contracting parties have notified it to him, the transcription of the act of canonical marriage on the civil register will be made at his expense, and he incurs besides liability to a fine of from twenty to a hundred pesetas. In this case the marriage will produce all its civil effects from the moment of its celebration. If it is the contracting parties who are at fault they may repair it by applying for the inscription of their marriage on the civil register. In this case the marriage will only produce its civil effects from the date of the inscription (*c*).

Persons who propose to contract a canonical marriage *in articulo mortis* may notify it to the functionary charged with the civil register at any moment before the celebration, and may give, in any form, a mandate to a third party to fulfil this obligation. The penalties for the omission of this formality are not applicable to such marriages if it has been impossible to comply with them in time. In any case, however, in order that the marriage may produce its civil effects from the date of its celebration, the religious act must be inscribed on the register within the ten days following the celebration (*d*).

The canonical *secret* marriage celebrated before the Church without the presence of the civil magistrate is not subjected to any of the formalities of the civil law, but it only produces civil effects after its publication by means of inscription on the register. This form of marriage produces, however, its civil effects from the date of its celebration if the two contracting parties with one accord solicit

(*b*) Art. 75.
(*c*) Art. 77.
(*d*) Art. 78.

from the Bishop who has authorised it a copy of the act inscribed on the private register of the Bishop and forward it directly with the desired reservation to the general direction of the civil register and demand their inscription. For this purpose the general direction keeps a special and private register, and takes the precautions necessary to secure the secrecy of its contents till the parties call for their publication by their transcription on the municipal register of their domicil (*e*). In the case of canonical marriages the cognisance of suits for nullity and separation belongs to the ecclesiastical tribunals (*f*). The execution of the decree belongs, however, to the civil authority (*g*). The definitive decree in a suit for nullity or separation is inscribed on the civil register and presented to the ordinary tribunal to secure its execution as regards its civil effects (*h*).

II. **The Civil Marriage.**—Parties are required to present to the municipal judge a declaration signed by them and stating their names, conditions, professions, domicil or residence, and those of their parents. To this declaration is added the acts of birth and status of the parties, and the prescribed authorisations or consents or dispensations (*i*). A marriage cannot be celebrated unless the party is really present or represented by a mandatory having a special power of attorney; but it is necessary to have the presence of the contracting party who is domiciled or resident in the district of the judge who is to celebrate the marriage. The power should indicate the name of the person with whom the marriage is to be contracted, and it will be valid unless before the celebration notice of its revocation has been given in authentic form to the mandatory (*k*).

The municipal judge, with the preliminary consent of the *fiancés*, announces the intended marriage by publication during a period of fifteen days. The publication gives all the details mentioned in the parties' declaration, and calls upon all persons having knowledge of any impediment to declare it; similar notices are sent to the municipal judges of the communes where the interested

(*e*) Art. 79.
(*f*) Art. 80.
(*g*) Arts. 68, 81.
(*h*) Art. 82.
(*i*) Art. 86.
(*k*) Art. 87. Marriage by procuration was recognised in old French law; but although the Code Civil has only prohibited it by implication in art. 75, the unanimous opinion of the jurists is that it is no longer admissible in France: Demolombe, iii., n. 210; Levé, Cod. Civ. Esp., p. 24, n. 1.

parties have had their domicil or their residence during the two last previous years. These notices are published for a period of fifteen days in the public audience hall, and are then returned with an attestation that this formality has been complied with and that no impediment has been notified (*l*).

Soldiers on active service who intend to marry are dispensed from publication beyond the place of their residence on presenting a certificate that they are free to marry from the chief of the corps to which they belong (*m*).

If the interested parties are foreigners, or have not had two years' residence in Spain, they may prove by a formal certificate, given by the competent authority, that in the place where they have had their domicil or their residence during the two preceding years publication of the intended marriage has been made with the required solemnities (*n*). In all other cases the Government may itself dispense with publication for serious reasons, duly established (*o*). Notwithstanding the above provisions, the municipal judge may authorise the marriage of persons in imminent danger of death who are domiciled in the locality or passing through it. Such marriages are conditional on legal proof of the freedom of the contracting parties being adduced (*p*). Similar marriages, subject to the same condition, may be authorised by the officers of men-of-war, and the captains of merchant vessels (*q*), and the chiefs of military corps *en campagne* (*r*).

On the expiry of the period of fifteen days above referred to, without any impediment having been notified, the municipal judge being unaware of any himself, the celebration of the marriage is proceeded with in the prescribed manner (*s*). If more than a year has elapsed since publication without the marriage having been celebrated a new publication is necessary (*s*).

If before the celebration of the marriage opposition, on the allegation of a legal impediment, is notified, the celebration is suspended till the non-existence of the impediment has been declared by a definitive judgment (*t*). All persons having knowledge of the project of marriage are bound to declare any impediment

(*l*) Art. 89.
(*m*) Art. 90.
(*n*) Art. 91.
(*o*) Art. 92.
(*p*) Art. 93.
(*q*) Art. 94.
(*r*) Art. 95.
(*s*) Art. 96.
(*t*) Art. 97.

to it of whose existence they are aware. The declaration of impediment is forwarded to the *ministère fiscal*, who, if it has a legal basis, formulates an opposition. Those private individuals alone who have an interest in preventing a marriage can themselves formulate an opposition to it (*u*). In either case the opposition is presented in conformity with the law of civil procedure and disposed of as an incident (*u*).

If a definitive decision declare the impediment false or not sufficiently proved, the party who has put it forward is liable for the damage and prejudice suffered (*x*).

The marriage is celebrated when the two contracting parties or one of them and the person who has obtained from the absent party the special power of attorney, as well as the two witnesses, who must be majors and without any legal incapacity, appear before the municipal judge (*y*). The procedure is practically identical with the Italian law above described (*z*). The consuls and vice-consuls exercise the functions of municipal judge as regards the marriages of Spaniards contracted abroad (*y*).

Swiss Law.—The celebration of marriage in Switzerland is at present governed by the Federal Law of Civil Status and Marriage of December 24th, 1874, which recognises none but civil marriages, and forbids the celebration of any religious ceremony without production of the certificate of civil marriage (*a*). A marriage celebrated within the territory of the Confederation must be preceded by the publication of the promise to marry in the place of residence and the home of each of the spouses (*b*); as in Germany, this publication is ineffective unless the marriage takes place within six months (*c*). Publication is the duty of the officer of civil status, and is carried out by way of advertisement in a public place, or in the official gazette (*d*). The form of celebration is similar to that prescribed by the German Code (*e*), and the presence of two witnesses of full age is required (*f*). If the husband is a foreigner the marriage cannot take place without production of a certificate from the competent foreign authority that the marriage will be recognised with

(*u*) Art. 98.
(*x*) Art. 99.
(*y*) Art. 100.
(*z*) P. 166, *supra*.
(*a*) Art. 40.
(*b*) Art. 29.
(*c*) Art. 36.
(*d*) Art. 33.
(*e*) See above, p. 165.
(*f*) Arts. 38, 39.

all its consequences, unless the Government of the canton where it is to be solemnised dispenses with this formality (*g*). All these provisions, except those relating to the marriage of foreigners, are preserved in the Swiss Code, though the form is different (*h*).

Opposition may be made within ten days of the publication of the banns on the ground of the impediments recognised by arts. 26, 27, and 28 of the Federal Law of Civil Status and Marriage, and on no others (*i*). The impediments recognised by the law are absence of consent of the parties (*j*), insufficient age (the legal age of marriage is eighteen for the husband, sixteen for the wife), want of consent of parents or guardian, bigamy, relationship within the prohibited degrees, and mental disease. Widows and divorced wives, as well as women whose marriage has been declared invalid, may not contract a new marriage within three hundred days after the dissolution of their former marriage. An opposition whose validity is not admitted by the intending spouses must be made good by action within ten days (*k*). These provisions also are preserved by the Code in a somewhat different form (*l*), except that the age of marriage is raised to twenty for males and eighteen for females, and the Code also requires that the parties to a marriage shall be capable of discernment (*l*).

In exceptional cases the Cantonal Government, with the consent of parent or guardian, may declare males of eighteen years or females of seventeen years of age capable of marriage (*m*).

(*g*) Arts. 31, 37.

(*h*) See Civil Code, arts. 105—118. When the Code comes into force, the rules for the marriage of a foreigner will be different. If he is domiciled in Switzerland he must obtain permission to have his marriage celebrated from the Government of the Canton where he is domiciled, and such permission cannot be refused if the State to which he belongs makes a declaration that his marriage will be recognised with all its effects. If he is domiciled abroad the corresponding permission must be obtained from the Government of the Canton where the marriage is to be celebrated, and in this case proof of the recognition by the State of nationality is a necessary condition. See Federal Law of 1891, art. 7 e (Final Title of Code, art. 61).

(*i*) Law of 1874, art. 34. See above, pp. 100, 103, 104, 112, 120.

(*j*) The presumption of consent is excluded by compulsion, deceit, or mistake of person.

(*k*) Art. 35. The consent of the parents or guardian is required only where the intended spouse is under age. An appeal against the refusal of the guardian's consent lies to the competent guardianship authority.

(*l*) See Civil Code, arts. 97, 98, 100, 103.

(*m*) Art. 96.

The consent of the parent who exercises the paternal power is sufficient, if it is exercised by one of them alone (*n*). The Code also introduces the impediments of interdiction (*o*) and relationship by adoption (*p*), and permits a marriage to be dissolved if either spouse has been judicially declared to have disappeared (*q*); and under it the period of 300 days above mentioned may be shortened by the Court if a birth takes place, or if there is no possibility of pregnancy by the former husband (*a*).

Law of Russia.—The solemnisation of the act of marriage in a church is the absolute condition under which a marriage is valid for members of the Orthodox religion as well as for members of any other Christian Churches. The minister of religion who performs the act of solemnisation of marriage has to register it in the parish marriage registers. To prove the existence of a legal matrimonial union it is enough to produce an extract from such parish register.

SECTION III.

Laws of British Dominions and United States.

Promise of Marriage.—English and Scots Law.—The laws of England and Scotland in regard to breach of promise of marriage are practically identical, and may be considered together. The promise may be oral or written (*b*); it may be proved by parol, and the parties are, of course, competent witnesses (*c*). In England, under Denman's Act (*d*), the plaintiff cannot recover unless his or her testimony is corroborated by some material evidence in support of the promise (*e*), *e.g.*, the fact that the defendant was present at the trial and was not called to contradict the plaintiff's statements may be taken account of (*f*). But the omission of the defendant to reply to an abusive letter alleging a promise has been held not

(*n*) Art. 98.

(*o*) Art. 99. Interdicted persons have a right to appeal against their guardian's refusal of consent to the guardianship authority, and the appeal may in the last resort come before the Federal Court.

(*p*) Art. 100.

(*q*) Art. 102; see arts. 35—38.

(*a*) Art. 103.

(*b*) Cork *v.* Baker (1725), 1 Str. 34; Harrison *v.* Cage (1798), 1 Raym. (Lord), at p. 387.

(*c*) As regards Scotland, see 37 & 38 Vict. c. 64, s. 3.

(*d*) 32 & 33 Vict. c. 68.

(*e*) S. 2.

(*f*) Willcox *v.* Gotfrey (1872), 26 L. T. 328; and see Bessela *v.* Stern (1877), 2 C. P. D. 265.

to be sufficient corroboration to support the plaintiff's case (*g*). The plaintiff must have assented either expressly or tacitly to the defendant's proposal (*h*). If no time or condition is prescribed for the fulfilment of the promise, the promise is taken to be one to marry in a reasonable time (*i*), but if a conditional contract is repudiated by the defendant before the condition is fulfilled, either by express words or by his putting it out of his power to fulfil the contract, for instance, by his marrying another person, a right of action accrues to the aggrieved party at once (*k*).

The following are good defences to the action: (a) The existence of a legal barrier to the union, if known to both parties at the time of the promise (*l*); (b) discharge by mutual agreement (*m*); (c) the unchastity of the plaintiff after the engagement, or before it, if unknown to the defendant at the date of his promise (*n*); (d) fraudulent misrepresentation or concealment of material facts as to the character, position, or previous history of the plaintiff (*o*). It is no defence that the defendant was a married man at the time of his promise, unless the plaintiff was aware of the fact, when such a promise is void as against public policy (*p*); or that since the promise the defendant has by reason of physical infirmity become unfit to marry (*q*). In England an action of breach of promise cannot be brought either by (*r*) or against (*s*) the executors of the person to, or by, whom the promise was made, except in case of special damage and to the extent of such damage. Apparently the same rule would be followed in Scotland as regards an action by executors (*t*), unless it were *lis pendens* at the time of the

(*g*) Wiedemann *v.* Walpole, [1891] 2 Q. B. 534.

(*h*) Vineall *v.* Veness (1865), 4 F. & F. 344; and as to Scotland, see Fraser, Husband and Wife, i., 496.

(*i*) Potter *v.* Deboos (1815), 1 Stark. N. P. 82.

(*k*) Frost *v.* Knight (1872), L. R. 7 Ex. 111.

(*l*) Millward *v.* Littlewood (1850), 5 Exch. 775.

(*m*) Davis *v.* Bomford (1860), 6 H. & N. 245.

(*n*) Jones *v.* James (1868), 18 L. T. 243.

(*o*) Irving *v.* Greenwood (1824), 1 C. & P. 350; Wharton *v.* Lewis (1824), 1 C. & P. 529; Foote *v.* Hayne (1824), 1 C. & P. 546; Fraser, *ad loc. cit.*, i., 491.

(*p*) Millward *v.* Littlewood (1850), 5 Exch. 775; Spiers *v.* Hunt, [1908] 1 K. B. 720; Wilson *v.* Carnley, *ibid.*, 729.

(*q*) Hall *v.* Wright (1858), E. B. & E. 746.

(*r*) Chamberlain *v.* Williamson (1814), 2 M. & S. 408.

(*s*) Finlay *v.* Chirney (1887), 20 Q. B. D. 494.

(*t*) Fraser, i., 488.

pursuer's death (*u*). But an action would, it seems, lie against the executors of the promisor (*v*).

Laws of the Colonies.—Breach of promise is actionable in certain of the colonies by statute, *e.g.*, Ceylon, British Guiana, and Natal (*x*).

Law of the United States.—As in England, "the agreement to marry is quite distinct in its nature and consequences from that mutual consent to present marriage which superinduces the status" (*a*). It is an executory contract, founded in most cases on the mutual promise of the parties as a consideration. In the absence of restrictive legislation on the point, a promise of marriage may be written (*b*), or oral (*c*), or constituted by the acts of the parties (*d*). The parties must be competent in law to intermarry at the time when the promise is made. But a party who by marrying another person becomes disqualified (*e*), or who refuses in advance (*f*) to fulfil an agreement to marry, is immediately liable to an action for breach of promise of marriage. And a single woman may have her breach of promise action against a married man whom she believes to be single, if he contracts to marry her (*g*). The parties must act towards each other in good faith; and any deception, fraud, or vital mistake, *e.g.*, as to such matters as antenuptial chastity, capacity for intercourse, and sanity (*h*), will invalidate the agreement of the party misled (*a*).

So also either party may rescind the promise for supervening misconduct "of a nature and to a degree not quite definable yet far less than would be required for divorce after marriage" (*a*),

(*u*) Walton, Husband and Wife, 293—294.

(*v*) Evans *v.* Stool (1885), 12 Rettie, 1295; Liddell *v.* Easton's Trustees (1907), Sess. Cas. 154.

(*x*) See p. 156.

(*a*) Bishop's Law of Marriage and Divorce, i., s. 235, and, generally, ss. 181 *et seq.*

(*b*) Russell *v.* Cowles (1860), 15 Gray, 582.

(*c*) Homan *v.* Earle (1873), 53 N. Y. 267.

(*d*) Wells *v.* Padgett (1850), 8 Barb. 323.

(*e*) Bishop, *ad loc. cit.*, s. 190.

(*f*) Burtis *v.* Thompson (1870), 42 N. Y. 246.

(*g*) Blattmacher *v.* Saal (1858), 29 Barb. 22.

(*h*) Button *v.* McCauley (1862), 38 Barb. 413; Gring *v.* Lerch (1886), 112 Penn. 244; Bishop, *ad loc. cit.*, s. 221. But the rule does not apply to discoverable defects: *ibid.*, s. 220. The Supreme Court of Washington, however, has held, on grounds of public policy, that a man was not liable for breach of a promise of marriage where the woman was suffering with pulmonary tuberculosis, though he knew that she had the disease at the time of the engagement: Grover *v.* Zook (1906), 87 P. 638.

or for supervening personal incapacity, "by the visitation of God." In estimating damages a jury may take account both of pecuniary loss and of mental suffering. An action for breach of promise of marriage does not survive the death of the wrong-doer in the absence of damage to the estate (*i*). In an action for breach of promise, seduction may, it seems, be pleaded as an element of punitive damages (*k*). A promise to marry made while the woman is the wife of another man is void as against public policy (*l*).

Formalities of Marriage.—As already stated (*m*), under the ancient canon law, which was the basis of the matrimonial law of England, the intervention of a priest was not required as an essential to the validity of marriage.

Law of England.—Common Law.—It has been held by the House of Lords (*n*), that to constitute a valid marriage by the common law of England it must have been celebrated in the presence of a clergyman in holy orders (*o*); and the same Court has decided (*p*) that the fact that the bridegroom is himself a clergyman in holy orders, there being no other clergyman present, will not make the marriage valid. In the former edition, Burge maintained the same view, citing a number of English and Colonial statutes enacting it

(*i*) Bishop, *ad loc. cit.*, s. 194; Rul. Cas., ii., 14, 15, 17; Wade *v.* Kalbfleisch (1874), 58 N. Y. 282.

(*k*) Bishop, *ad loc. cit.*, s. 232; Lanigan *v.* Neely (1907), 89 P. 441, where this proposition was affirmed, notwithstanding that s. 374 of the Code of Civil Procedure of California gives a woman a right of action for her own seduction.

(*l*) Leaman *v.* Thompson (1906), 86 P. 926.

(*m*) See pp. 147, 148.

(*n*) R. *v.* Millis (1843—44), 10 Cl. & F. 534. It was suggested in Beamish *v.* Beamish, n. (*p*), *infra*, that the decision is not applicable to the case where the presence of a priest is impossible, and there are cases in which marriages *per verba de præsenti*, in parts of India, Australia and South America have been held valid, on proof that no clergyman could be found: Pollock & Maitland, Hist. Eng. Law, ii., 370; Catterall *v.* Sweetman (1845), 1 Roberts. 304; Catterall *v.* Catterall (1847), 1 Roberts. 580; Maclean *v.* Cristall (1849), Perry, Oriental Cases, 75; 7 No. Cas. Eccl. & M. App., p. xvii.; Lightbody *v.* West (1902), 87 L. T. 138; and see Culling *v.* Culling, [1896] P. 116.

(*o*) As to whether, since the Reformation, a deacon can celebrate marriage, see R. *v.* Millis, *ubi supra*, per Lord Lyndhurst, L. C., at p. 859; and the authorities collected and examined in art. Marriage, in Enc. Laws of Engl., 2nd ed.

(*p*) Beamish *v.* Beamish (1859—1861), 9 H. L. C. 274, where the House held that R. *v.* Millis was binding on it and all inferior Courts; and generally the House is bound by its own judgments: London Street Tram. Co. *v.* London C. C., [1898] A. C. 375.

as a condition (*q*). The general proposition has, however, been adversely criticised in Canada and dissented from in the United States, and was only itself adopted on an equal division of opinion on the principle that *semper præsumitur pro negante* (*r*). Ample provision has, however, been made by modern legislation for the solemnisation of marriages before registrars, and by the ministers of Nonconformist bodies (*s*).

In Canada the Courts have been called upon to decide upon the validity of non-Christian or pagan marriages, and the rule of *R.* v. *Millis* (*t*) has been held inapplicable in places where no local form of marriage as recognised by civilised people exists, and marriage in such places has been held valid as regards form, if made in compliance with the common law of England. In what has been judicially described as "the very celebrated case" of *Connolly* v. *Woolrich* (*u*), the Court of Queen's Bench in Lower Canada concluded that a marriage, in 1803, in a portion of what is now the North-West Territories, between a white man with a domicil of origin in Lower Canada and an Indian woman according to the usage of the Cree Indians to which she belonged, was valid, notwithstanding the existence of polygamy and divorce at will among the Crees. It was held in that case that "a marriage contracted where there are no priests, no magistrates, no civil or religious authority, and no registers, may be proved by oral evidence," and that such a marriage, although not accompanied by any civil or religious ceremony, was valid.

Unless this case can be distinguished on the peculiar facts which were presented to the Court, it appears to be in conflict with the decision in *In re Bethell* (*v*) and similar English decisions which would probably prevail in the Appellate Courts of Canada upon the effect of the polygamous practice. In *R.* v. *Nem-e-quis-a-Ka* (*w*) the principle of this decision was applied to the marriage of an Indian man and an Indian woman in accordance with their Indian customs, and the marriage was supported upon the ground that the law of

(*q*) Pp. 158—168 *passim*.

(*r*) In Canada, Breakey *v.* Breakey (1846), 2 Upp. Can. Q. B. 349; in U.S., Wharton, C. L., 3rd ed., ss. 169 *et seq.*; in England, by Dr. Lushington, in Catterall *v.* Catterall, *ante*.

(*s*) *Post*. For a list of English, Scotch, and Irish statutes as to celebration of marriage, see Phillimore, Ecc. Law, 2nd ed., i., 643.

(*t*) 10 Cl. & F. 534.

(*u*) (1867), 11 L. C. Jurist, 197.

(*v*) (1888), 38 Ch. D. 220.

(*w*) (1889), 1 N. W. T. 21.

England was not applicable to them under the circumstances of the case. On the other hand, both these cases were distinguished in the later case of *In re Shearn* (*x*), and a marriage between a white man and an Indian woman in the Canadian Territories, after their settlement and political organisation, without ceremony of any kind, was declared invalid, although complying with the tribal customs of the parties. The Court held that "it is only in cases where the marriage *per verba de præsenti* takes place in a strictly barbarous country, where a marriage according to the English common law, or, perhaps, according to local rules and customs, cannot be effected, that it would be sufficient." In a case decided in Ontario (*y*) the Court preferred to base the legitimacy of the children upon other evidence from which a legal marriage according to the recognised form among Christians could be presumed than upon the validity of a marriage of a Christian man and an Indian woman of a nomadic native tribe in a remote part of British Columbia, in 1869, which conformed to the custom of the Indian tribe to which the woman belonged. With the rapid settlement of the Western Territories of the Dominion, decisions of this class are mainly of historical interest.

Statute Law.—In England the Marriage Act of 1753 (*z*), known as Lord Hardwicke's Act, established a public and regular form of marriage, and made certain religious rites essential to its validity. That Act was repealed by the Marriage Act, 1823 (*a*), which re-enacted its provisions with some modifications, and this latter statute, together with the Marriage Acts, 1836 (*b*), 1886 (*c*), 1898 (*d*), 1906 (*e*), and 1908 (*f*), now constitutes, so far as solemnisation is concerned, the present matrimonial law of England.

Banns.—Marriages are celebrated in England either by banns or by licence, ordinary or special, or with the certificate of a registrar or person authorised under the Marriage Act, 1898 (*d*). All banns of matrimony must be published in the parish church, or in some public chapel of the parish or chapelry, wherein the persons to be

(*x*) (1889), 4 N. W. T. 83.
(*y*) Robb *v.* Robb (1891), 20 O. R. 591.
(*z*) 26 Geo. II. c. 33.
(*a*) 4 Geo. IV. c. 76.
(*b*) 6 & 7 Will. IV. c. 85.
(*c*) 49 & 50 Vict. c. 14.
(*d*) 61 & 62 Vict. c. 58.
(*e*) 6 Edw. VII. c. 20 (Marriage with Foreigners Act).
(*f*) 8 Edw. VII. c. 26 (marriages on board ships of the Royal Navy).

married dwell, according to the form prescribed by the rubric prefixed to the office of matrimony in the Book of Common Prayer, upon three Sundays preceding the solemnisation of marriage, during the time of morning service (*g*), or of evening service (if there should be no morning service), immediately after the second lesson. If the persons dwell in different parishes the banns are, in like manner, to be published in the church or chapel of the parish, or chapelry, wherein each of the persons dwell; and all other the rules prescribed by the said rubric, concerning the publication of banns, and the solemnisation of matrimony, and not by the Act altered, are to be duly observed; and in all cases where banns have been published, the marriage shall be solemnised in one of the parish churches, or chapels, where such banns have been published, and in no other place (*h*).

No clergyman is obliged to publish banns without seven days' notice in writing of the names and place of abode, and duration of residence there, of the parties (*i*).

Ministers who, after publication of banns, solemnise the marriage of a minor without the consent of parents are not punishable by ecclesiastical censures, unless they shall have had notice of dissent; and where dissent is publicly declared, the banns are void (*k*).

A republication of the banns is required, and in marriages by licence a new licence must be granted, in case the marriage is not solemnised within three months after a complete publication or after the grant of the licence (*l*).

It is expressly enacted, that if any persons shall knowingly and wilfully intermarry in any other place than a church, or such public chapel wherein banns may be lawfully published, unless by special licence, or shall knowingly and wilfully intermarry without due publication of banns or licence from a person or persons having authority to grant the same first had and obtained, or shall knowingly and wilfully consent to or acquiesce in the solemnisation of such marriage by any person not being in holy orders, the

(*g*) As to the proper time for publication, see Phillimore, Eccl. Law, 2nd ed., i., 588.

(*h*) Marriage Act, 1823 (4 Geo. IV. c. 76), s. 2.

(*i*) S. 7. See Nicholson *v.* Squire (1809), 16 Ves. 259 (a), as to responsibility of clergyman for not requiring proper notice.

(*k*) S. 8.

(*l*) Ss. 9, 10.

marriages of such persons shall be null and void, to all intents and purposes whatsoever (*m*).

To render a marriage invalid under this provision both parties must be aware of the absence of the proper preliminary at the time of the marriage (*n*).

The prescribed hours for marriage are between 8 a.m. and 3 p.m. (*o*). In the publication of banns the names, both pre-name and surname, by which the parties are generally known, should be given (*p*). It seems that for not publishing, after due notice, the banns of a baptised and confirmed parishioner, a clergyman would be liable to proceedings under the Church Discipline Act, 1840 (*q*), although probably not to a criminal indictment for misdemeanour, either at common law or under the Marriage Act (*r*). The point has been raised but not decided, whether, under any circumstances, a civil action will lie against a clergyman for refusing to celebrate a marriage; apparently, if such an action will lie, it would be necessary to show a malicious and unreasonable refusal and actual temporal damage (*s*). The Marriage and Registration Act, 1856 (*t*), provides that, when one of the parties resides in Scotland, a certificate of proclamation of banns in Scotland, by the Session clerk of the parish, shall be as valid and effectual as in England is a registrar's certificate.

Marriage by Licence.—There are three forms of marriage licence: (a) The common licence of the Ordinary (*u*); (b) the special licence of the Archbishop of Canterbury (*x*); (c) the licence of the superintendent registrar (*y*).

(a) The common licence is a dispensation by virtue of which a

(*m*) 4 Geo. IV. c. 76, s. 22.

(*n*) Greaves *v.* Greaves (1872), L. R. 2 P. & D. 423; and see Wiltshire *v.* Prince (1830), 3 Hagg. E. R., p. 332; R. *v.* Wroxton (1833), 4 B. & Ad., p. 640; 38 R. R. 341; Templeton *v.* Tyree (1872), L. R. 2 P. & D. 420; Gompertz *v.* Kensit (1872), L. R. 13 Eq. 369; R. *v.* Rea (1872), L. R. 1 C. C. R. 365.

(*o*) Marriage Act, 1886 (49 & 50 Vict. c. 14), s. 1.

(*p*) Wyatt *v.* Henry (1817), 2 Hagg. C. R. 215; but see Fendall *v.* Goldsmid (1877), 2 P. D. 263.

(*q*) 3 & 4 Vict. c. 86.

(*r*) Reg. *v.* James (1850), 3 Car. & K. 167, 172.

(*s*) Davis *v.* Black (1841), 1 Q. B. 900.

(*t*) 19 & 20 Vict. c. 119, s. 8.

(*u*) See Canons of 1603, 101 *et seq.*, and the Marriage Act, 1823 (4 Geo. IV. c. 76).

(*x*) See 25 Hen. VIII. c. 21, ss. 4, 16, 17.

(*y*) Marriage Act, 1836 (6 & 7 Will. IV. c. 85), as amended by the Marriage Acts, 1856 (19 & 20 Vict. c. 119), and 1898 (61 & 62 Vict. c. 58).

marriage can be celebrated without the preliminary publication of banns. It can be granted only by a Bishop or by a person having episcopal authority. Such licences are, in fact, usually granted by the Chancellors of the various dioceses (*z*). There has been some controversy as to whether these licences are *ex debito justitiæ*, or a matter of discretion and favour (*a*).

In the case of marriages between foreigners and English persons, by the instructions of certain Bishops (including the Bishop of London), such licences are not granted until the foreigner produces a certificate from his consul that no impediment exists by his law to his or her marriage in this country. But in the case of divorced persons applying for licences for marriage to third parties, it is doubtful whether any such discretion exists to withhold a licence for a marriage allowed by the law of England, and it would seem that anyhow the refusal would be matter of appeal to a superior Court. The licence merely dispenses with publication of banns, and the marriage has to be celebrated with the same formalities as a marriage after banns (*b*). A marriage by licence in which the parties are wrongly named or described is not invalid (*c*).

(b) The power of issuing special licences, exercised by the Archbishops of Canterbury prior to the Reformation as *legati nati* of the Pope, was continued to their successors by the statute 25 Hen. VIII. c. 21 (*d*), the Act concerning Peter-pence and Dispensations, and is exercised on their behalf by the Master of the Faculties. The effect of such licences is to enable the parties, in whose favour they are granted, to marry at any convenient time or place.

(c) The Marriage Act, 1836 (*e*), provides for marriages taking place in registered buildings on the authority of licences issued by the superintendent registrars. The issue of such licences appears to be *ex debito justitiæ* where the statutory conditions are complied with (*f*).

(*z*) See tit. Licence (Marriage); Encyclo. Laws Eng., 2nd ed.

(*a*) See Bevan *v.* McMahon (1861), 30 L. J. P. M. & A. 61, and Prince of Capua's Case (1836), *ad loc. cit.*: Forsyth, Cases and Opinions on Constitutional Law, p. 479, in favour of the view that such licences are a matter of grace; *contra*, Ex parte Brinckman (1895), 11 T. L. R. 387, 388, 496.

(*b*) Encyclo. Laws Eng., *ad loc. cit.*

(*c*) Ewing *v.* Wheatley (1814), 2 Hagg. C. R. 175; Bevan *v.* M'Mahon, *ubi supra*. See opinions of Dr. Tristram, Chancellor of London, and Sir L. Dibdin, Dean of Arches: *Times*, May 23rd, 25th and 30th, 1903.

(*d*) Ss. 4, 16, 17.

(*e*) 6 & 7 Will. IV. c. 85.

(*f*) See ss. 9 *et seq.*

Marriage by Registrar's Certificate.—Marriages may also be celebrated, on the authority of a certificate issued by the superintendent registrar, either in his office or in a registered building (*g*). The Marriage Act, 1898 (*h*), dispenses, in favour of Nonconformists, with the attendance of registrars at marriages in Nonconformist places of worship which have been registered for that purpose whether by registrar's licence or by registrar's certificate.

Royal Marriages.—The marriages of the Royal Family are, as regards the mode and the time of their celebration, free from the requirements of the Marriage Acts (*i*), and are governed by the old common and canon law. The presence of a clergyman in holy orders is, therefore, necessary to the due solemnisation of a Royal marriage, but such marriages are valid without prior publication of banns or licence, and they may be celebrated in private rooms or chapels not licensed for marriages.

The Royal Marriage Act, 1772 (*k*), provides that no descendant of King George II. (other than the issue of princesses, married, or who may marry into foreign families) shall be capable of contracting marriage without the previous consent of the sovereign signified under the Great Seal, and that every marriage without such consent first had and obtained shall be null and void to all intents and purposes whatever. If any such descendant, above twenty-five years of age, persists in his or her resolution to contract a marriage disapproved of by the sovereign, he or she, upon giving notice to the Privy Council, may at any time from the expiration of twelve calendar months after such notice has been given, contract such marriage, which shall be good, unless both Houses of Parliament shall have disapproved of it before the twelve months have expired. The Royal Marriage Act applies to marriages contracted abroad (*l*). Royal marriages are exempt from the Foreign Marriage Act, 1892 (*m*).

Jews and Quakers.—As regards both Jews (*a*) and Quakers (*b*), notice of the intended marriage has to be given to the superintendent registrar of the district in which the parties reside, or the registrar of

(*g*) Marriage Act, 1836; Marriage and Registration Act, 1856.

(*h*) 61 & 62 Vict. c. 58.

(*i*) See Marriage Acts, 1823 (4 Geo. IV. c. 76), s. 30; 1836 (6 & 7 Will. IV. c. 85), s. 45.

(*k*) 12 Geo. III. c. 11.

(*l*) Sussex Peerage Case (1844), 11 Cl. & F. 85; 8 Jur. 793; 6 St. Tri. (N. S.) 79.

(*m*) 55 & 56 Vict. c. 23, s. 23.

(*a*) See pp. 49—51.

(*b*) See pp. 52—54.

each district where they do not reside in the same one; the registrar has then to issue his certificate (*c*). When, in the case of Jews, the marriage has taken place, it is the duty of the secretary of the Synagogue to which the husband belongs to register it forthwith in the duplicate register kept by him (*d*). It has never been necessary that the registrar of marriages should be present at Jewish or Quaker marriages, and the provisions of the Marriage Act, 1898 (*e*), do not apply either to Jews or to Quakers (*f*). Jews and Quakers may also be married by licence (*g*). Although the prohibited degrees, as defined by Lord Lyndhurst's Act (*h*), differ in some respects from those of the Jewish religion, they nevertheless apply to Jewish marriages in England (*i*) and also to the marriages abroad of adherents of the Jewish faith who are domiciled British subjects (*k*). The ordinary presumption of marriage from cohabitation applies in the case of a Jew and a Christian, although their marriage would not be recognised by the Jewish religion (*l*).

Marriages of British Subjects and Foreigners.—Provision has been made by a recent Act for obtaining certificates in the case of such marriages in England or abroad to the effect that no impediment exists to the marriage according to the foreign or English law respectively (*m*).

Foreign Marriages.—The marriages of British subjects in the chapels or houses of British Ambassadors or Ministers, or in the chapels of British factories abroad, or on board any British ships on the high seas and King's ships even in foreign waters, according to the rites of the Church of England, but without regard to the local law, had acquired the reputation of being valid before any legislation took place to that effect.

(*c*) Marriage Act, 1836 (6 & 7 Will. IV. c. 85), ss. 2, 4, 16.

(*d*) Marriage and Registration Act, 1856 (19 & 20 Vict. c. 119), s. 22.

(*e*) 61 & 62 Vict. c. 58, s. 13.

(*f*) S. 13.

(*g*) 19 & 20 Vict. c. 119, s. 21.

(*h*) 5 & 6 Will. IV. c. 54.

(*i*) Hammick, Marriage Laws of England, p. 164.

(*k*) De Wilton *v.* Montefiore, [1900] 2 Ch. 481. In this case it was held by Stirling, J., that the *dicta* of Lord Stowell in Lindo *v.* Belisario (1795), 1 Hagg. C. R. 216, as to the validity of Jewish marriages being regulated by Jewish law, related to the form, not to the substance of such marriages. For the history of the Jews in England see the note to Lindo *v.* Belisario, *ubi supra*, p. 217, n.

(*l*) Goodman *v.* Goodman (1859), 33 L. T. (O. S.) 70.

(*m*) 6 Edw. VII. c. 40. This will not come into force until it is applied by Order in Council to a particular country, and no such Orders have yet been made.

The present statute regulating this matter is the Foreign Marriage Act, 1892 (*n*), and the Orders in Council, 1892 and 1895, made under it, by which marriages may take place between British subjects (*o*) in accordance with the rites of the Church of England or any other form or ceremony that the parties desire containing the declaration specified in the Act, by or by another person in the presence of British diplomatic officers, such as Ambassadors or Consuls at their official houses, or by naval officers commanding a King's ship on a foreign station so authorised by a Secretary of State, on board that ship (*p*), or a Governor, or High Commissioner, Resident, or other substituted officer, within or without British dominions. Such marriages are subject to similar conditions as to notices, consents, objections, hours of celebration, witnesses and registration, as if taking place in the United Kingdom, and if so are valid as if they had taken place there. One of the parties must sign a notice stating the name, surname, profession, condition, and residence of each of the parties, and whether each of them is or is not a minor, and that they have resided within the district of the marriage officer to whom the notice is addressed not less than a week then next preceding (*q*). Each party must also take an oath before marriage that he or she believes that there is no impediment to it by reason of kindred or alliance or otherwise, that they have for three weeks immediately preceding had their usual residence within that district, and that if either is a minor, not being a widow or widower, the proper consents have been obtained (*r*). The Act only requires one of the parties to be a British subject (*a*), but it empowers a marriage officer to refuse to solemnise or permit a marriage to be solemnised in his presence

(*n*) 55 & 56 Vict. c. 23, repealing and reproducing the former statutes: 1824, 4 Geo. IV. c. 91; 1849, Consular Marriage Acts, 12 & 13 Vict. c. 68; 1868, 31 & 32 Vict. c. 61; Marriage Act, 1890 (53 & 54 Vict. c. 47), s. 47; Foreign Marriage Act, 1891 (54 & 55 Vict. c. 74). See also for special statutes legalising British marriages in Russia, 1824, 4 Geo. IV. c. 67, and Greek marriages in England, 1884, 47 & 48 Vict. c. 20, not good by the local law, and marriages on board British men-of-war, 1879, 42 & 43 Vict. c. 29, and 1908, 8 Edw. VII. c. 26.

(*o*) Under the Act 4 Geo. IV. c. 91, it was held that for this purpose only the nationality of the husband is regarded, neither his domicil nor the nationality of his wife being material: Wright's Trusts (1856), 25 L. J. Ch. 621.

(*p*) Foreign Marriage Act, 1892, ss. 11, 12.

(*q*) *Ibid.*, s. 2.

(*r*) *Ibid.*, s. 7.

(*a*) *Ibid.*, s. 1

which would in his opinion be inconsistent with international law or the comity of nations, subject to an appeal to the Secretary of State (*b*). The Orders in Council, however, require both parties to be British subjects, and this is in accordance with the recognised modern rule of private international law on this point; and the English decisions have established that a marriage of foreigners in an Ambassador's chapel, without banns or licence, is null, where neither party is of the country or suite of that Ambassador, certainly in a case where the man belonged to another suite, and the woman was not described as domiciled in any Ambassador's family, though she had acquired a matrimonial domicil by a month's residence in England (*c*).

The Act expressly saves the validity of any marriage solemnised beyond the seas otherwise than according to its provisions (*d*); and therefore such marriages where they would have been valid apart from legislation are equally, it seems, valid now, and will for all British subjects be governed by the common law of England (*e*). It may be assumed that no British subject can be party to an exterritorial marriage in England celebrated before a foreign officer, diplomatic or consular (*f*).

Naval Marriages.—By a recent Act, provision is made for the celebration of marriages after publication of banns and issue of certificates on board ships of the Royal Navy (*g*).

Marriages within Lines of British Army.—Marriages solemnised within the British lines by any chaplain or officer or other person officiating under the orders of a commanding officer of a British army serving abroad are as valid as if solemnised within the United Kingdom with due observance of all forms required by law (*h*). This confirms the former decisions, namely, that in the case of a military force stationed in a conquered country for the purpose of enforcing the obedience of the natives, and composing for the time

(*b*) S. 19. Marriages of members of the British Royal Family are also exempted from its provisions: s. 23, see p. 183.

(*c*) Pertreis *v.* Tondear (1790), 1 Hagg. C. R. 136; Lautour *v.* Teesdale (1816), 8 Taunt. 830; Bailet *v.* Bailet, May, 1901, L. M. & R., xxvi., p. 347. See p. 271, *post*.

(*d*) S. 23. See Culling *v.* Culling, [1896] P. 116.

(*e*) Marriage Commission's Report, 1868, p. 1; Dicey, 620; and see In re Johnson, [1903)] 1 Ch. 821.

(*f*) Dicey, 620, citing Marriage Commission's Report, p. xxxviii.

(*g*) Naval Marriages Act, 1908 (8 Edw. VII. c. 26).

(*h*) Foreign Marriage Act, s. 22.

"a distinct and immisceable body," the law of the conquered country is not that to which the subjects of the conquering country are bound to conform. It is competent for them to contract the marriage according to the law of their own country. The law of France was held not to apply to an officer of the English army of occupation marrying an English lady, on the ground that at that time, and under such circumstances, the parties were not French subjects under the dominion of French law. The same principle would be applied to the condition of a garrison of a subdued country (*i*).

Irish Law.—The marriage law of Ireland is regulated, so far as the formalities go, by statutes of which the most important are the Marriages (Ireland) Act, 1844 (*j*), the Marriage Law (Ireland) Amendment Acts, 1863 and 1873 (*k*), and the Matrimonial Causes and Marriage Law (Ireland) Amendment Act, 1870 (*l*). Statutory provision is made for marriages being celebrated according to the ritual of: (a) The Irish Episcopal Church; (b) the Presbyterians; (c) Quakers and Jews; and for a civil ceremony before the registrar on lines practically the same as the English law as regards banns, notices, licences, and the like. Special licences may be granted by the Archbishop of Armagh (*m*) for any persons, or by any Bishop of the Irish Church (*n*), or by heads of religious denominations, such as the Moderator of the General Assembly of the Irish Presbyterian Church, and including the clerk to the yearly meeting of the Society of Friends in Ireland (though not it seems the chief officer of the Jews), where both parties belong to the same denomination (*o*). Otherwise the marriage hours are 8 a.m. to 2 p.m. (*p*). Roman Catholic marriages are not touched

(*i*) Burn *v.* Farrar (1819), 2 Hagg. C. R. 369; Rex *v.* Brampton (1808), 10 East, 282; Ruding *v.* Smith (1821), 2 Hagg. C. R. 371.

(*j*) 7 & 8 Vict. c. 81, passed in consequence of the decision of the House of Lords in R. *v.* Millis (1844), 10 Cl. & F. 534; 17 Rul. Cas. 66, that a marriage celebrated in Ireland by a minister of the Presbyterian Church according to its rites was not valid. The Act places the marriage of Presbyterians and other bodies in Ireland not recognising priesthood, on a statutory basis. As to the old statute law, see Burge, vol. i., 1st ed., pp. 169—171.

(*k*) 26 & 27 Vict. c. 27; 36 & 37 Vict. c. 16.

(*l*) 33 & 34 Vict. c. 110 (mixed marriages, s. 38); and see 34 & 35 Vict. c. 49, ss. 2, 21—29.

(*m*) 7 & 8 Vict. c. 81, s. 2.

(*n*) 33 & 34 Vict. c. 110, s. 36.

(*o*) Hammick, 236; 33 & 34 Vict. c. 110, s. 37.

(*p*) 7 & 8 Vict. c. 81, s. 29; 26 & 27 Vict. c. 27, s. 7.

by statute except as regards registration (*q*), the grant of licences by Roman Catholic Bishops where both parties or one are or is Roman Catholic (*r*), and the power of Roman Catholic priests to marry Roman Catholics to persons of other persuasions (*s*), in the last case the marriage hours being fixed as above. Otherwise a marriage of Roman Catholics by a priest is good, at whatever hour or place it is performed, and in whatever manner, without any restrictions as to consent, residence, notice, or banns, being governed by the decree of the Council of Trent (parish priest or a priest authorised by him and two witnesses), and even its non-observance as to banns does not affect the marriage (*t*), but if one of the parties is a Protestant the marriage was and is invalid. There are similar provisions to those of English law as regards marriage of minors, for which consent of parents or guardians is required (*u*), and forfeiture of property accruing to parties marrying by fraudulent means as to notice, name, and the like (*x*); and an earlier law declared that the marriage of minors had without such consent should be void if proceedings to avoid them were taken within a year (*y*). Breach of a condition of a mixed marriage nullifies the marriage, as will also want of due publication of banns, licences, registrar's certificate or licence, or celebration in an unauthorised building (*z*). For a marriage to take place in Ireland, where one party resides in Scotland or England, a certificate is required of proclamation of banns in the one case, or from the superintendent registrar of the party's residence in the other case, respectively, and the marriage is by licence (*a*). For a marriage in England, where one party resides in Ireland, a certificate is required from the Irish district registrar (*b*). The system of registration in Ireland is the same as the English for Episcopalians, but not for other denominations (*c*).

(*q*) Hammick, 233; 26 & 27 Vict. c. 90, *passim*.

(*r*) 34 & 35 Vict. c. 49, ss. 24—27.

(*s*) 33 & 34 Vict. c. 110, ss. 38, 40.

(*t*) Hammick, 233; Marriage Commission Report, 1868, Irish Law, pp. 11—17; Smith *v.* Maxwell (1824), Ry. & Moo. 80; 1 C. & P. 271; Bruce *v.* Burke (1825), 2 Addams, 471; Yelverton *v.* Longworth (1864), 4 Macq. H. L. C. 745.

(*u*) 7 & 8 Vict. c. 81, s. 19.

(*x*) *Ibid.*, s. 51.

(*y*) Act 9 Geo. II. (I.), c. 11; Steele *v.* Braddell (1838), Milw. Eccl. Rep. 1; cited in Brook *v.* Brook (1861), 9 H. L. C. 193, at p. 201.

(*z*) 33 & 34 Vict. c. 110, s. 39; 7 & 8 Vict. c. 81, s. 49.

(*a*) 9 & 10 Vict. c. 72, ss. 1, 2.

(*b*) 19 & 20 Vict. c. 119, s. 7.

(*c*) See Hammick, 232; and for

Scots Law (*d*).—The basis of the Scots marriage law is the canon law. Till 1834 only ministers of the Established Church in Scotland and Episcopalian clergy could marry regularly (*e*). For a marriage in England, where a party resides in Scotland, a certificate of proclamation of banns in Scotland is required; for a marriage in Scotland, where a party resides in England, no preliminary steps can be taken in England (*f*). Under the law of Scotland marriages are either regular, clandestine, or irregular.

Regular Marriages.—The regular marriage (*g*) is one celebrated by a minister before at least two witnesses after due proclamation of banns or on a registrar's certificate. Fifteen clear days' residence in a parish is necessary to entitle the parties to have their banns proclaimed (*h*). Proclamation is required to be made on three separate Sundays by the minister in presence of the congregation. But the minister may, if he knows the parties or is satisfied that there is no impediment to their union, complete the proclamation on a single Sunday. On the expiry of forty-eight hours after the proclamation of the banns, the minister may grant a certificate of publication, and at any time within three months thereafter the marriage may be celebrated. Protestant Dissenters from the Established Church of Scotland must have their banns proclaimed in their parish church. Under the Toleration Act, 1711 (*i*), Scotch Episcopalians are required to have their banns proclaimed in their own churches. But it is said (*j*) that this provision has fallen into desuetude. As an alternative to proclamation of banns the Marriage Notice (Scotland) Act, 1878 (*k*), enables a regular marriage to be constituted after obtaining a registrar's certificate that notice of

Roman Catholics, 26 & 27 Vict. c. 90. For the Irish Church's continuing duty in this respect under the Act of 1844, see R. *v.* Magee (1893), L. R. I. 32 Q. B. & Ex. 87.

(*d*) On the whole subject of the forms of marriage under Scots law, see Fraser, Husband and Wife, i., 258 *et seq.*; Walton, Husband and Wife, p. 14; and a very learned article by the writer last named, *s.v.* Marriage, in Encyclo. Scots Law, viii., p. 256; and an article by Stocquart, Law Magazine and Review, 1903, xxviii., 326, 431; and a paper by Professor Goudy, Int. Law Association, Glasgow Conference Report, 1901, p. 243.

(*e*) 10 Anne, c. 7; 4 & 5 Will. IV. c. 28.

(*f*) Hammick, 221—231.

(*g*) Fraser, Husband and Wife, i., 289; 17 & 18 Vict. c. 80, s. 46.

(*h*) Act of Assembly, VIII., May 29th, 1880, sess. 2.

(*i*) 10 Anne, c. 10, s. 7.

(*j*) Encyclo. Scots Law, ii., p. 24.

(*k*) 41 & 42 Vict. c. 43.

the intended marriage has been given in the manner prescribed by the statute. It seems (*l*) that the Act does not apply where one party is not resident in Scotland. There are no canonical hours for marriage in Scotland (*m*), and the marriage is complete when the consents of the parties have been exchanged. Consummation is not necessary.

Clandestine Marriages.—A clandestine marriage is now (*n*) practically one celebrated (a) by a minister without due proclamation of banns, or (b) by a layman assuming the character of a minister (*o*). Penalties against persons celebrating (*p*), or being parties (*q*) or witnesses (*r*) to such marriages, are enacted by old Scots statutes; and the Marriage Notice (Scotland) Act, 1878 (*rr*), provides that any person otherwise entitled to celebrate a marriage who does so without certificates of due proclamation of banns or registrar's certificates of notice, is liable to a penalty of £50 (*s*).

Irregular Marriages.—There are three forms of irregular marriage in Scotland: I. Marriage *per verba de præsenti*. II. Marriage by promise, *subsequente copula*. III. Marriage by cohabitation and "habite and repute."

I. Marriage *per verba de præsenti* is constituted by the mere interchange of consent, assuming such consent to be genuine and the parties to be under no incapacity or disqualification for the contract (*t*). It is not necessary that the exchange of consents should be made in the presence of witnesses, although the absence of witnesses may make it impossible to prove the marriage if not followed by cohabitation, or if there is no acknowledgment in writing (*u*). Consent may be proved either by parol or by writing. It has been doubted whether, in a case of declarator of marriage,

(*l*) Circular of Registrar-General for Scotland of December 30th, 1878, quoted in Encyclo. Scots Law, ii., p. 25.

(*m*) Fraser, Husband and Wife, i., 282, 289.

(*n*) As to the old forms of clandestinity, see article Marriage, Encyclo. Scots Law, viii., pp. 257, 258.

(*o*) H. M. Advocate *v.* Ballantyne (1859), 3 Irvine, 352, 369.

(*p*) C. 246 of 1661; C. 6 of 1698.

(*q*) C. 246 of 1661.

(*r*) C. 6 of 1698.

(*rr*) 41 & 42 Vict. c. 43.

(*s*) S. 12.

(*t*) In the case of parties non-resident in Scotland, twenty-one clear days' residence in that country immediately preceding the marriage *per verba de præsenti* is required: Lord Brougham's Act (19 & 20 Vict. c. 96), s. 1; Lawford *v.* Davies (1878), 4 P. D. 61.

(*u*) Marriage Commission Report, 1868, p. xvi; Fraser, Husband and Wife, i., 294.

reference to the oath of the defender is competent; reference will be allowed if the interests of a wife, whom the defender has regularly married since the alleged marriage *per verba de præsenti*, are concerned (*x*). The Court must, of course, be satisfied that the consent was real (*y*).

II. **Marriage by Promise, Subsequente Copula.**—A promise of marriage—the true *sponsalia*, or the *sponsalia de futuro* of the canon law—may, while things remain entire, be resiled from at any time, though the party guilty of a breach of promise without any adequate cause, may be liable in damages (*z*).

If, however, the promise be followed by *copula* it is, with an exception to be noticed, converted into an actual marriage, in consequence of the presumption arising from the fact of a consent to present marriage having then been interposed. The marriage being complete in this way necessarily invalidates any other with third parties (*a*).

It has been held that in order to establish a marriage in this way the promise must be proved by the writ (*b*) or oath (*c*) of the party whose promise is founded on. But facts and circumstances, as a long courtship, may be taken into account in construing doubtful expressions (*d*).

Where illicit intercourse has previously occurred between the

(*x*) Longworth *v.* Yelverton (1867), L. R. 1 Sc. & Div. 220, 226, 227. But see Dysart Peerage Case (1881), 6 A. C., at p. 512.

(*y*) Maloy *v.* Macadam (1885), 12 Rettie, 431; Imrie *v.* Imrie (1891), 19 Rettie, 185.

(*z*) Ersk. b. i. tit. 6, s. 3; Stair's Inst., b. 1, tit. 4, s. 6, n.; Hogg *v.* Gow (1812), May 27th, 1812, F. C.

(*a*) Pennycook *v.* Grinton (1752), December 15th, 1752, Mor., p. 12,677; Dalrymple *v.* Dalrymple (1811), 2 Hagg. C. R. 54; 17 Rul. Cas. 10.

(*b*) A writing amounting to an acknowledgment of a promise is sufficient: Honyman *v.* Campbell (1831), 2 Dow & Cl. 265; Longworth *v.* Yelverton (1864), 4 Macq. 856.

(*c*) In Longworth *v.* Yelverton (1867), L. R. 1 Sc. & Div. 220, 226, 227, the view was expressed that reference to oath is no longer competent in actions of declarator. But the Court has still a discretion to grant it, though it will be refused if prejudice would be caused to third parties: Dysart Peerage Case (1881), 6 A. C., at p. 512.

(*d*) Smith *v.* Grierson, June 27th, 1755, Mor., p. 12,391; Honyman *v.* Campbell (1831), 2 Dow & Cl. 265; and cf. Harvie *v.* Inglis (1837, 1839), 15 Shaw, 965, 968; 1 Dunlop, 542; Lowrie *v.* Mercer (1840), 2 Dunlop, 960; Monteith *v.* Robb (1844), 6 Dunlop, 938, 943; Mackenzie *v.* Stewart (1848), 10 Dunlop, 636; Ross *v.* McLeod (1861), 23 Dunlop, 978, 989, 993; Longworth *v.* Yelverton (1864), 4 Macq. 745.

parties the applicability of the principle as to a promise *cum copula* constituting marriage has been much questioned. This distinction seems to be well founded. The promise only raises the presumption from the idea that the female would not have submitted to the embraces of an individual whom she had been taught to expect as a husband, except on an immediate consent to hold her as his wife. But where illicit intercourse has previously subsisted the presumption is the other way. In that case the promise is prospective; the intention of continued intercourse immediate. In short, the man promises that at some future period he will make the woman his wife, but in the meantime he calculates on nothing further than a continuance of the illicit connection, a principle which precludes the idea of an immediate consent of marriage attending the *concubitus* (*e*).

The promise and the *copula* must take place in Scotland, or at least in a country where that form of constituting marriage is recognised (*f*).

It is still undecided if an action of declarator is necessary to the constitution of marriage *subsequente copula* (*g*).

III. **Marriage by Habite and Repute.**—Marriage may also be constituted by the parties living openly together in the character of man and wife, or in the language of the law of Scotland, *habite and repute* (*h*).

A distinction has been made between cases where the parties have been reputedly married from the first and those in which the connection has begun illicitly. In the former the reputed cohabitation is sufficient; in the latter the presumption is that the parties continue to cohabit illicitly, and it is necessary to prove in some other way that they really regarded each other as man and wife (*i*).

(*e*) Stair's Inst., b. 1, tit. 4, n. 6, n.; Morrison *v.* Dobson (1869), 8 Macph. 347; Maloy *v.* Macadam (1885), 12 Rettie, 431; Hoggan *v.* Craigie (1839), Macl. & R., at p. 972; Sim *v.* Myles (1829), 8 Shaw, 89.

(*f*) Longworth *v.* Yelverton (1864), 4 Macq. 879, 902; Fraser, Husband and Wife, i., 384; Walton, Husband and Wife, 28.

(*g*) Marriage Commission Report, 1868, p. xix; Maloy *v.* Macadam (1885), 12 Rettie, 431; Encyclo. Scots Law, tit. Marriage, viii., 262—264.

(*h*) See Dysart Peerage Case (1881), 6 A. C. 489.

(*i*) Sommerville *v.* Halcro (1626), July 7th, 1626, Mor., p. 12,635; Swinton *v.* Kaills (1676), January 15th, 1676, Mor., p. 12,637; Inglis *v.* Robertson (1786), March 3rd, 1786, Mor., p. 12,689; Cunningham *v.* Cunningham (1814), 2 Dow, 482; Macneil *v.* Macgregor (1828), 1 Dow

Although cohabitation as man and wife be a proof of marriage, yet even where the parties live avowedly in that relation it is competent to prove that they never intended marriage, but merely assumed that character to save appearances. But the proof of this under such circumstances must be strong, nay, conclusive (*k*).

Cohabitation outside Scotland will not constitute the marriage, although it may be competently founded on, either as corroborative evidence of a ceremony in Scotland or as evidence that a ceremony proved to have taken place in Scotland was truly intended by the parties as a present interchange of matrimonial consent (*l*).

The Marriage Act of 1753 and the present Marriage Act, being confined to England and Wales, the marriage law of the British Colonies is that which either prevailed in England before the passing of the Act in 1753 or which has been established by their own municipal laws (*m*).

Laws of the Dominions.—Full effect is now given in point of form to any British (Colonial) marriage throughout British dominions, as the statutory proviso that such marriage is not to have such validity unless at the time of marriage both parties were competent to contract it according to the law of England, only touches questions of capacity (*n*). There are certain common features in all these various laws, similar to those of English law, such as the requirement of previous notice by banns or notice, declaration that no impediment to marriage exists, celebration in a public or registered building, the presence of two witnesses, obtaining consent of parents or guardians, if the parties or one of them is a minor, and denominations being allowed to use their own ritual for the ceremony. No denomination, however, as in England, has any privileged position in this respect, and in almost all the Colonies the persons performing the ceremony, whether clergymen or civil officers, must be authorised by the authorities for this purpose and registered. The following

& Cl. 208; Lapsley *v.* Grierson (1848), 1 H. L. C. 498; Campbell *v.* Campbell (1867), L. R. 1 Sc. & Div. 182; Dysart Peerage Case (1881), 6 A. C., per Lord Watson, at p. 539.

(*k*) Stair's Inst., b. 1, tit. 4, s. 6, n See Steuart *v.* Robertson (1875), L. R. 2 Sc. & Div. 494.

(*l*) Dysart Peerage Case (1881), 6 A. C. 489.

(*m*) See *ante*, pp. 127, 129.

(*n*) Colonial Marriages Act, 1865 (28 & 29 Vict. c. 64).

summary will indicate the chief statutory provisions of the Colonies as to the forms of marriage.

Isle of Man.—The statutes are the Marriage Act of 1849, Dissenters' Marriage Acts of 1849, 1885, and 1908, and the Marriage Law Amendment Act of 1895. The hours are now 8 a.m. to 4 p.m.; if one of the parties at the time of publication of banns is resident in the United Kingdom it is enough that the banns are also published in the church of the place where that person resides, according to the law of the United Kingdom.

Channel Islands.—By Ordinances of the Royal Court of Jersey (1567), young persons contracting marriage were required to have the consent of their fathers or mothers or guardians, on pain of fine and the marriage being null; (1658) registers were required to be kept; and (1684—5) notice had to be given to the Governor of marriages between inhabitants of the island and foreigners (*nn*).

In **Jersey** (*o*) and **Guernsey** (*p*), marriages may be by (1) banns, but the marriage must be within the canonical hours (8 a.m. to 12 noon); (2) ordinary licence from the Dean, dispensing with publication of banns only; (3) special licence from the Dean, authorising the clergyman, to whom it is issued, to celebrate the marriage in or out of canonical hours, and in whatever place in his parish he may think fit; (4) superintendent registrar's, and, in Guernsey, registrar's certificate: and (5) superintendent registrar's, and, in the case of Guernsey, registrar's licence.

No civil provision exists for notice of a marriage to be given either in Jersey or in England and Wales by parties residing one in each country, but the due publication of banns is reciprocally received in Jersey and in the United Kingdom, *i.e.*, where one party resides in Jersey and the other in the United Kingdom, the marriage after banns may take place either in the parish church of the party residing in Jersey, or in that of the party residing in the United Kingdom at their option. Where one party resides in England and Wales, and one in Guernsey, the same conditions exist as to notice and banns as in Jersey.

In Guernsey the law of 1840 acknowledges the validity of

(*nn*) Recueil d'Ordonnances (1852), i., 24, 186.

(*o*) Canon Law and Stat. Law of 1841.

(*p*) Canon Law, and Order in Council of October 3rd, 1840; 69th Annual Report (1908) of Registrar-General of Births, Deaths, and Marriages in England and Wales, pp. 14, 15 [Cd. 3833].

marriages performed by a minister of the Established Church according to the Rubric, or with the licence or special licence of the Surrogate of the Bishop of Winchester, who is usually the Dean of the island. Special exceptions are made in regard to Quakers and Roman Catholics. The registrar is authorised to certify civil marriages at the registry office or in licensed places of worship.

Dominion of Canada.—By the British North America Act, 1867, the subjects of "Marriage and Divorce" are committed to the exclusive jurisdiction of the Dominion Parliament of Canada, while the Provinces are given authority to legislate exclusively respecting "the solemnisation of marriage in the Provinces" (*a*).

The only Dominion statute in this connection is one imposing penalties on unlawful marriage or procuring of marriage (*b*).

All the Provinces and the North-West Territories have availed themselves of the power and have passed local Marriage Acts, which have been severally consolidated, except in Prince Edward Island (*c*).

In British Columbia and the North-West Territories a civil marriage may be celebrated by a civil official in no way associated with any religious body or organisation. In New Brunswick no marriage can be solemnised by any person who is not registered as required by the Act. In Nova Scotia no civil marriage is allowed. With these exceptions, there is a marked similarity in the Provincial Statutes. The consent of parents or guardians is uniformly required for the marriage of minors, although the age-limit varies from eighteen to twenty-one years, and the details are different in different Provinces. In no case is the marriage declared to be invalid for the want of the required consent. The marriage must be by licence or banns in all cases, with local differences as to publication of banns and the procedure for obtaining the licence, for which an affidavit of the applicant is always necessary. In the older Provinces there is curative legislation for the protection of marriages solemnised in good faith and followed by cohabitation,

(*a*) Ss. 91, 92. See Lefroy's Legislative Power in Canada, pp. 488—489; Clement's Canadian Constitution, 2nd ed., 234; Citizens' Insurance Co. of Canada *v.* Parsons (1881), 7 App. Cas. 96, 108.

(*b*) R. S. C. (1906), c. 146, ss. 307—312.

(*c*) The consolidated statutes are Ontario, R. S. O. (1897), c. 162; Nova Scotia, R. S. N. S. (1900), c. 111; New Brunswick, R. S. N. B. (1903), c. 76; British Columbia, R. S. B. C. (1897), c. 129; Manitoba, R. S. Man. (1902), c. 105; North-West Territories, Con. Ord. N. W. T. (1898), c. 46.

and of the rights acquired under them. We may commence a short account of the several statutes by a brief reference to the legislation of the Province of Ontario.

Ontario.—The following persons being men and resident in Canada may solemnise marriage in Ontario: duly ordained ministers and clergymen of every religious denomination; elders, evangelists, and missionaries of the "Disciples of Christ," if duly chosen to solemnise marriage; duly appointed commissioners or staff-officers of the Salvation Army; duly appointed elders of the Farringdon Independent Church (*d*). Marriages solemnised according to the rites of Quakers are valid (*e*). There must be, at least, two adult witnesses, and, except under special circumstances, the celebration may not take place between the hours of 10 p.m. and 6 a.m. (*f*); but it is not necessary that the marriage should be solemnised in a consecrated church or chapel (*g*). No person shall celebrate the ceremony unless authorised by licence of the Lieutenant-Governor, unless the intention of the two persons to intermarry has been proclaimed by at least one publication of banns (*h*). No licence is to be granted, except on affidavit, or to any person under fourteen years of age, except where proof is given by a medical man that otherwise there will be illegitimate offspring. Before the licence is granted one of the parties must make an affidavit in accordance with the requirements of the Act (*i*), and stating, *inter alia*, the age of the deponent, and that the other contracting party is of the full age of eighteen years, or the age of such other party if under eighteen, the condition in life of the parties, whether bachelor, widower, spinster, or widow, and the belief of the deponent that there is no affinity, consanguinity, or other lawful cause or legal impediment to hinder the marriage. The affidavit shall further state the facts necessary to enable the issuer to judge whether or not the required consent has been given in the case of any party under the age of eighteen years, or whether or not such consent is necessary. The consent of the father or, if the father is dead, of the mother, if living, or of the guardian, if any duly appointed, shall be required before the issue of the licence where

(*d*) R. S. O. (1897), c. 162, s. 2; Ontario, 4 Edw. VII. c. 10, s. 39.
(*e*) R. S. O. (1897), c. 162, s. 3.
(*f*) *Ibid.*, s. 5.
(*g*) *Ibid.*, s. 22.
(*h*) *Ibid.*, s. 4.
(*i*) *Ibid.*, s. 17.

either of the parties, not being a widow or widower, is under the age of eighteen years, and where required, the written consent shall be verified by oath and annexed to the applicant's affidavit(*j*). If both the father and mother are dead and there is no guardian, the issuer may grant the licence on being satisfied as to the facts, as he may also do in case the father or mother, though living, is not a resident of and not within the Province at the time of the application, and the minor is a resident, and has been for the preceding twelve months (*k*).

The curative provision is as follows (*l*): "Every marriage heretofore or hereafter solemnised between persons not under a legal disqualification to contract such marriage, shall after three years from the time of the solemnisation thereof, or upon the death of either of the parties before the expiry of such time, be deemed a valid marriage so far as respects the civil rights in this Province of the parties or their issue, and in respect of all matters within the jurisdiction of the legislature of Ontario, notwithstanding the clergyman, minister, or other person who solemnised the marriage was not duly authorised to solemnise marriages, and notwithstanding any irregularity or insufficiency in the proclamation of intention to intermarry, or in the issue of the licence or certificate, or notwithstanding the entire absence of either. Provided that the parties after such solemnisation lived together and cohabited as man and wife, and that the validity of the marriage has not before such death or prior to the expiry of the said time been questioned in any suit or action; and, provided further, that nothing in this section shall make valid any such marriage in case either of the parties thereto had or has previous to the death of the other and previous to the expiration of the said three years contracted matrimony according to law, and in such case the validity of such marriage shall be determined as if this section had not been passed."

Nova Scotia.—In Nova Scotia only duly ordained ministers or clergymen, being men and resident in Canada(*m*), or male commissioners and staff-officers of the Salvation Army, duly appointed (*n*), may solemnise marriage, and it must be celebrated in the presence of two witnesses: and provision is made for the issue of certificates and returns by clergymen and issuers of licences.

(*j*) R. S. O. (1897), c. 162, ss. 15, 18.
(*k*) S. 15 (3), (4).
(*l*) S. 30.
(*m*) R. S. N. S. (1900), c. 111, s. 3.
(*n*) *Ibid.*, s. 12.

Marriage may be by banns or licence (*o*). The usual affidavit is required upon application for a licence (*p*), and consent of the father, if living, or, if the father be dead, of the mother, or if both mother and father are dead, of the guardian, if any, shall be obtained where either party, not being a widow or widower, is under the age of twenty-one years (*q*). If there be no parent or guardian, the licence may be issued without such consent (*r*). The Act also provided that every marriage solemnised in Nova Scotia on or before April 19th, 1884, in good faith, before any clergyman or minister of any religious denomination, in the presence of one or more witnesses, and the parties to which have cohabited, shall be deemed valid, notwithstanding any want of legal authority in such clergyman or minister, or want of any licence or publication of banns, provided that nothing therein contained shall confirm or render valid any marriage between parties legally incapable of entering into the marriage by reason of consanguinity, affinity, prior marriage, or otherwise (*s*).

New Brunswick.—No person shall solemnise marriage in New Brunswick who is not registered as authorised by statute (*t*). Christian ministers or teachers, duly ordained; resident, retired or superannuated Christian ministers or teachers in good standing; commissioners or staff-officers of the Salvation Army resident within the Province, and Jewish Rabbis, may be registered (*u*). A registered person solemnising or attempting to solemnise a marriage which must not be celebrated without licence or the publication of banns, and must be celebrated in the presence of two witnesses (*v*), is liable to penalties (*w*), and "no person shall knowingly solemnise any marriage where either party is under the age of eighteen years, without the consent of the father or guardian" (*x*). Section 15 confirms all former marriages solemnised before ministers, or teachers of religious denominations in the presence of two or more witnesses, and followed by cohabitation upon satisfying conditions similar to those contained in the legislation of Nova Scotia.

Prince Edward Island.—Clergymen of any sect or denomination of

(*o*) R. S. N. S. (1900), c. 111, s. 5.
(*p*) *Ibid.*, s. 8.
(*q*) *Ibid.*, s. 11.
(*r*) *Ibid.*, s. 11 (3).
(*s*) *Ibid.*, s. 34.
(*t*) R. S. N. B. (1903), c. 76, s. 6.
(*u*) *Ibid.*, s. 2.
(*v*) *Ibid.*, s. 10.
(*w*) *Ibid.*, s. 7.
(*x*) *Ibid.*, s. 9.

Christians having spiritual charge of a congregation within the island upon securing a certificate to that effect from the Lieutenant-Governor, and "all others" thereto similarly authorised by the Lieutenant-Governor or Commander-in-Chief, may solemnise marriage by licence or the publication of banns in Prince Edward Island, but clergymen of most denominations and male commissioners and staff-officers of the Salvation Army may perform the ceremony without a certificate (*y*). Persons under twenty-one must have the consent of parents or guardians, but if there is no parent or guardian the person authorised to solemnise the marriage may inquire into the propriety of it and give his consent if he thinks proper (*z*). Former marriages solemnised by licence or upon publication of banns by any clergyman, or minister of the Gospel, or any justice of the peace, or other lay person are confirmed by the Provincial statute, with the usual exceptions.

British Columbia.—Ministers and clergymen of every Church and religious denomination in British Columbia, including Salvation Army officers and registrars appointed by the Lieutenant-Governor in Council, may celebrate a marriage (*a*). In the event of the parties objecting to, or not desiring marriage by a clergyman or minister of any religious denomination, provision is made for civil marriage on certain conditions (*b*), with which marriages of Quakers and Jews, according to their rites and usages, must also comply (*c*). The usual consent is required for the marriage of any person under twenty-one years (*d*), and if unduly refused a Judge of the Supreme Court is empowered to declare judicially to that effect, and to allow the marriage (*e*).

Manitoba.—The Marriage Act (*f*) bears a close resemblance to the legislation of Ontario. Ministers and clergymen of every Church and religious denomination, duly ordained or appointed; elders, &c., of the "Disciples of Christ"; male commissioners or staff-officers of the Salvation Army, commissioned for the purpose, may solemnise marriage in that Province (*g*). Marriages may be performed between Quakers according to their rites and usages (*h*), and such persons of

(*y*) 2 Will. IV. c. 14, s. 2; 3 Edw. VII. c. 7, s. 1. See also 1843, 6 Vict. 8; 1868, 31 Vict. c. 10; 1891, 55 Vict. c. 7.
(*z*) 2 Will. IV. c. 14, ss. 3, 7.
(*a*) R. S. B. C. (1897), c. 129, ss. 4, 6.
(*b*) *Ibid.*, s. 7.
(*c*) *Ibid.*, s. 12.
(*d*) S. 17.
(*e*) S. 18.
(*f*) R. S. Man. (1902), c. 105.
(*g*) Ss. 3, 25, 27.
(*h*) S. 24.

the Jewish faith as comply with special requirements (*i*) as to their appointment can also celebrate marriage. The marriage ceremony is not to be performed except upon licence or upon publication of banns (*k*). An affidavit of the applicant for the licence is necessary (*l*), and in case either of the parties, not being a widow or a widower, is under the age of twenty-one, it shall state that the consent of the person whose consent to the marriage is required by law has been obtained (*m*). Dispensation from banns may be granted by the head of any Church or congregation (*n*), and registration is provided for (*o*). The father, if living, or, if dead, the guardian or guardians, or if none, the mother may give the consent (*p*), but if there be no person having authority to give the consent, it shall be lawful upon oath to that effect to grant the licence without it.

The Act confirms all former marriages solemnised by any minister or clergyman of any religious denomination under any licence or certificate, notwithstanding the want of compliance with statutory formalities, and provides that any ceremony of marriage performed by or in the presence of any magistrate or justice of the peace in any case where there was no person duly authorised to solemnise marriage within fifty miles from where the parties resided, in pursuance of which the parties intended to assume, and did thereafter assume towards each other, the position of husband and wife, shall be considered a valid, lawful, and binding marriage (*q*).

North-West Territories.—Marriage may be solemnised by ministers and clergymen of any Church or religious denomination and commissioned staff-officers of the Salvation Army, by banns or licence, and by commissioners appointed for that purpose by the Lieutenant-Governor in Council by licence (*r*). A subsequent Act (*s*) follows the model of the British Columbia statute and enacts that civil marriage may be performed by marriage commissioners appointed by the Lieutenant-Governor in Council if desired by the parties, upon their compliance with the requirements set forth in the Act. Upon the like compliance, Quakers or Doukhobortsi may celebrate marriage according to the rites and

(*i*) R. S. Man. (1902), c. 105, s. 29.
(*k*) S. 4.
(*l*) S. 12.
(*m*) S. 13.
(*n*) S. 5.
(*o*) Ss. 20—23.
(*p*) R. S. Man. (1902), c. 105, s. 17.
(*q*) S. 32.
(*r*) Con. Ord. N. W. T. (1898), c. 46, s. 2.
(*s*) 17 of 1901.

ceremonies of their own religion or creed (*t*). The usual consent is required by the Consolidated Ordinance (*u*), which in some cases may be given by the acknowledged guardian, who may have "brought up," or, for three years immediately preceding the intended marriage, supported or protected the minor. Consent may be dispensed with where the minor is a female living apart from her parents or guardians, and over the age of eighteen years (*v*).

Quebec.—The French ordinances already referred to (*x*), only allowing marriages to be performed by Roman Catholic priests, were in force in Lower Canada; but after the Colony became British, legislation was passed legalising the celebration of marriages by ministers of other religious denominations (*y*).

Under the present law marriage must be solemnised openly by a competent officer recognised by law (*z*). There is no civil marriage by a lay officer. Roman Catholic priests, the ministers of all the chief denominations of Protestants, and those of the Jews are authorised to solemnise marriage (*a*). When both the parties to a marriage are Roman Catholics it has been held that the marriage in order to be valid must be solemnised by the proper *curé* of the parties. Accordingly the marriage of two Roman Catholics solemnised by a Protestant minister has been declared invalid (*b*).

The law of Quebec on this point is governed by the Civil Code of Lower Canada (*c*), and the Code of Civil Procedure (*d*). It follows generally the French law as to formalities and consents.

Newfoundland.—The statutory law of the Colony of Newfoundland is consolidated in Chapter 133 of the Consolidated Statutes of Newfoundland, 2nd series, 1892. All marriages which may be solemnised in the Colony and Dependencies shall be solemnised by persons in holy orders, or by some resident minister publicly recognised as the pastor or teacher of any congregation having a church or chapel, or by persons employed to discharge the duties

(*t*) 17 of 1901, s. 5.

(*u*) Con. Ord. N. W. T. (1898), c. 46, s. 11.

(*v*) C. 11 of 1903, s. 1.

(*x*) See p. 158.

(*y*) See Burge, 1st ed., i., p. 176.

(*z*) C. C. of L. C., art. 128.

(*a*) For complete enumeration, see Mignault, Droit Civil Canadien, i., 172.

(*b*) Durocher *v.* Degré (1901), R. J. Q. 20 S. C. 456.

(*c*) Arts. 57—64.

(*d*) Arts. 1105—1113; Act XX. of Consol. Statutes of Lower Canada governs registration.

of teachers or preachers of religion, such teachers or preachers being duly licensed to celebrate marriage by the Governor (*e*). Any person performing a marriage between any two persons, either of whom shall be under age, without having first published the banns on three successive Sundays in some church or chapel, or, if no such publication, without causing notice of the marriage to be placarded in some conspicuous place of public resort for three weeks immediately preceding the day appointed, or without having first obtained the consent of the parents or guardians of such person under age, shall be guilty of a misdemeanour (*f*). The presence of two witnesses is necessary in all cases (*g*). When the residence of any woman about to be married shall be distant ten miles from the residence of the nearest clergyman or a licensed teacher or preacher of religion, any magistrate, being first licensed for that purpose by the Governor, may celebrate a marriage between any persons resident in such place; and if there be no such teacher or preacher so authorised nor any magistrate so licensed within fifteen miles of the woman about to be married, in such case any layman or person duly licensed for such purpose by the Governor may celebrate marriage between any persons resident in such place (*h*); by an amending statute of 1893 (*i*) the Act is made to apply to the Salvation Army, and any duly appointed commissioner or staff-officer resident in the Colony, and being a man duly commissioned by the Army to solemnise marriage and an attested copy of whose commission has been deposited in the office of the Colonial Secretary shall have authority to solemnise marriage.

Registration is provided for by c. 21 of 1890, amended by c. 9 of 1891, c. 28 of Cons. Stat., amended by 55 Vict. c. 12, and No. 9 of 1899.

Commonwealth of Australia (*k*).—**Victoria.**—Marriages may be celebrated by (1) ministers of religion whose names are registered with the Government statist, including heads of religious denominations; (2) the Government statist or any registrar of marriages. There is no restriction of hours for marriages by ministers, and for those by

(*e*) Cons. Ord. c. 133, s. 1.
(*f*) S. 3.
(*g*) S. 2.
(*h*) S. 7.
(*i*) 56 Vict. c. 18.

(*k*) See Journal of Comp. Leg., 1899 *et seq.*; Parl. Papers as to Marriage Laws of Colonies, 1894 (144, 145); 1903, Cd. 1785; Hammick, Marriage Law of England, 389 *et seq.*

civil officers the hours are from 8 a.m. to 4 p.m. without fee. The governing statutes are the Marriage Act of 1890, No. 1166, and its amending Act, 1890, No. 1204, Marriage Act, 1898, No. 1582, the Registration Act, 1890, No. 1137, and amending Act No. 1303.

Papua.—The Act, 1898, No. 9, validates marriages celebrated previously before any missionary or teacher of any Christian mission or before any minister of religion of any denomination of Christians.

New South Wales.—Marriages may be celebrated by (1) ministers of religion registered with the Registrar-General, or (2) before registrars of marriages acting in the district where the intended wife lives. There is no legal restriction of hours. It is doubtful if there are any prohibited degrees, though probably (except for marriage with a deceased wife's sister) these are the same as in England at the time of the passing of the 9 Geo. IV. c. 83. The governing Act is the consolidating Act No. 15 of 1899.

Queensland.—Marriages may be celebrated by ministers registered with the Registrar-General; but if the parties object or no minister is available, they may be married before a district registrar according to a prescribed form of words. The legal hours are 8 a.m. to 8 p.m. In remote parts of the Colony the Governor may appoint justices to celebrate marriages in a public place with open doors between 8 a.m. and 6 p.m., with similar procedure to that before a registrar. The marriageable age is fourteen (*l*).

Western Australia.—The marriage officers are the same as for Queensland. No marriage is to be made void by celebration by a person other than a minister or a district registrar, if either party *bonâ fide* believed him to be such, or for non-registration of the minister or improper appointment of the registrar. The marriage hours are from 8 a.m. to 8 p.m. (*m*). Marriages between Jews may be celebrated (1) by a minister or other person of the Jewish religion, duly registered or authorised to celebrate marriages; or (2) by a district registrar (*n*).

South Australia, &c.—The marriage law of the Colony is the English law brought by its first settlers as on December 28th, 1836, except so far as it has since been altered by statute. Marriages are

(*l*) Statutes, 28 Vict. No. 15; 34 Vict. No. 8; 36 Vict. No. 12; 41 Vict. No. 25.

(*m*) Marriage Act, 1894 (58 Vict. No. 11), s. 6, as amended by s. 5 of No. 7 of 1907.

(*n*) No. 7 of 1907, s. 14.

performed by persons authorised, ministers of religion, and civil officers, the Registrar-General, and district registrars. The Act of 1867 made registration conclusive evidence of a valid marriage and marriages unimpeachable for non-observance of formalities, but this was amended by the Act of 1869 (*o*).

Tasmania.—The regulating statutes are the Marriage Act of 1895 (*p*), amended by Acts of 1896 (*q*), and 1906 (*r*). Marriages may be performed by any registered minister of religion, or the Registrar-General, or a registrar of marriages, and parties who object to marriage by a minister or a registrar by licence or certificate may marry by mutual contract before two or more witnesses and in presence of a registrar. The marriage hours are 8 a.m. to 4 p.m. with open doors; civil marriages can only take place in the business hours of the marriage officer. Special provision is made for the marriages of Friends and Jews. There is no statutory restriction of age, but probably the English rule of fourteen for husbands and twelve for wives is in force. There are no banns, only licences.

New Zealand.—The governing statute is the Marriage Act, 1904 (*s*). Marriages are performed by ministers of religion certified to the Registrar-General as officiating ministers by their ecclesiastical authorities, or failing that, two office-bearers of their respective churches (*t*), and before district registrars by parties who object to be married in the presence of an officiating minister (*u*). There are no licences, but a certificate of a registrar is necessary in every case (*x*). There are similar provisions to those of English law as to validity and invalidity of marriage and forfeiture of property acquired by marriage of minors without consent (*y*). The Act does not apply to the aborigines until so applied by the Governor, and in places chosen by him, but they can marry according to it if they like (*z*). Registration is provided for (*a*). The common law of England applies as regards the age for parents' or guardians'

(*o*) Statute, 15 of 1867 (consolidating); 21 of 1870—1871; 5 of 1868—1869; 243 of 1882; 10 of 1874.

(*p*) 59 Vict. No. 23.

(*q*) 60 Vict. No. 13.

(*r*) 6 Edw. VII. No. 19, an Act which provides that marriages are not to be avoided in consequence of certain specified irregularities.

(*s*) 4 Edw. VII. No. 19 of 1904.

(*t*) S. 10.

(*u*) S. 34.

(*x*) S. 31.

(*y*) Ss. 44—51.

(*z*) S. 2.

(*a*) Ss. 35—43.

consent (*b*), but there is no statutory limit of age of parties at which the registrar can refuse to issue a certificate; he has a discretionary power to do so if a lawful impediment (such as legal affinity within the table of prohibited degrees in the Anglican Book of Common Prayer, previous union, or want of parents' (resident in the Colony) written consent to minor's marriage) is shown, or if the certificate is forbidden by caveat (*c*). The parties may marry according to any form they see fit to adopt, with open doors, from 8 a.m. to 4 p.m. (*d*).

Fiji.—The marriage law of Fiji, to which the Ordinance 15 of 1875 applies all English laws of general application, is contained in the Marriage Ordinance, 1892, No. 18. Marriage may be performed religiously by ministers registered for that purpose or civilly before a registrar, but the latter is not applicable to Fijians or Indians or their descendants. Registration is dealt with by the Registration Ordinance of 1892, No. 16.

West Indies.—Jamaica.—The governing statute is the marriage law of 1897 (*e*). Marriages may be celebrated by marriage officers who may be superintendent registrars or ministers of religion, with two witnesses; the hours are 6 a.m. to 8 p.m.; it must be with open doors and certain words must be used. Marriages *in articulo mortis* may also be made without notice or banns. The requirements are (1) a superintendent registrar's certificate after notice; or (2) a marriage officer's certificate of publication of banns; or (3) a licence from the Governor; or a licence from a justice of the peace, the clerk of the resident magistrate's Court, or any person appointed for the purpose by the Governor (*f*). Provision is also made for the marriage, divorce, and succession of Indian immigrants; the protector of immigrants may designate husbands and wives among them, and register them as such, and the parties are then deemed to be married, the age for men being fifteen and for women thirteen.

Turk's and Caicos Islands.—The marriage law consists of the old Bahamas law, 2 Vict. No. 13; the local law 10 of 1873, by which the marriage hours are 8 a.m. to 4 p.m., and the ceremony may be performed by lay readers of the Anglican Church, or presiding elders, deacons, or delegates of any known sect of Christians in

(*b*) 4 Edw. VII. No. 19 of 1904, s. 19.
(*c*) Ss. 21—23.
(*d*) S. 32.
(*e*) No. 25 of 1897, amended in detail by No. 28 of 1905.
(*f*) No. 28 of 1905, s. 7.

the islands; and registration is provided for by No. 4 of 1862, amending 2 Vict. No. 13; and the laws of Jamaica (*ff*).

Barbados.—The Marriage Act, 1891 (*g*), governs, and registration is provided for by that Act, and No. 19 of 1891. Any minister of the Christian religion may publish banns and marry; licences are granted by the Governor or other civil officers; there is civil marriage by police magistrates, and a prescribed form of words must be followed for the marriage of non-Anglicans. The marriage hours are 8 a.m. to 9 p.m. with open doors.

Trinidad and Tobago (united in 1888).—The marriage laws are the Marriage Order in Council of September 7th, 1838, replaced by Ordinances Nos. 11 of 1863, 13 of 1865, and 17 of 1893; and for registration Nos. 13 of 1847 and 12 of 1889, making the register proof of marriage. Ministers of registered places of worship may marry on certificate or licence from the Governor, and the hours are 7 a.m. to 5 p.m. Special provision is made for the marriage and divorce of Indian immigrants by No. 23 of 1891.

British Guiana.—The law on this subject is now consolidated in the Marriage Ordinance of 1901, No. 25, and No. 29 of 1902, which last allows of marriages *in articulo mortis*, with similar provisions to the foregoing legislation. Specified words must be used in the ceremony where the Anglican service is not used. The hours are 6 a.m. to 9 p.m. for religious marriages, and for civil marriages 10 a.m. to 4 p.m. No proceedings lie to compel marriage by reason of any breach of promise or seduction, but this provision does not affect actions for damages for breach of promise or seduction (*h*). No. 36 of 1903 gives effect to the Foreign Marriage Act, 1892, for marriages of British subjects outside British Guiana. Provision is made for the marriage of heathen immigrants into the Colony by the Immigration Ordinance of 1891, No. 18, part ix.

British Honduras.—The governing statute is the Marriage Ordinance, 1889 (No. 18), amended by Nos. 27 of 1892, 18 of 1900, and 10 of 1907. Marriages may be performed in public and by ministers of religion registered with the Governor or by district magistrates; specified words must be used for the ceremony and a

(*ff*) Laws of Turk's and Caicos Islands (1908).

(*g*) No. 15 of 1891, amended as to the conditions of the grant of marriage licences in the case of minors and majors by No. 1 of 1905.

(*h*) No. 25 of 1901, s. 66.

declaration on oath is required that there are no impediments to the marriage, and consents are required for the marriage of minors. A defect in the declaration will not avoid the marriage, and no marriage performed by a person registered is avoided by the fact of such person not being a minister of religion, but every person so registered is deemed conclusively to be competent to perform the marriage. The marriage hours are 8 a.m. to 7 p.m., except by special licence. No. 14 of 1903 gives effect to the Foreign Marriage Act, 1892, and its Order in Council. Registration is dealt with by No. 27 of 1892.

Grenada.—The law is contained in the Marriage Ordinance of 1900, No. 12, with an amending Act, No. 18 of 1901, repealing Nos. 12 of 1841 and 79 of 1865 (registration), as to registration, the effect of which is similar to the foregoing legislations. Marriage requires the authority of a registrar's certificate, or marriage officer's certificate (*i.e.*, banns), or licence, except in the case where persons have been living in concubinage and one of them is *in articulo mortis*. Persons under twenty-one (except widowers and widows) cannot marry without consent of the father or guardian. No. 8 of 1903 gives effect to the Foreign Marriage Act, 1892.

St. Lucia.—The subject is dealt with by the Civil Code (1879), Book II. and Book V., c. 2, and the Civil Status Ordinance, No. 15 of 1879.

By a French Ordinance of March, 1685, art. 10, the rites enjoined by the Ordinance of Blois and the Declaration of 1639 were extended to St. Lucia (*i*).

Bermuda.—The principal Act is the Marriage Act, 1905 (*k*). Marriages may be celebrated (*l*) by any incumbent (a term extended by the Marriage Act, 1906 (*m*), to military chaplains or licensed ministers) after the publication of banns (*n*) or the grant of licences (*o*). Provision is made for the registration of marriages (*p*).

Bahamas.—The principal Act is now the Marriage Act, 1908 (*q*).

(*i*) See *ante*, p. 158, and Burge, 1st ed., i., p. 176.
(*k*) No. 27 of 1905.
(*l*) S. 2.
(*m*) No. 16 of 1906, s. 1.
(*n*) No. 27 of 1905, ss. 4—9.
(*o*) Ss. 10—16.
(*p*) S. 26.
(*q*) 7 & 8 Edw. VII. c. 4.

Marriages may be celebrated by ministers of the Christian religion licensed by the Governor, registrars of marriages, and other persons entitled to appointment as marriage officers (*r*). Marriage is solemnised on the authority either of the registrar's or marriage officer's certificate, or the Governor's licence (*s*). The hours for marriages, other than by special licence, are from 6 a.m. to 8 p.m. (*t*). Provision is made for the registration of marriages (*u*) and for marriage *in articulo mortis*, to which special provisions apply (*v*).

St. Vincent.—The chief statutes are No. 40 (1841) and No. 373 (1873), allowing any Christian minister to marry, and the hours are 8 a.m. to 12 a.m. Registration is provided for by this Act, by No. 283 (1868), and by No. 26 of 1897.

Leeward Islands (embracing Antigua, St. Kitts, Nevis, Dominica, Montserrat, and Virgin Islands, which, however, all legislate separately).—By No. 5 of 1882 the marriage hours by Christian ministers are fixed at from 8 a.m. to 8 p.m.

Antigua.—By No. 89 of 1844, banns are to be published in any place of worship licensed by the Governor, and on certificate of publication the officiating minister can marry the parties between 8 a.m. and 12 a.m.; as also after licence. No. 161 (1860, s. 31), imposes a penalty on a clergyman marrying otherwise. Where the ceremony is not Anglican a prescribed form of words must be used, similarly to Jamaica and Trinidad.

In **St. Kitts** and **Anguilla** (joined together for legislative purposes in 1885, but retaining their old laws) (*x*) the marriage law is contained in No. 63 (1845) to prevent clandestine marriages, and registration of marriages is legislated for (No. 2 of 1885); and marriages by Moravian and Wesleyan ministers were allowed by No. 57 (1843). The marriage hours are 8 a.m. to 12 a.m.

In **Nevis** No. 39 of 4 Vict. (1840) regulates the marriage of Dissenters from the Anglican Church.

Dominica.—By 35 of 1882 marriages celebrated by justices of the peace when no Protestant clergyman can be found are good, and registration is dealt with by Acts of 1860, Nos. 2 and 3, repealed by Act 69 of 1868 and 6 of 1874.

(*r*) 7 & 8 Edw. VII. c. 4, ss. 6, 7.
(*s*) Ss. 16—19.
(*t*) Ss. 23—24.
(*u*) S. 27.
(*v*) S. 31.
(*x*) Statutes of St. Kitts and Anguilla (1857). See Burge, vol. i., 258.

Montserrat.—The celebration and the registration of marriages are dealt with by Ordinance No. 1 of 1904.

Virgin Islands.—No special statutory provision seems to be made on the subject.

Falkland Islands and South Georgia.—The marriage law is now contained in the Marriage Ordinance, 1902, No. 8. There are three registered buildings: Christ Church Cathedral, the Roman Catholic Church, and the Baptist Tabernacle; and the marriage hours are 8 a.m. to 8 p.m.

Saint Helena.—By No. 1 of 1868, English law, so far as applicable and not excluded by local Ordinances, governs.

Mediterranean.—Gibraltar.—No. 1 of 1861 is the chief statute, allowing civil and religious marriages, and by 7 of 1902 a foreigner to marry there must produce a certificate from his authorities of his capacity.

Malta and Gozo.—Marriages in Malta and Gozo are celebrated as follows: (1) In the Roman Catholic Church in accordance with the decrees of the Council of Trent, in the presence of a Roman Catholic clergyman and two witnesses, after publication of banns (as a rule); (2) in the Anglican Church in accordance with the law of England, in the presence of the clergyman and two witnesses, after publication of banns or by licence; (3) in the Scotch and Wesleyan communions, in the presence of the minister and two witnesses, after publication of banns or by licence. Licences are granted by the Governor on production of an affidavit declaring that there is no legal impediment to the marriage (*y*).

In 1896 the Judicial Committee, on a reference to them of the question of law, reported, and an Order in Council of August 13th, 1895 (*z*), has declared: (1) That unmixed marriages celebrated in Malta by English clergymen and by Presbyterian and Wesleyan ministers are valid; the Anglican marriages being fully sanctioned by inveterate usage, and the grounds on which the validity of Presbyterian and Wesleyan marriages was maintained, though not so clear, being sufficient; (2) that mixed marriages celebrated in Malta by ministers other than those of the Roman Catholic Church are valid. On this last point, however, the Judicial Committee intimated that the question was one of great difficulty, and that, notwithstanding the elaborate character of the argument addressed

(*y*) Guide to the Laws and Regs. of Malta, 1907.

(*z*) Parl. Pap., 1896, c. 7982.

to them, it was possible that, in the event of the question coming before them judicially, additional information and authorities might be produced tending to shake the conclusion derived from the materials before them. They suggested that, in the case of persons contracting in good faith, but in such circumstances that the validity of the marriage might be open to question, the matter should be set at rest by legislative declaration.

Cyprus.—The marriage of British subjects in Cyprus is regulated by Ordinance 2 of 1889.

Eastern Possessions.—Ceylon.—The Ordinance 19 of 1907 consolidates the law of all marriages other than Kandyan or Muhammadan ones. The age is for men sixteen, for Burgher or European women fourteen, and other women twelve years (*a*). The modes of solemnisation of marriage are either by a minister in a registered place of worship or other authorised place (*b*) between the hours of 6 a.m. and 6 p.m. (*c*), or by a registrar in his office, station, or other authorised place (*d*). Special licences may be obtained (*e*). Registration is required (*f*), but is not necessary to the validity of a marriage (*g*). No suit lies to compel marriage by reason of any promise or contract, or of the seduction of any female (*h*); no such promise or seduction vitiates any marriage duly solemnised and registered under the Ordinance (*i*). An action of damages lies, however, for breach of promise or seduction; but in the former case only where there has been a promise in writing (*j*). The celebration (1) of Kandyan marriages is governed by Ordinance 3 of 1870, as amended by No. 9 of 1870 and No. 13 of 1905 (*k*); and (2) of Muhammadan marriages by Ordinance 8 of 1886, as amended by No. 2 of 1888.

Straits Settlements.—The Christian Marriage Ordinance, 1898, No. 3, superseding the Indian Marriage Act, 1865, which governed the colony while under the Government of India, and its supplementary Act of 1880 allows marriage to be performed by: (1) Persons episcopally ordained for marriage according to rites of the Church of England; (2) clergymen of the Church of Scotland; (3) ministers of the English Presbyterian Church; (4) any minister of religion licensed under the Ordinance to marry; (5) before a

(*a*) S. 16.
(*b*) S. 32.
(*c*) S. 33 (1).
(*d*) Ss. 32, 34.
(*e*) S. 36.
(*f*) See ss. 33 (2), 34 (5), 36 (3).
(*g*) See Pereira, Laws of Ceylon, ii., 112, 113.
(*h*) S. 21 (1) of No. 19 of 1907.
(*i*) S. 21 (2).
(*j*) S. 21 (3).
(*k*) S. 9.

marriage registrar, appointed under the Ordinance, for their respective forms of ceremony. The hours are 6 a.m. to 7 p.m., except by special licence. Ministers of religion celebrating marriage have to keep register books and send duplicates to the marriage registrar.

Federated Malay States.—In **Negri Sembilan** the celebration of Christian marriage is dealt with in Ordinance 4 of 1902, and Muhammadan marriages in Ordinance 5 of 1900 (*l*). The corresponding Ordinances for the other States are these: For **Pahang**, Nos. 7 of 1902 (Christian Marriage), 13 of 1900 (Muhammadan Marriage); for **Perak**, Nos. 3 of 1902 (Christian Marriage), 2 of 1900 (Muhammadan Marriage); and for **Selangor**, Nos. 7 of 1902 (Christian Marriage), and 8 of 1900 (Muhammadan Marriage).

Hong-Kong.—The celebration of marriage is regulated by Ordinance 7 of 1875. Marriages may be celebrated either in a place of worship before a competent minister of the body to which it belongs between the hours of 6 a.m. and 6 p.m. (except in case of a special licence) (*m*) on production of the Registrar-General's certificate or the Governor's special licence (*n*), or before the Registrar-General between 10 a.m. and 4 p.m. (*o*), or by the Governor's special licence at some other place (*p*). Provision is made for the registration of marriages (*q*). The Ordinance applies to all marriages where neither of the parties has an undivorced husband or wife living, except marriages between persons neither of whom professes the Christian religion, duly celebrated according to the personal law and religion of the parties; and the words "husband and wife" include persons married according to their personal law and religion (*r*). Ordinance 3 of 1893 provides for marriage *in articulo mortis*.

Africa.—Cape Colony.—The governing statutes have been already referred to (*rr*). The hours are eight to four in church (but this is only directory), and nine to twelve in a secular building; but the ceremony can be performed at any time with open doors before ministers or a magistrate. Competent marriage officers are Christian ministers, magistrates for their districts, and for Jews and Muhammadans, persons appointed by the Governor.

(*l*) No. 6 of 1904 enacts a penalty for breach of betrothal (s. 8); and cf. No. 20 of 1904, s. 8 for Perak.

(*m*) S. 19 (1).

(*n*) S. 19 (2).

(*o*) S. 21.

(*p*) S. 22.

(*q*) Ss. 23—25.

(*r*) S. 37. And see the Weihaiwei Ordinance, No. 9 of 1903.

(*rr*) See pp. 155, 156. Cape Colony Statutes, Tennent & Jackson (1895).

Natal (*s*).—The governing statutes are: No. 17 of 1846 enforcing the Marriage Order in Council of 1838, dealing with licences (2 of 1876, and 7 of 1889), marriage officers (19 of 1881), registration (16 of 1867, 17 of 1875, 17 of 1894, 5 of 1896, natives married with Christian rites), marriages of Indians (25 of 1891, 7 of 1896), marriages of natives (28 of 1865, 13 of 1875, 46 of 1887, and 44 of 1903, with Christian rites), and 19 of 1891, Native Code, c. 24. Provision is made for Muhammadan and Jewish marriages. No. 2 of 1907 makes provision for the registration of marriages of Indian immigrants, and imposes a penalty on the parents of any Indian girl for breach of promise, without good excuse, to give her in marriage, after value received (*t*).

Orange Free State.—Ministers must be authorised by the Executive; the hours are 8 a.m. to 4 p.m. in a church or public building, or a private house with two witnesses, and there are banns and licences. Prohibited degrees are specified in c. 91 of the Orange River Colony Statutes (*u*); Ordinance 27 of 1902 legalises marriages performed since May 24th, 1900 (the date of the annexation), by landrosts, and since February 28th, 1902, by marriage officers appointed by the late Government of the Orange Free State.

Transvaal (*v*).—The statutes governing marriage are: Volksraad Resolution, June 15th, 1852, as to the consent of parents being required; No. 3 of 1871, amended by 3 of 1897 and 39 of 1904 as to coloured persons; 34 of 1889; 14 of 1864, licences; 117 of 1876, fees; 141 of 1895, marriage officers; Proclamations of Lord Kitchener, Nos. 2 and 22 of 1901 (May 16th), relating to marriage licences during the South African war, and August 12th, 1901, allowing marriages in burgher camps; No. 28 of 1902, prohibiting parents re-marrying till children's portions are secured; No. 31 of 1902 (May 27th, 1902) and Ordinance No. 26 of 1902 legalising marriages performed by persons authorised by a military governor, British military chaplains, and ministers authorised by the late South African Republic; and Act 29 of 1903, validating marriages of coloured persons by registration taking place before 1897 (*x*).

Bechuanaland.—Proclamations of October 11th, 1886, and

(*s*) Hitchins's Statutes of Natal (1901), vol. ii., tits. Marriage and Registration.

(*t*) S. 2.

(*u*) Orange River Colony Statutes, Botha's translation (1901).

(*v*) Transvaal Statutes (1901)

(*x*) See Camel *v.* Dlamini (1903), Transvaal High Court Rep., i., 258.

June 26th, 1888, and November 29th, 1889, September 3rd, 1886, and December 2nd, 1892 (registration).

Mauritius.—The law is contained in Ordinance 26 of 1890 (*z*), the provisions of which are generally analogous to those of the Code Civil, prior to the law of June 21st, 1907.

Seychelles.—Ordinance 4 of 1893 makes similar provision.

West Africa.—Gambia (*a*).—The statute is No. 9 of 1862, and registration is dealt with by No. 11 of 1886, consolidating No. 5 of 1883, and No. 8 of 1845. Ordinance 10 of 1905 provides for the validity of the marriages between Muhammadan natives duly contracted in accordance with Muhammadan law, and for the establishment of a Muhammadan Court at Bathurst.

Gold Coast (*b*).—No. 14 of 1884 embodies the general law. No. 21 of 1907 makes provision for the registration of Muhammadan marriages.

Sierra Leone.—Ordinance 22 of 1906 consolidates the law as to the celebration and registration of Christian marriages both in the Colony and in the Protectorate of Sierra Leone. Marriage is by banns or licence, unless one party is a native, in which case it can only take place after publication of banns (*c*). The hours of celebration in a place of worship are between 8 a.m. and 3 p.m. (*d*). Marriage is not enforceable because of a promise to marry, but damages may be claimed for breach of promise of marriage or seduction (*e*). Ordinance 20 of 1905 recognises the validity of marriages between Muhammadans, which are valid according to Muhammadan law, and provides that proof according to Muhammadan law of such marriages shall be received in evidence by all Courts in the Colony.

Southern Nigeria.—No. 14 of 1884, as amended by Proclamation 10 of 1906 (*ee*).

African Protectorates.—The law of marriage in the British Protectorates in Africa has been placed on a uniform basis by Ordinances framed in similar terms following the provisions of English law.

East Africa Protectorate.—Ordinance 30 of 1902 regulates the celebration and registration of marriages. This Ordinance applies to

(*z*) Ss. 46 *et seq.*; ss. 89—91 deal with the marriages of immigrants.

(*a*) Ordinances of the Gambia, 1900, 1902, i., 455.

(*b*) Griffiths's Gold Coast Ordinances, 1903, i., 434.

(*c*) S. 2.

(*d*) S. 8.

(*e*) S. 28.

(*ee*) Speed's Laws of Southern Nigeria (1908), ii. 1051.

native Christians, who may, however, if they choose, marry with the formalities preliminary to marriage, which are established, usual or customary, for native Christians in the denomination to which the parties belong (*f*). No. 13 of 1906 provides for the registration of Muhammadan marriages. A proclamation of December 2nd, 1907, made in virtue of art. 26 of Ordinance 13 of 1906, has extended the provisions of that enactment to all native Muhammadans in the mainland dominions of the Sultan of Zanzibar and the Sultanate of Witu. The governing laws for the other territories are as follows:—

Somaliland.—Regulation No. 3 of 1902.

Uganda.—Nos. 5 and 11 of 1902; for native marriages there Nos. 14 of 1903, and 6 of 1906; and for Muhammadan marriages, No. 7 of 1906.

British Central Africa.—No. 3 of 1902.

Southern Rhodesia.—Orders in Council, June 10th, 1891, October 3rd, 1895, and July 14th, 1899, and proclamations thereunder; especially that of August 14th, 1899, by which magistrates act as marriage officers. In all of these the marriage hours are 8 a.m. to 6 p.m.

The Sudan.—The Non-Muhammadan Marriage Ordinance, 5 of 1906.

Law of India.—It had for many years been the custom at Madras, in the case of marriages between Europeans, to require and obtain the previous permission of the Governor, signified in writing to the officiating clergyman of the settlement, and this custom had been strictly adhered to. Two British subjects, Protestants, resident there, having failed in their application to the Governor of that settlement for his licence, were married without such licence, by a Portuguese Roman Catholic priest, and the marriage ceremony between the parties was read and performed according to the Roman Catholic form. It was held that this marriage, followed by cohabitation, was valid (*g*).

Until 1851, there was no Indian legislation on the subject, except a statute (*h*), which validated marriages by ordained ministers of the Church of Scotland. In 1851, statute 14 & 15 Vict. c. 40, provided a procedure for Christian marriages, and that statute was supplemented in 1852 by an Act of the Indian Legislature (*i*). There was, in 1865, another Marriage Act (*k*), which (with the previous

(*f*) No. 9 of 1904, ss. 3, 4.

(*g*) Lautour *v.* Teesdale (1816), 8 Taunt. 830; S. C. 2 Marsh. 243; cf. Rex *v.* Inhabitants of Brampton (1808), 10 East, 282.

(*h*) 58 Geo. III. c. 84.

(*i*) Indian Act V. of 1852.

(*k*) Indian Act V. of 1865.

enactments) was repealed by Indian Act XV. of 1872, which contains the present law on the subject.

Christian Marriages in India.—The solemnisation in India of the marriages of persons professing the Christian religion is now governed by the Indian Christian Marriage Act, 1872 (*l*). The Act provides that such marriages may be solemnised in India (*a*) by: (a) Any person who has received episcopal ordination, if the rites and ceremonies prescribed by his Church are observed; (b) by any minister of the Church of Scotland, under the same condition (*b*); (c) by any minister of religion licensed under the Act for the purpose: (d) by, or in the presence of, a marriage registrar appointed under the Act; (e) by any person licensed under the Act to grant certificates of marriage between native Christians (*c*). Marriages may be celebrated by the Anglican and Roman Catholic clergy in virtue of special or, in the case of the latter, general or special licences (*d*) at any hour. Apart from these exceptions, marriages are to be solemnised between 6 a.m. and 7 p.m. (*e*). No Anglican clergyman is to celebrate a marriage in any place other than a church, unless there is no church within five miles distance, or he has received from his Bishop, or the Commissary, a special licence authorising him to do so (*f*). Marriages solemnised by licensed ministers of religion, or by or in the presence of marriage registrars, have to be preceded by notice duly published (*g*). Marriages between native Christians may be certified by persons licensed for the purpose, without any preliminary notice, if the following conditions are fulfilled: (a) The age of the man exceeds sixteen and that of the woman thirteen: (b) neither has a wife or husband still living; (c) the parties take each other as husband and wife by a declaration in the presence of the licensed person, and two other credible witnesses, consent of the father, if living, or if the father be dead, the guardian of the person, and in case there be no such guardian, then the mother, being required when either party has not completed his or her eighteenth

(*l*) Act XV. of 1872.

(*a*) S. 5.

(*b*) Doubts were formerly raised as to the validity of such marriages, Scotch ministers not having received episcopal ordination, and it was found necessary to pass an Act (58 Geo. III. c. 84), to validate them. See Burge, 1st ed., i., p. 160.

(*c*) See ss. 60 *et seq.*

(*d*) S. 10.

(*e*) *Ibid.*

(*f*) S. 11.

(*g*) Ss. 12, 38.

year, unless it appears that there is no person living authorised to give such consent (*h*).

Hindu Marriages.—There are two orthodox forms of marriage known to modern Hindu law, the *Brahma* and the *Asura*. The former was peculiar to Brahmins, but is now in use among all classes (*i*). In the latter a payment of money or other consideration is given for the bride (*k*). The forms of marriage and the ceremonies vary considerably in different localities. The details of the orthodox ceremony are to be found in A. T. Colebrooke's third essay on the religious ceremonies of the Hindus. The important portions of the ceremony are the giving of the bride to the bridegroom, and what is called the Saptapadi, which completes the ceremony, and makes it irrevocable. This portion of the ceremony is described as follows : "The bridegroom takes the bride's hand, she steps on a stone. The bridegroom recites a fixed text. A hymn is chanted. The bride and bridegroom walk round the fire. The bride is conducted by the bridegroom and directed by him to step successively into seven circles, a text being recited at each step." On the completion of the last step, the actual marriage has taken place, and, in the absence of any caste, or district custom requiring other ceremonies, "the marriage is complete, even though never followed by consummation, and though, in consequence of the conversion to Christianity of one party, the other renounces the obligations of marriage" (*l*). As to registration of a Sambandham, a form of marriage amongst certain Hindus in Malabar, see the Malabar Marriage Act, 1896 (No. 4) (*m*).

Muhammadan Marriages.—A Muhammadan marriage is a purely civil contract; no religious ceremony is necessary; there must be an exchange of offer and acceptance respectively by the parties, in each other's presence and hearing, and (*n*) according to the Sunnis, in

(*h*) S. 60.

(*i*) Jaikisondas Gopaldas *v.* Harkisondas Hullochandas (1876), I. L. R. 2 Bom., at p. 17.

(*k*) Asiatic Researches, vii., p. 288.

(*l*) Mayne, 7th ed., p. 118; Administrator-General of Madras *v.* Anandachari (1886), I. L. R. 9 Mad. 466; Madras Act IV. of 1896.

(*m*) Madras Act IV. of 1896; Journal of Comp. Leg., 1896, i., p. 146.

(*n*) Unless this is a rule, not of substantive law, but of evidence, in which case it would be superseded by the Indian Evidence Act, 1872 (Act I. of 1872), s. 118, abolishing any disqualification for giving testimony on the ground of sex or religion, and s. 134, according to which "no particular number of witnesses shall in any case be required for the proof of any fact." In Sir R. K. Wilson's

the presence and hearing of two male, or one male and two female, witnesses, being sane and adult Muhammadans, the whole transaction being completed at a single meeting (*o*). The Shiahs do not require witnesses (*p*). Marriage may be contracted through the agency of one or more persons acting for the bride and bridegroom, or for their guardians (*q*), and unauthorised agency may be subsequently ratified (*r*). Continuous cohabitation and acknowledgment of marriage are by Muhammadan law presumptive evidence that all the required formalities have been observed (*s*).

Other Marriages.—The statutory provisions for Parsi marriages and marriages of certain Hindus in the Madras Presidency have been already referred to; and Act III. of 1872 provides a form of marriage by a registrar's certificate for persons who are neither Christians, Jews, Hindus, Muhammadans, Buddhists, Sikhs or Jains.

Law of United States.—In the United States of America the intervention of a clergyman is not an essential part of the marriage contract (*t*).

United States (*u*).—**Licences.**—In the United States a judicial or administrative licence is generally required as a preliminary to marriage—*e.g.*, in Alabama, Arizona, Arkansas, California (*x*), Connecticut, District of Columbia, Indiana (*y*), Kansas, Kentucky, Massachusetts, Missouri, New York (*z*), North Carolina, Pennsylvania, South Dakota, Texas, and Washington. In Mississippi the issue of a licence is essential to the validity of a marriage (*a*). In New York, though prescribed under penalty, the failure to procure a licence does not invalidate the marriage (*b*). There is no provision for the issue of licences in Alaska, Idaho, New Mexico, or South Carolina. In Louisiana, before a licence is issued, the

view, the rule is one of substantive law: Digest, s. 24, n.

(*o*) Wilson's Digest, s. 24; Baillie's Digest, i., p. 6.

(*p*) Baillie's Digest, ii., p. 4.

(*q*) Wilson's Digest, s. 27, where the special rules applicable to such agency are stated.

(*r*) *Ibid.*, s. 28.

(*s*) Khajah Hidayut Oollah *v.* Rai Jan Khanum (1844), 3 Moo. Ind. App. 295; Mahomed Bauker Hoossain Khan *v.* Shurfoon Nissa Begum (1860), 8 Moo. Ind. App. 136.

(*t*) 2 Kent's Com., p. 87.

(*u*) See Parl. Rep. No. 2 (1903), Cd. 1468, and the Year Books of Legislation from 1903 onwards.

(*x*) Unmarried persons, not minors, who have been cohabiting as man and wife, may be married by any clergyman without licence.

(*y*) See laws of 1905, c. 126.

(*z*) Cons. Laws (1909), c. 14, s. 15.

(*a*) Parl. Rep. of 1903, p. 62.

(*b*) Cons. Laws (1909), c. 14, s. 25.

intending husband must give a bond with a surety, proportionate to his means, conditioned that no impediment exists. In Maryland and other States an examination of the applicant on oath as to the validity of the marriage is required; and in Maryland a law of 1906, c. 766, requires also a statement on oath as to whether the applicant was ever divorced. There are similar provisions in Tennessee. In New Jersey no licence is required where either party is a resident of the State. In Delaware white persons do not need a licence if their banns have been published on two Sundays in a place of worship immediately after service.

Who may Solemnise.—Generally speaking, marriages may be celebrated by any recognised minister of any religious sect or denomination, or by prescribed judicial or administrative officers. There appears to be no provision on the subject in Maryland, Pennsylvania, and South Carolina.

Form.—As a rule no form is prescribed, but two witnesses are required in many States—*e.g.*, Alaska, Kentucky, Michigan, Minnesota, Montana, Nebraska, Oregon, Rhode Island, Utah, and Washington. In New York, North Carolina, and South Dakota, one witness besides the celebrant is required. In Louisiana there must be three adult witnesses, and an act must be made in duplicate of the celebration, signed by the celebrant, parties, and witnesses.

Return and Record.—Throughout the States generally, all persons solemnising marriages are required within prescribed limits of time to make official returns thereof. Such returns are recorded, and are evidence of the fact of marriage. In Alaska no provision is made for returns and records of marriages. But the celebrant of a marriage is required to give to each party a certificate specifying the names and residences of the parties and of at least two of the witnesses. There is a similar provision in California as regards unmarried persons, not minors, who have been cohabiting as man and wife, and are married without licence. In that State also, parties claiming to have contracted a marriage of which no record exists, may join in a written declaration of marriage, subscribed and attested by at least three witnesses, and acknowledged and recorded like deeds of grant to real property. If either party denies the alleged marriage or refuses to join in the declaration, the other party may proceed in the Superior Court to have the validity of the marriage judicially determined and declared. There are similar provisions in Montana.

CHAPTER IV.

NULLITY OF MARRIAGE—IMPEDIMENTS.

Void and Voidable Marriages.—There is an important distinction between the Codes of different countries in the manner of treating marriages which have been contracted contrary to law. The illegality may either affect the validity of the contract itself and make it void or voidable; or merely impose a penalty on the parties or the person performing the marriage ceremony. Such illegalities are generally termed impediments, and distinguished according to the classification (*impedimenta dirimentia* or *prohibitiva*) adopted by the canon law, which has been already described. In countries such as Spain or Austria and Hungary, persons belonging to the Roman Catholic Church are subject to the rules of the canon law with regard to the necessary conditions of marriage; while in others, such as Russia or Greece, the rules on this point prescribed by the Orthodox Eastern Church are similarly binding on its adherents and even on persons not belonging to its communion in certain respects, such as the marriage ceremony. The subject of nullity of marriage is here considered under the heads of: (1) the different degrees of nullity, or impediments, which may make the marriage void or voidable only; (2) the procedure to obtain nullity; (3) the effect of a decree of nullity, both in the English and American laws and in the foreign Codes.

The law of England, which, like that of other European States, generally adopted the provisions of the canon law with regard to marriage (*a*), recognises different degrees of voidability and different classes of impediments (*b*).

English Law.—As regards the former, a void marriage has been defined as a marriage good for no legal purpose, the invalidity of

(*a*) See Lord Stowell, Proctor *v.* Proctor (1819), 2 Hagg. C. R. 292, 300, 301; Dalrymple *v.* Dalrymple (1811), *ibid.*, 54, 81, 82; Burgess *v.* Burgess (1804), 1 Hagg. C. R. 384, 393; and see R. *v.* Millis (1844), 10 Cl. & F. 534, *passim*, and Hammick, c. 1, *passim*.

(*b*) Lord Stowell, Dalrymple *v.* Dalrymple, *ubi cit. supra*, at p. 65; Lindo *v.* Belisario (1795), 1 Hagg. C. R. 216.

which may be maintained in any Court between any parties whether in the lifetime or after the death of the parties to it, whether the question arises directly or collaterally; a voidable marriage as one in whose constitution there is an imperfection which can only be inquired into during the life of the parties in a proceeding to obtain a sentence declaring it null; it subsists until it has been set aside by the decree of the proper tribunal, but the effect of the sentence is to render it void *ab initio* (*c*). In England, this distinction, which was not known to the early common law, became part of it owing to the existence of the separate ecclesiastical and temporal jurisdictions (of which the former was liable to be prohibited by the latter), and the provisions of the statute 32 Hen. VIII. c. 38 (*d*), which confined the power of the Spiritual Courts to impeaching a marriage for causes within the Levitical degrees or forbidden by God's law; and the temporal Courts prohibited the Ecclesiastical Courts from declaring marriage void for a canonical impediment after the death of one of the parties, on the ground that this would bastardise the issue, though the surviving party could be proceeded against in the Ecclesiastical Court criminally, as for incest (*e*).

Scots Law.—It is doubtful if this distinction is recognised in Scots law (*f*).

Law of United States.—The common law of the United States is the same as that of England; in both, the canonical disabilities, such as prohibited degrees and corporal infirmity, such as impotence, make the marriage voidable, not *ipso facto* void, until sentence of nullity be obtained, and such marriages are esteemed valid to all civil purposes (*g*), unless such sentence of

(*c*) Bishop, Marr. & Div., 258–270; R. *v.* Brighton (1861), 1 B. & S. 447; Lord Stowell, Sullivan *v.* Sullivan (1818), 2 Hagg. Cons. 239, 253.

(*d*) This Act declared all marriages between persons not prohibited by God's law from marrying, being contracted and solemnised in the face of the Church and consummate with bodily knowledge or fruit of children, good notwithstanding any precontract or precontract of matrimony not consummate with bodily knowledge which either of the parties should have made before with any other person, and that no reservation or prohibition, God's law except, should trouble any marriage without the Levitical degrees, and no person should be admitted in any of the Spiritual Courts within the realm or the King's other lands and dominions to any process, plea or allegation contrary to the Act.

(*e*) Ray *v.* Sherwood (1836), 1 Curt. 193.

(*f*) Bishop, s. 269.

(*g*) *E.g.*, legitimacy of children, dower, bigamy, husband's right of administration, see Goodman's Case (1859), 5 Jur. N. S. 902; 28 L. J.

nullity is actually declared in the lifetime of the parties (*h*). Civil disabilities, such as previous marriage (*i*), want of age, idiocy, want of consent, made the marriage void. The civil disabilities above mentioned do not dissolve a contract already made, but they render the parties incapable of contracting at all; they do not put asunder those who are joined together, but they prevent the junction taking place; and if any persons subject to these legal incapacities come together it is a meretricious and not a matrimonial union, and therefore no sentence of avoidance is necessary (*h*). In both countries statutes have modified this position; in England, by Lord Lyndhurst's Act (*k*), marriage within prohibited degrees is made void instead of voidable, thus bringing our law into conformity with the canon of the 4th Lateran Council (1215); in the United States similar legislation has been passed (*l*).

Impediments.—England.—Besides the impediments above mentioned, the following belong to the class of impediments which avoid a marriage: if both parties knowingly and wilfully marry in any other place than a church or public chapel where banns may be published except by special licence, and for a civil marriage if they do so except in a building duly registered for that purpose (*m*); or if they do so without due publication of banns or licence from a person having authority to grant the same (*n*); or if they similarly consent to or acquiesce

745; Phillimore, Eccl. Law, i., 563; Rennington *v.* Cole (1617), Noy, 29; R. *v.* Jacobs (1826), 1 Moody, 140; Elliott *v.* Gurr (1812), 2 Phillimore, 16; Bishop, s. 272.

(*h*) Sir J. Nicholl, Elliott *v.* Gurr, *ubi cit. supra*, at p. 19; R. *v.* Wroxton (1833), 4 B. & Ad. 640; 38 R. R. 341; 1 Blacks. Com. 439; Bankton's Institutes, b. 1., tit. 5, s. 51; Encyclo. Laws of Engl., tit. Nullity of Marriage, 2nd ed.; Encyclo. Scots Law, tit. Marriage, viii., 245.

(*i*) To constitute the offence of bigamy a marriage within prohibited degrees counts if it is the second marriage, not if it is the first: R. *v.* Chadwick (1847), 2 Cox, C. C. 381; R. *v.* Allen (1872), 12 Cox, 193; 41 L. J. M. C. 97.

(*k*) 5 & 6 Will. IV., *c.* 54, s. 42.

(*l*) Bishop, ss. 287 *et seq.*

(*m*) 6 & 7 Will. IV. c. 85, s. 42.

(*n*) Knowledge of both parties is requisite in all cases. The words "without due publication of banns" include the use of a false name in banns, or publication at the wrong time, or non-publication in the churches of the places where the parties are residing: Marriage Act, 1823, ss. 2, 22; Wright *v.* Elwood (1837), 1 Curt. 669, citing other cases; Midgeley *v.* Wood (1862), 4 S. & T. 267; Gompertz *v.* Kensit (1872), L. R. 13 Eq. 369; Templeton *v.* Tyree (1872), L. R. 2 P. & D. 422; Phillimore, i., 587. In the case of a licence obtained through

in the solemnisation of such a marriage by any person not in holy orders (*o*) or if the marriage is not had within three months after the registrar has received notice of application for his certificate for the marriage. On the other hand, such deficiencies as the fact that the consent of parents or guardians has not been obtained to the marriage of a minor (*p*) or (perhaps) that the marriage takes place outside lawful hours, or that the marriage takes place in a church where the parties' banns have not been put up are impediments which do not avoid the marriage. In the first of these latter cases, a penalty is imposed on the parties by their being deprived of any benefit from property accruing by reason of such marriage (*p*) and on the priest if he has notice of

fraud shown by a false description in the licence, the marriage may be avoided, but an incorrect name is not enough as in banns, "the difference between them being that in banns the proclamation is the material circumstance to which the Court looks, and it is defective in the way of notice if there is any material variance of name, while in a licence it is the identity of the person," as the Bishop's officer may accept what evidence he likes of notice: Lord Stowell, Ewing *v.* Wheatley (1814), 2 Hagg. Cons. R. 175; Cope *v.* Burt (1809), 1 Hagg. Cons. R. 434; Phill. i., 611; and thus it has been held that an omission of one of the wife's names, giving her a false residence, and a false description of the husband's residence and occupation being made wilfully by the husband to the knowledge of the wife, will not avoid the marriage: Clowes *v.* Jones (1842), 2 N. of C. 1; Bevan *v.* McMahon (1861), 2 S. & T. 230; see, too, Dormer *v.* Williams (1823), 1 Curt. 874; Greaves *v.* Greaves (1872), L. R. 2 P. & D. 423; 41 L. J. P. & M. 66.

(*o*) As to marriage by an unqualified person, guilty knowledge of both parties is similarly essential for avoiding the marriage: Lord Stowell, Hawke *v.* Corri (1820), 2 Hagg. Cons. R. 280, 288; and Lords Campbell, Lyndhurst and Cottenham, R. *v.* Millis (1844), 10 Cl. & F. 784, 860, 906. The Act 51 & 52 Vict. c. 28, legalising marriages performed by a certain unqualified priest does not seem to have been necessary: Phillimore, i., 622.

(*p*) Canon 100 of 1603, Marriage Act, 1753, s. 11. As already indicated (see p. 127), this was not required by the universal law of Europe before the Reformation, and the absolute necessity of parental consent to the validity of the marriage contract is not of more than positive and civil institution. Nothing belongs to the validity of the contract naturally but the consent of the persons themselves if they are of an age capable of executing the duties of the contract (Lord Stowell, Horner *v.* Horner (1799), 1 Hagg. Cons. R. 348), while the requisite of consent of guardians is only to be found in certain feudal relations: *ibid.*; Marriage Act, 1823, ss. 8, 16, 17, 23; Phill., i., 600. If there is no person authorised to assent to, or dissent from, a minor's banns, it seems that the marriage cannot be declared null for false and undue publication of banns: Holmes *v.* Simmons (1868), L. R. 1 P. & D. 523. A false statement by minors that they have obtained such consent subjects them to punishment for perjury, whether it be made in the

dissent from the parent or guardian (*q*); while in the others, a penalty is imposed on the priest only (*r*), but the validity of the marriage is not affected. In a similar spirit, after marriage has taken place by banns or licence, no inquiry is allowed whether the residence alleged by the parties was actual or not (*s*). In **Scotland**, however, the three weeks' residence requisite for an irregular marriage by declaration, acknowledgment or ceremony is a condition the breach of which creates an *impedimentum dirimens* (*t*). In **Ireland** a marriage of a minor under twenty-one without consent of parents, &c., could formerly be annulled by proceedings taken within a year, but after that time it was unimpeachable. The law on this and other infringements of the marriage law now seems to be the same as that of England (*u*). Under the Marriage Act of 1753 want of such consent made the marriage by licence void, but this was altered by the Act of 1823 introduced by Dr. Phillimore (*x*).

Procedure to obtain Nullity.—In England the jurisdiction of the ecclesiastical courts in suits for nullity of marriage is now exercised by the Divorce Division of the High Court of Justice. In such suits the legal presumption is in favour of the validity and against the nullity of the marriage (*y*). In England and in Scotland any one with the slightest interest in the marriage, *e.g.*, a father of a spouse, or a spouse can sue for nullity (*z*).

In English law, upon a decree of nullity, the marriage is void *ab initio* and produces no civil effects, and putative marriages are not admitted (*a*).

Effect of Judgment as to Nullity or Validity of Marriage.—A judgment of a matrimonial Court, declaring the status of parties, is a judgment *in rem*, and as such is binding not only *inter partes*, but on

statement to the registrar or the affidavit for licence: Marriage Act, 1823, s. 14; 19 & 20 Vict. c. 119, s. 2; R. *v.* Chapman (1849), 1 Den. 432; Phillimore *v.* Machon (1876), 1 P. D. 481; Phill., i., 612, 616.

(*q*) Phill., i., 599, 600; 4 Geo. IV. c. 76, ss. 7, 8.

(*r*) 4 Geo. IV. c. 76, s. 21; 49 & 50 Vict. c. 14, s. 1.

(*s*) Hammick, 193.

(*t*) Lawford *v.* Davies (1878), 4 P. D. 61.

(*u*) Steele *v.* Braddell (1838), Milw. Eccl. Rep. 1; Brook *v.* Brook (1861), 9 H. L. C. 193, now altered by later statutes; Marriage Law Commission Report on Irish Law, pp. 11—17, and later Acts.

(*x*) Hammick, 15; R. *v.* Birmingham (1828), 2 M. & R. 230.

(*y*) Encyc. of English Law, tit. Nullity of Marriage, vol. x., 90.

(*z*) Sherwood *v.* Ray (1837), 1 Moo. P. C. 353.

(*a*) See Burge, vol ii., pp. 266, 330.

strangers also (*b*). It may, however, be impeached by a stranger, as having been obtained by fraud in the sense of wilful deception practised upon the Court (*c*). But a sentence which does not determine status has not the effect of a judgment *in rem*. Thus a verdict in a divorce suit that the wife has committed adultery, followed by the dismissal of the petition on the ground that the jury had found the husband also guilty of adultery, was held not to be conclusive against a plaintiff suing the husband for necessaries supplied to the wife (*d*), although in such a case, estoppel would have applied between the parties (*e*). And a decree in a suit for jactitation of marriage is not a judgment *in rem*, for there the spiritual Court does not intend to affect the status of the parties by its decree, but merely to prevent one party from falsely asserting that a marriage happened under certain specified circumstances (*f*).

Law of the United States.—Suits for Nullity, when, and by whom, Competent.—Suits to annul marriages (*g*) are expressly legalised by statute in most States when the marriage is voidable or void. As a general rule, the libel to annul may be brought by either party. But in some States (*h*) a suit for nullity on the ground of non-age cannot be brought by a contracting party who was of age at the time; nor, in others (*i*), a suit for nullity on the ground of idiocy or lunacy by the other party, if he or she knew of the incapacity at the date of the marriage; nor, in Wyoming, for cause of impotence by the party impotent; nor, in Oregon, by the guilty party in cases of force or fraud.

Effects of Decree of Nullity or Validity.—A decree of nullity is conclusive on all persons in New Hampshire, Massachusetts, Michigan, and Wyoming; only on the parties to the action and those claiming under them in California, New York, and Vermont. In Vermont and New York, if pronounced during the lifetime of the parties, it is conclusive in all Courts and proceedings. The parties

(*b*) Meddowcroft *v.* Huguenin (1844), 4 Moo. P. C. 386; Perry *v.* Meddowcroft (1846), 10 Beav. 122.

(*c*) Duchess of Kingston's Case (1776), 20 State Trials, 355; 2 Sm. L. C., p. 731.

(*d*) Needham *v.* Bremner (1866), L. R. 1 C. P. 583.

(*e*) See Sopwith *v.* Sopwith (1861), 30 L. J. P. M. & A. 131.

(*f*) Duchess of Kingston's Case, and notes thereto in 2 Sm. L. C., p. 731.

(*g*) See Stimson, Amer. Stat. Law, ss. 6150 *et seq.*; Bishop, Law of Marr. and Div., ii., ss. 794 *et seq.*

(*h*) So in New York, Pennsylvania, Indiana, and Michigan.

(*i*) So in Indiana, Wisconsin and Minnesota.

become single and may marry again. In Oregon a marriage, once declared valid in a suit for nullity, cannot afterwards be questioned for the same cause directly or collaterally. Generally speaking, the consequences of a decree of nullity on the property of the spouses are similar to those of a decree for divorce (*k*).

Custody of Children.—In suits for nullity the Court has generally the same power that it has in suits for divorce to deal with the care, custody, and maintenance of the infant children of the parties (*l*). In Iowa (*l*), in case either party entered into the annulled marriage in good faith, supposing the other capable, the Court may decree to the innocent party compensation as in cases of divorce.

Suits to affirm Marriages.—Such suits may in many States (*m*) be brought when the validity of a marriage is denied or doubted by either party. A decree affirming the marriage is conclusive on all parties concerned.

Foreign Law.—The Continental Codes generally call marriages void when they are only voidable in our sense. The only case in which an alleged marriage is absolutely void (*i.e.*, without the need of a special declaration to that effect by the Court) is the case of a ceremony purporting to be a marriage ceremony but which does not comply with the rules prescribed by the local law; and French writers call this a *mariage inexistant* as opposed to a *mariage nul*. Such would be a marriage between two persons of the same sex, persons living in a state of concubinage, and in France and Germany a religious ceremony of marriage, since only a civil ceremony is there recognised as valid, want of consent from lunacy, or the like (*n*). The "void" marriages in Continental law, which answer to our voidable marriages, are in French law classified as marriages liable to absolute nullity and those liable to relative nullity, and in German law similarly as *nichtige* and *anfechtbare*, and this division is also used in the Swiss Civil Code (*o*), and so in the Hungarian marriage law (*p*).

(*k*) See p. 941, *post*.

(*l*) Stimson, *ad loc. cit.*, s. 6154.

(*m*) So in Arizona, Delaware, Iowa, Kansas, Kentucky, Massachusetts, Michigan, Nebraska, Oregon, Virginia, and West Virginia.

(*n*) Code Civil, arts. 146, 165; German C. C., s. 1324; for the distinction between *inexistant* and *nul*, see Sillas-le-Normand *v.* Bisson (1844), Sirey, 1845, i., 246; C. *v.* T. (1852), C. de Colmar, Dalloz, 1852, ii., 260; Baudry-Lacan., ii., p. 272, ss. 1679 *et seq.* (want of consent).

(*o*) Arts. 120, 123.

(*p*) S. 4. The same rule applies in Roman-Dutch law: see p. 238.

Grounds of Nullity and Proceedings to obtain Nullity. — With marriages of the first class the nullity may be established by representatives of the public authority as well as by the parties and relatives, the reason being that the impediments which are the grounds of the nullity are impediments of public policy, *impedimenta dirimentia juris publici*. Marriages of the second class can be attacked by persons of specified classes only, and generally only within a restricted time. The grounds on which the nullity of these marriages can be established are called *impedimenta dirimentia juris privati*. In French law the grounds of nullity set out in arts. 191, 144, 147, 161, 162, 163, of the Code Civil are the only grounds belonging to the first class; in German law the grounds specified in ss. 1325—1328 of the German Civil Code and in Austrian law those specified in art. 94 of the Code are the only grounds belonging to the first class; all others belong to the second class (*q*); by the Continental systems generally the validity of a marriage cannot be impugned except within certain limits of time by the persons or parties legally entitled to do so, nor can nullity ensue till it has been declared by the decree of a competent tribunal (*r*).

Law of France.—Old Law.—According to the law of France, before the promulgation of the Code Civil, impediments which were relative to or affected the rights of one of the parties constituted a ground for setting aside the marriage at the instance only of the injured party. Thus, the party on whom force or fraud had been practised could alone avoid the marriage on either of these grounds. The parent, when the marriage was voidable for the want of his consent,

(*q*) See German C. C., s. 1329, and Code of Civil Proc., 632; Code Civil, arts. 184, 196; Baudry-Lacan., p. 279, s. 1684; and pp. 290, 291, ss. 1697 *et seq.*, and 298, s. 1702. In the case of a bigamous marriage (which ordinarily is an *impedimentum dirimens juris publici*) contracted in the continued absence of a former spouse of one of the parties declared or presumed to be dead, in French law the first marriage remains valid and only the first husband can impeach it, and this is therefore only an impediment *privati juris* (Code Civil, art. 139); while in the German law the second marriage dissolves the first, but is itself indictable at the option of either spouse, but not of the first husband: C. C., s. 1348. French law distinguishes impediments *prohibitifs* from those *dirimants*, only the latter affecting the validity of the marriage: Aubry et Rau, v., pp. 54, 64, 81, and Code Civil, arts. 170, 171, 151 (former), and 161—163, 144, 148.

(*r*) See German Civil Code, ss. 1329, 1330 *et seq.*; Hungarian Marriage Law (1894), ch. 4; Austrian Civil Code, arts. 94 *et seq.*

was alone competent to impeach it on that ground; but he could not sustain a suit for that purpose if he had expressly or tacitly approved of the marriage.

Collateral relations could in no case impeach the marriage during the lifetime of the parties, nor whilst the parents were living, nor on the preceding grounds, nor unless they had some right dependent on the legality or illegality of the marriage. The impediments on which they, as well as the parties, or the parents, might set aside the marriage were those founded on consanguinity or affinity, or on the neglect of the forms required for its celebration (*s*).

Code Civil.—The Code Civil does not allow marriages contracted without the consent of the father and mother, of the grandfathers and grandmothers, or of the family council, in those cases respectively in which such consent is required by law, to be impeached by any other persons than those whose consent is necessary, or than by such one of the contracting parties as, not being competent to contract marriage without consent, should yet have failed to procure the necessary consent (*t*).

A suit for nullity of marriage cannot be maintained, either by the husband or wife, or by those relatives whose consent is required by law, in any case wherein it shall appear that the marriage has been approved of expressly or impliedly by the persons whose consent is necessary; nor can such suit be maintained in any case where one entire year shall be suffered to elapse, after knowledge of the celebration of the marriage shall have reached the persons last mentioned without objection raised on their part; neither can a suit for nullity be maintained by either of the parties united in marriage, whenever there shall have been suffered to elapse, without objection raised to the marriage by such party, one whole year after he shall have attained the age at which he is by law competent to contract marriage without consent (*u*). The following are examples of such impediments:—

(i.) A marriage contracted by parties who have not attained the age prescribed by the law, or where there is a subsisting marriage,

(*s*) Pothier, Traité du Mariage, ss. 442 *et seq.*

(*t*) Art. 182.

(*u*) Art. 183. As to the penal sanction which the law attaches to its provisions with regard to the consent of parents, see Code Civil, arts. 156, 192; Code Pénal, art. 193.

or where the parties are within the prohibited degrees of consanguinity or affinity, may be impeached by the husband or wife, by any party having an interest in the question, or by the Ministère Public (*x*).

Nevertheless, a marriage contracted between parties, both or either of whom shall not have attained the age required by law, cannot be impeached in either of the following cases:—

1st, If six months shall have been suffered to elapse without objection, after the parties, or such one of them as was at the time of the marriage under the age required by law, shall have attained the legal age of consent.

2nd, Whenever the wife, being under the legal age of consent, shall conceive before the expiration of six months from the day of marriage (*y*).

If the father, the mother, the ancestors, or the family council, as the case may be, shall have given consent to a marriage contracted between parties, both or either of whom shall not have attained the age required by law, the party whose consent has been so given shall not be admitted to impeach the marriage on the ground of nonage (*a*).

A suit for nullity of marriage, which may, pursuant to art. 184, be instituted by all persons having an interest in the question, cannot, nevertheless, be instituted by collateral relations, or by the children of a former marriage, whilst both the husband and the wife are living, unless the interest of such relations or children be a present vested interest (*b*).

(ii.) Any husband or wife, to the prejudice of whose rights as such a second marriage has been contracted, may sue for a sentence of nullity of such second marriage, even in the lifetime of that party to the second marriage with whom such husband or wife, as the case may be, has been previously united in marriage (*c*).

(iii.) Any marriage not celebrated in public and before the competent civil officer may be impeached by either of the parties to such marriage, as also by the fathers and mothers of the parties respectively, by the ascendants next in degree, and by all persons

(*x*) Art. 184.
(*y*) Art. 185.
(*a*) Art. 186.
(*b*) Art. 187.
(*c*) Art. 188.

having a present vested interest in the question, as also by the Ministère Public (*d*).

(iv.) Relationship within the prohibited degrees (*e*).

Austria.—The following impediments (under the Code of 1804) render a marriage void:—

(1) Weakness of mind and incapacity, including age under fourteen years (*f*). (2) Restricted capacity, owing to minority or for other reasons, unless the consent of the lawful father or the Guardianship Court is obtained (*g*). (3) Impotence (*h*). (4) Existing marriage (*i*). (5) Higher orders and solemn vows (*k*). (6) Difference of religion (*l*). (7) Blood relationship and affinity as defined above (*m*). (8) Adultery with a spouse whom the offender desires to marry on condition that this act is proved before the marriage is contracted (*n*). (9) Murder of a spouse (*o*). (10) Criminal participation in the dissolution of a marriage (*p*). (11) Mistake as to the person (*q*). (12) Reasonable fear, especially in case of abduction (*r*). (13) Complete omission of the forms prescribed for contracting marriage (*rr*).

All these render the marriage void *ab initio*. In the case of Nos. 4, 5, 6, 7, 8, 9, 10, 12, and 13, the validity of the marriage is to be investigated on the demand of the official authority; in all other cases it is only to be investigated on the demand of the aggrieved party (*s*).

Hungarian Law.—The Hungarian marriage law makes similar distinctions between non-existent, void, and voidable marriages, on similar grounds to those of the German Code, though there are many differences in details, especially as to proceedings to obtain nullity.

German Civil Code.—Under the German Civil Code, as mentioned above (*t*), failure to observe the proper form makes the marriage void in the English sense of the word (with the exception stated

(*d*) Art. 191.
(*e*) Baudry-Lacan., ii., p. 400, s. 1841.
(*f*) Civil Code, s. 48.
(*g*) Ss. 49—53.
(*h*) S. 60.
(*i*) S. 62.
(*k*) S. 63.
(*l*) S. 64.
(*m*) Ss. 65, 66, 125.
(*n*) S. 67.
(*o*) S. 68.
(*p*) S. 119.
(*q*) Ss. 57—59.
(*r*) Ss. 55—66.
(*rr*) S. 75.
(*s*) S. 94.
(*t*) Ss. 1317, 1324.

above), but marriages are voidable (*nichtig*) in the following cases:—(a) Incapacity, unless there is subsequent ratification (*u*); (b) bigamy (*x*); (c) prohibited degrees of relationship (*y*); (d) adultery where particular parties have been prohibited in the divorce decree from re-marriage, subject to the possibility of dispensation (*z*).

The nullity of a marriage void on these grounds cannot be alleged in any legal proceeding unless it has been previously established by a decree of nullity in a special action brought in the proper Court, which is generally the Court of the district where the husband has his domicil. The same rule holds good of a marriage null for want of proper form if it has been entered in the register of marriages (*a*).

Marriages are also voidable in German law on the following grounds and on the application of the following parties (*b*): (a) Restricted capacity, the required consent not having been obtained, on the application of the spouse who was of such restricted capacity at the date of the marriage (*c*); (b) absence of consent, on the application of the spouse whose consent was absent (*d*); (c) mistake as to the essential qualities of the other spouse, on the application of the person who was under mistake (*e*); (d) fraudulent misrepresentation, on the application of the deceived spouse (*f*); (e) coercion, on the application of the coerced spouse (*g*); (f) discovery of the existence of a former spouse judicially declared to be dead, on the application of the other spouse (*h*). Applications for nullity may be made on the part of persons under incapacity or of restricted capacity (*i*). The right of contestation is excluded when the party possessing it has ratified the marriage after having become aware of the facts or when the new marriage is dissolved by the death of one of the spouses (*k*). If it is the spouse of the preceding marriage who contests the validity of the

(*u*) S. 1325.
(*x*) S. 1326.
(*y*) S. 1327.
(*z*) S. 1328.
(*a*) S. 1329.
(*b*) S. 1330.
(*c*) S. 1331.
(*d*) S. 1332.
(*e*) S. 1333.
(*f*) S. 1334. Similarly in French law, where the wife prior to the marriage falsely made her husband believe that she was pregnant by him the marriage may be annulled: B. c. B. (1900), Sirey, 1903, iv., 1.
(*g*) S. 1335.
(*h*) S. 1350.
(*i*) See ss. 1336, 1340.
(*k*) S. 1350.

second marriage, maintenance must be supplied to the other spouse, if unaware of the existence of the impediment at the time of the marriage (*l*).

As to the time for bringing nullity proceedings for impediments *privati juris*, the following rules are contained in the German Code: (a) The action cannot be brought after the death of the party against whom the application would be made (*m*); (b) the application cannot be made after the lapse of six months from the date at which the circumstance justifying the application became known to the party entitled to make it; and in the case of persons of restricted capacity after the lapse of six months from the date at which they acquire full capacity (*n*).

Italian Law.—Under the Italian Code there is the same distinction as in other systems between grounds of nullity on which application may be made by the Public Procurator, as well as by the interested parties, and others in which only certain specified interested parties can take proceedings. In the former class, however, the Public Procurator is precluded from making the application after the death of one of the spouses in any case (*o*).

The first-named grounds are: (a) Want of age (*a*); (b) bigamy (*b*); (c) prohibited degrees of relationship, including adoption (*c*); (d) certain criminal offences committed against the other spouse (*d*); (e) incompetence of the registrar or absence of the requisite witnesses, but this ground must be taken within a year from the date of the marriage (*e*); (f) mental disease where there has been a formal declaration of lunacy (*f*).

The grounds on which applications can only be made by specified persons and within a specified time are the following: (a) Lack of consent by the spouse whose free consent was wanting; (b) mistake as to the person, by the spouse who was misled (thus differing from the German law, by which this can only be done by the spouse who caused the mistake) (*g*); as regards both (a) and

(*l*) S. 1351.

(*m*) S. 1338.

(*n*) S. 1339.

(*o*) Art. 114.

(*a*) Arts. 55, 104. See, however, arts. 110, 111, as to limit of time and estoppel.

(*b*) Arts. 56, 104. As to the right of the former spouse in this case and cases of absence, see art. 113.

(*c*) Arts. 58, 59, 60, 104.

(*d*) Arts. 62, 104.

(*e*) Art. 104.

(*f*) Art. 112.

(*g*) Art. 105; see p. 237, *post*.

(b) the right of action is lost by cohabitation continuing for a month after the possibility of free consent or the discovery of the mistake (*h*); (c) manifest and perpetual impotence, by the other spouse (*i*); (d) want of consent of persons whose consent was requisite, on their application or the application of the spouse to whom the consent was necessary. The application, however, cannot be made by a son who had attained the age of twenty-one at the date of the marriage (*k*). In this last case the action cannot be brought if the persons required to give consent have approved of the marriage expressly or tacitly, or if six months have elapsed since the time at which the persons required to give consent knew of the marriage (*l*). When an action of nullity has been brought by one spouse the tribunal may, on the request of either of them, or *ex officio* if both or either are minors, order their temporary separation during the proceedings (*m*).

Spanish Law.—Under Spanish law the following are the grounds of nullity: (a) Minority (*n*); (b) mental disorder (*o*); (c) impotence (*p*); (d) holy orders (*q*); (e) anterior marriage (*r*); (f) prohibited relationship (*s*); (g) adoption (*t*); (h) adultery (*u*); (i) conviction of homicide of one spouse (*x*); (j) error as to the person, force, or fear (*y*); (k) ravishment (*a*); (l) absence of municipal judge, or of witnesses, at marriage (*b*).

The persons to whom the right of action for nullity belongs have been already referred to (*bb*). The cognisance of actions of nullity as regards civil marriages belongs to the civil tribunals (*c*).

Provision is made, on the institution of proceedings, for (a) the

(*h*) Art. 106.
(*i*) Art. 107.
(*k*) Art. 108.
(*l*) Art. 109.
(*m*) Art. 115.
(*n*) Arts. 83 (1), 101 (1), and p. 99, *supra*.
(*o*) Arts. 83 (2), 101 (1), and p. 104, *supra*.
(*p*) Arts. 83 (3), 101 (1), and p. 116, *supra*.
(*q*) Arts. 83 (4), 101 (1), and p. 122, *supra*.
(*r*) Arts. 83 (5), 101 (1), and p. 112, *supra*.
(*s*) Arts. 84 (1)—(4), 101 (1), and pp. 117, 118, *supra*.
(*t*) Arts. 84 (5), (6), 101 (1), and p. 120, *supra*.
(*u*) Arts. 84 (7), 101 (1), and p. 121, *supra*.
(*x*) Arts. 84 (8), 101 (1), and p. 122, *supra*.
(*y*) Art. 101 (2), and p. 103, *supra*.
(*a*) Art. 101 (3), and p. 103, *supra*.
(*b*) Art. 101 (4), and pp. 169, 172, *supra*.
(*bb*) See pp. 99, 103, 104, 116.
(*c*) Art. 103; and see art. 67.

separation of the spouses in every case; (b) the assignment, in certain cases, of a residence to the wife; (c) the custody of the children; (d) the aliment of the wife, and of children who are not under the paternal power; (e) preventing a husband, against whom a claim is brought, from prejudicing his wife as regards the administration of her property (*d*).

Canonical marriages have already been mentioned (*e*).

Law of Russia.—Marriage may be annulled by the Church authorities also on the following grounds: (1) Impotence of either of the parties if the impotence has arisen previous to the marriage and has lasted not less than three years after the marriage; (2) deprivation of all civic rights of either party by a Court sentence; (3) the disappearance of either party for not less than five years if during that time his whereabouts is unknown; and lastly, if both parties, not having children, have joined religious orders.

Switzerland.—The Swiss Code, as above stated, distinguishes, like the other Codes above mentioned, between *Nichtigkeit*, or *nullité absolue*, where the marriage can be avoided by the competent public authority or any other person interested (*f*), and *Anfechtbarkeit*, or *nullité relative*, where action may be brought by one of the spouses or his or her parent or guardian (*g*).

A marriage is absolutely void if (1) either of the spouses is already married; (2) either of the spouses is insane or incapable of discernment (*h*) for some permanent reason; (3) the spouses are related within the prohibited degrees by blood or marriage (*i*).

(*d*) Art. 68.

(*e*) See p. 168, *ante*.

(*f*) Arts. 120—122.

(*g*) Arts. 124—128. The present law, which is contained in arts. 50—55 of the Federal Law of Civil Status and Marriage, does not make this distinction. Under it a suit for nullity may be brought by one of the spouses on the ground of want of consent, caused by duress, fraud or error as to the person, provided three months have not elapsed since the cessation of the cause by which the consent was invalidated; by a public authority in the case of bigamy, marriage within the prohibited degrees or insanity; by the parent or guardian in case of a marriage of persons under age (but the action may not be received if the spouses have attained the legal age, if the wife has become pregnant, or if the parents or guardian have consented to the marriage); or in the case of want of consent of parents or guardian by the person or persons whose consent is required, who must bring the action before the spouse in question has attained the age which would render him or her independent of the consent.

(*h*) See art. 16, above, p. 104.

(*i*) Art. 120.

After the dissolution of a marriage no proceedings shall be taken by the public authority to invalidate it; but any other person may still set up its invalidity for the protection of his own interests. After the termination of insanity or incapacity of discernment the marriage can no longer be avoided except by one of the spouses. And a marriage cannot be avoided on the ground of the bigamy of one of the spouses if the other was at the time of its celebration ignorant of the previous marriage, and if the latter has since been determined (*k*).

A marriage may be avoided by one of the spouses on account of: (a) Absence of consent, where he or she was at the time of celebration incapable of discernment from a temporary cause (*l*); (b) defective consent, by reason of mistake either as to the nature of the ceremony, the personality of the other spouse, or qualities of the other spouse, which are of such importance that in their absence a common life would be intolerable (*m*); (c) deceit as to (1) honourable character; (2) disease which would be in a high degree dangerous to the health of the other spouse or of the issue of the marriage (*n*); (d) threats inducing the marriage (*o*).

An action of nullity on one of these grounds can only be brought within six months after the discovery of the mistake or deceit, or after the effect of the threats has ceased, and is absolutely barred after the lapse of five years from the celebration of the marriage (*p*).

The marriage of a person who is incapable of marriage or generally under incapacity or interdicted may be avoided by his or her parents or guardian, but no marriage can be avoided on this ground after the incapacity has ceased or the wife has become pregnant (*q*).

A marriage which ought not to have been celebrated for any of the following reasons is nevertheless valid: (1) That one of the spouses is the adopted parent of the other (*r*); (2) that a period of waiting imposed by the law or by the Court has not been observed (*s*); (3) that the legal forms have not been observed,

(*k*) Art. 122.
(*l*) Art. 123.
(*m*) Art. 124.
(*n*) Art. 125.
(*o*) Art. 126.
(*p*) Art. 127.
(*q*) Art. 128.
(*r*) Art. 129. The marriage puts an end to the adoption.
(*s*) Art. 130.

provided that the marriage has been celebrated by the officer of civil status (*t*).

Effects of Annulment of a Marriage.—French Law.—(1) As regards the spouses and the children who have been parties to or represented in the proceedings for nullity (*u*).

The wife ceases to have the right to bear the husband's name. The children lose the status of legitimacy or legitimation; all the rights and obligations under the marriage cease. A minor spouse who has been emancipated by marriage loses the benefit of emancipation. The wife recovers her full liberty of action, but loses her legal hypothec over the property of her husband; the matrimonial conventions end, and any donations *propter nuptias* fall with them.

(2) As regards third parties, or persons not represented in the proceedings.

A judgment annulling a marriage on a ground which it is only open to one individual to raise, *e.g.*, on the ground of coercion or error as to the person, has absolute authority as a *chose jugée* (*x*). As regards other cases, two different theories exist: (1) A decree of nullity has only a relative authority, *i.e.*, binds only parties to and persons represented in the proceedings, when the ground of nullity is relative (*y*). Such a decree has absolute authority as *chose jugée* provided that, first, the issue of the validity of the marriage was directly raised; secondly, the judgment was pronounced between the two spouses; thirdly, there was no fraudulent collusion (*z*).

The principle by which a marriage declared null produces no effect even in the past suffers exception in the case of putative marriages (*a*), and a marriage declared null, if contracted in good faith, produces civil effects (*b*). In such cases, when the parties have been married under the *régime* of the *communauté*, a liquidation of the *communauté* would have to be made as in the case of a divorce. The spouse of good faith also enjoys the right of succeeding *ab intestato* to his or her children. The children are considered as legitimate, &c. (*c*).

(*t*) Art. 131.

(*u*) Arts. 180, 181.

(*x*) Estevenet *v.* Estevenet (1890), Dalloz, 1891, ii., 153, and note by M. Loynes, *ad loc. cit.*

(*y*) Baudry-Lacan., ii., p. 440, s. 1881.

(*z*) *Ibid.*, pp. 446 *et seq.*, ss. 1887 *et seq.*

(*a*) See Burge, ii., 266.

(*b*) French Civil Code, arts. 201, 202, 1109, 1110; and see Putative Marriages, vol. ii., 266.

(*c*) 1 Fuzier-Herman, Rep. tit.

Italian Law.—A marriage declared null, if both parties were in good faith, produces all the effects of a marriage as well in respect of the spouses as also in respect of the children, including children born before the date of such marriage if duly acknowledged before the date of the decree of nullity. If only one of the parties was in good faith, such effect is produced only as regards that spouse and the children (*d*).

Spanish Law.—On decree of nullity, male children above three years of age are committed to the custody of the father; daughters to that of the mother, if both spouses have been of good faith. If only one spouse has been of good faith, the custody of the children of both sexes passes to him or her (*e*). These two last provisions do not apply if the parents by common consent have otherwise assured the necessary care of the children (*f*). If both have been of bad faith, a tutor may be appointed (*e*). In all cases children under three are placed in the custody of the mother, unless the judgment otherwise provides (*e*).

The execution of a decree of nullity will produce on the property of the spouses the same effects as a dissolution of the marriage by death. But a spouse who has acted in bad faith will have no right to *gananciales*. If bad faith existed on both sides, its effects cancel each other (*g*).

German Law.—If the application for the avoidance of a voidable marriage is effective a decree of nullity is made, with the result that the marriage is deemed to be void *ab initio* (*h*). A third party is not affected by the nullity of a void or voidable marriage unless the nullity at the date of the transaction between him and the spouses was either declared by decree of the Court or known to him (*i*); but this rule does not apply to marriages void in the English sense of the word under s. 1324.

If the nullity or voidability of the marriage was known to one of the spouses at the time of the marriage, but unknown to the other spouse, such other spouse may, after the decree of nullity, claim that in respect of all rights of property, and more particularly in respect of the right of maintenance, he or she should be placed in

Mariage, p. 386; Pandectes Françaises, tit. Mariage, p. 161.
(*d*) Art. 116; see Burge, ii., p. 266.
(*e*) Arts. 70, 73.
(*f*) Art. 71.
(*g*) Art. 72.
(*h*) S. 1343.
(*i*) S. 1344.

the same position as if the marriage had been a valid marriage and had been dissolved, and it had been found that the other spouse had been the only guilty party. This rule does not apply to marriages void in the English sense of the word (*k*).

If a marriage void on the ground of coercion is avoided, the coerced party has the same rights as the party ignorant of the nullity under the preceding rule. If, on the other hand, the marriage is dissolved on the ground of mistake, the corresponding right is vested not in the person who made the mistake, but in the person who caused the mistake, unless he or she knew of the mistake at the time of marriage (*l*).

If a party whose husband or wife has been declared to be dead re-marries, the effect of such re-marriage, as a general rule, is *ipso facto* the dissolution of the first marriage, which is effective even if it is found that the spouse declared to be dead is in fact alive, unless such fact was known to both parties at the date of the marriage, or unless the declaration of death has been appealed against within ten years of the date of the order, and such appeal is still pending. As mentioned above, a marriage entered upon under the aforesaid circumstances can be avoided by each of the spouses of the marriage (and by no one else); but if the application is made by the spouse who was married to the person declared to be dead, such spouse is bound to supply the other with maintenance on the same principles as in the case of divorce (*m*).

Swiss Law.—Under the Swiss Code, a void marriage has full effect until it is annulled by the judgment of a Court (*n*). The children of such a marriage are legitimate, and their legal relations with their parents, as well as the proprietary relations of the spouses themselves, are settled by the Court on the same principles as in case of divorce (*o*). The wife, if in good faith, retains the personal status which she acquired by the marriage, but takes the name which she previously bore.

Under the existing law, a marriage which is annulled has the same effect as if it were valid as regards both spouses and the

(*k*) S. 1345.

(*l*) S. 1346.

(*m*) Ss. 1348—1351. The obligation of the wife, however, to contribute with her husband to the maintenance of a child of the marriage remains: ss. 1352, 1585. Similar provisions are made by Hungarian law (XXXI. of 1894).

(*n*) Art. 132.

(*o*) Arts. 133, 134, 151—154, 156, 157.

children born of the marriage or legitimated by it, provided both spouses acted in good faith; if only one was in good faith the marriage has this effect only as regards that spouse and the children; or if neither were in good faith, as regards the children only (*p*).

Roman-Dutch Law.—Though the Roman law declared all marriages void which were contracted in disobedience of legal prohibitions (*q*), the Roman-Dutch law only applied this doctrine to the following marriages, which were declared null and void *ab initio*: (a) if contracted between parties within prohibited degrees of consanguinity or affinity (*r*); (b) bigamous marriages, unless sanctioned by the proper authorities (*s*); (c) marriages of minors without their parents' consent (*t*); (d) marriages between a spouse divorced for adultery and the adulterer (*u*). All other marriages contracted in spite of legal prohibitions were, generally speaking, voidable, and the only distinction between them was whether the marriage was voidable at the instance of the spouses themselves and a third person interested, or at the instance of either spouse only, *e.g.*, for the latter case, (e) in case of impotence proved to exist previously to the marriage, but not supervening afterwards (*x*); (f) in case of non-virginity of the wife at the time of the marriage, unknown to the husband, or in case of the pregnancy of a widow existing at the time of her second marriage by another man (*x*); if

(*p*) See Federal Law of Civil Status and Marriage, 1874, art. 55.

(*q*) Inst. de Nuptiis i., 10, 12.

(*r*) Polit. Ordon., April 1st, 1580, art. 8; J. Voet, Ad Pand. xxiv., 2, 15; Fock. Andr., Bijdragen, i., 168 *et seq.*

(*s*) Fock. Andr., Bijdragen, i., 163—164; v. d. Keessel, Thes. Sel., Thes. 63 and 64.

(*t*) Polit. Ordon., April 1st, 1580, art. 8; J. Voet, Ad Pand. xxiv., 2, 15; Fock. Andr., Bijdragen, i., 168 *et seq.*

(*u*) Whether this rule comprised every marriage of persons between whom there had been an adulterous intercourse is doubtful. If it were so in the Province of Holland and Zeeland, it does not seem to have been the case in the Province of Gelderland and the Generaliteitslanden. Echtreglement, art. 83; Placaat (Holland) of July 18th, 1674; Groot Plac., Bk. III., 507; Placaat (Zeeland) of March 18th, 1666; Groot Plac., Bk. IV., 1047; Schrassert, Codex Gelr. Zutf. I. in voce "Overspel," No. 7; v. d. Keessel, Thes. Sel., Thes. 70; Boel-Loenius, Decis. en Observ., p. 60; Fock. Andr., Bijdragen, i., pp. 180, 181.

(*x*) S. van Leeuwen, Cens. For. I., 1, 15, 10; Holl. Cons. III. b, Cons. 344; iv. App. on p. 332; J. Cos, Regtsgel. Verh., VII., 5—7; J. Voet, Ad Pand. xxiv., 2, 15, 16.

condoned, the ground for voidability ceased to exist; (g) if free will on the part of either spouse were wanting.

The effect of a marriage declared null and void *ab initio* was that the parties were, as much as possible, placed in the same condition as if no marriage had taken place. Any issue of the marriage (unless putative) were illegitimate (*y*), and the wife did not change her domicil.

A voidable marriage was valid till declared void. Any issue of the wife then pregnant was legitimate, though the father could disclaim it by action, but the wife's domicil was changed.

Private International Law.—This is considered with the law of divorce (*z*).

(*y*) J. v. Sande, Decis. Fris. II., 5, 2; v. d. Keessel, Thes. Sel., thes. 64 and 65, and authors quoted.

(*z*) See p. 941.

CHAPTER V.

CONSTITUTION OF MARRIAGE—PRIVATE INTERNATIONAL LAW.

In the preceding chapters a general outline has been given of the principal circumstances on which the validity of the marriage depends. It will have been seen that the laws which have been referred to differ from each other in several important particulars. The judicial tribunals of a country may be called upon to decide upon the validity of a marriage contracted, not in conformity with its own law, but either with that of the country in which it was celebrated or with that of the domicil of the parties. Each of these laws has to be considered in such a case for judging of the validity of the marriage.

The subject is here treated under the following heads :—

(1) The *lex loci contractus*, as formerly the governing law for the validity of marriage generally.

(2) The personal law (sometimes coupled with the *lex loci*), as now the governing law for capacity for marriage.

(3) The various incapacities imposed by the personal law.

(4) Whether both parties should be capable according to their respective personal laws.

(5) Impediments imposed by the *lex loci celebrationis.*

(6) Impediments imposed by the *lex fori.*

(7) The *lex loci celebrationis* generally, and the personal law occasionally, as the law governing the forms of marriage.

(8) Exterritorial marriages.

(9) Marriages where the local forms cannot be used.

1. **Former View.—Lex Loci Contractus governed Capacity and Form. —Older Jurists.**—The former view, resting on juristic authority, was that the *lex loci contractus* or *celebrationis* should be applied to all questions involving the validity of the marriage, whether they respected the capacity to contract or the manner in which the parties contract marriage. It will be observed that in the citations following the solemnities of the contract are mainly referred to.

This proposition is fully set out in the following passage from the judgment of an English ecclesiastical Judge. "From the infinite mischief and confusion that must necessarily arise to the subjects of all nations with respect to legitimacy, successions, and other rights, if the respective laws of different countries were only to be observed, as to marriages contracted by the subjects of those countries abroad, it has become *jus gentium*, that is, all nations have consented, or must be presumed to consent, for the common benefit and advantage, that such marriages should be good or not, according to the laws of the country where they are made. It is of equal consequence to all that one rule in these cases should be observed by all countries, that is, the law where the contract is made. By observing this law no inconvenience can arise, but infinite mischief will ensue if it is not. If countries do not take notice of the laws of each other with respect to marriages, what would be the consequence if two English persons should marry clandestinely in England, and that should not be deemed a marriage in France? Might not either of them, or both, go into France and marry again; because by the French law such a marriage is not good? And what would be the confusion in such a case? Or again: Suppose two French subjects, not domiciled here, should clandestinely marry, and there should be a sentence for the marriage; undoubtedly the wife, though French, would be entitled to all the rights of a wife by our law. But if no faith should be given to that sentence in France and the marriage should be declared null, because the man was not domiciled, he might take a second wife in France, and that wife would be entitled to legal rights there and the children would be bastards in one country and legitimate in the other" (*a*).

Sanchez discusses the question whether if the subject of a country in which the decree of the Council of Trent is in force, marries in a country where it is not admitted, he is bound to conform to it. He maintains the negative, because, "In contractibus, solæ leges loci in quo contractus celebratur, inspiciuntur: locus autem ubi hoc matrimonium initur, non petit eam parochi et testium solemnitatem ad matrimonii valorem, cùm ibi decretum Tridentini non obliget" (*b*).

(*a*) Scrimshire *v.* Scrimshire (1752), 2 Hagg. Cons. Rep. 395, 417, 418; Sir E. Simpson, approved by Story, s. 80 a; and in Ogden *v.* Ogden, [1908] P. 46, at p. 63; and Bishop, Marriage and Divorce, 1891, i., s. 853.

(*b*) Sanchez, lib. 3, disp. 18, n. 28. See accordingly for marriage of Roman Catholics in Russia, 1902, J. 470.

On the same ground he holds that a person will be bound to conform to it if it prevail in the place where the marriage is celebrated, although it is not admitted in the country of his domicil. "Ea solemnitas adhibenda est, quam petunt leges loci, ubi contractus initur: cùm ergò locus ubi celebratur matrimonium ab his peregrinis exigat solemnitatem Tridentini in eo vigentis, aliter contractum, nullum erit" (*c*).

The language of Huber is equally explicit. He considers that if the marriage be legal in the place where it is contracted and celebrated, "ubique validum erit effectumque habebit" (*d*).

J. Voet says, "Sufficit in contrahendo adhiberi solemnia loci illius, in quo contractus celebratur, etsi non inveniantur observata solemnia, quæ in loco domicilii contrahentium, aut rei sitæ, actui gerendo præscripta sunt: quo fundamento etiam in hanc sententiam duplex responsum extat in Responsis Juris. Holl. part 3, vol. i., consil. 181, 184" (*e*).

Merlin has thus forcibly described the extent to which this principle is carried. "Ainsi, les enfans qu'une femme sauvage aurait eus d'un sauvage, dans un pays où il n'y aurait point de lois établies, seraient regardés comme légitimes, même parmi nous, quand même le père et la mère n'auraient suivis d'autres lois que celles qu'ils se seraient imposées: de même ceux de deux époux, Anglais ou Chinois, qui auraient accompli les lois de l'empire de Chine ou du royaume d'Angleterre" (*f*).

Hertius thus lays down the rule: "Matrimonium juxta solemnitates loci alicujus, ubi sponsus et sponsa commorabantur, contractum, non potest prætextu illo rescindi, quòd in domicilio aut patriâ mariti aliæ solemnitates observentur" (*g*).

English Law.—The former law of England adopted this principle in its fullest extent. "A marriage good by the laws of one country is held good in all others where the question of its validity may arise" (*h*). It admitted the validity of a marriage contracted in

(*c*) Sanchez, lib. 3, disp. 18, n. 26, cited by Story, s. 122.

(*d*) Huber, de Conf. Leg., lib. 1, tit. 3, s. 8.

(*e*) Voet, lib. 23, tit. 2, n. 4; P. Voet, s. 9, c. 2.

(*f*) Merlin, sect. 2, s. 1, tit. Mariage; Boullenois, tom. 1, tit. 2, c. 3, obs. 23, p. 494.

(*g*) 1 Hertius, Opera, De Collis. Leg., s. 4, art. 10, p. 126.

(*h*) Lord Brougham, Warrender *v.* Warrender (1835), 2 Cl. & F. 488, at p. 530; Ryan *v.* Ryan (1816), 2 Phill. 332. See Kelyng's Cases, 79; Ilderton *v.* Ilderton (1793), 2 H. Bl. 145;

Scotland by English subjects according to the law of that kingdom, although the marriage would be invalid according to the law of England, and notwithstanding that the parties had acquired no *bonâ fide* domicil in Scotland but had resorted thither for the purpose of making a contract, which if they had remained in England they were prohibited from making (*i*). Lord Stowell, in deciding on the validity of a marriage celebrated in Scotland, observed "that the only principle applicable to such a case by the law of England is, that the validity of the marriage rights must be tried by reference to the law of the country where, if they exist at all, they had their origin. Having furnished this principle, the law of England withdraws altogether, and leaves the legal question to the exclusive judgment of the law of Scotland" (*k*).

Scots Law.—The law of Scotland took the same view (*l*).

United States.—A narrower application of this principle was adopted in the United States (*m*); and its Courts have laid down as the governing doctrine that a marriage valid by the law of the place where it is celebrated is valid everywhere, and a marriage invalid where it was contracted is invalid elsewhere, with the exceptions (presently to be noticed) of polygamous or incestuous marriages, or marriages where the forms of the *lex loci celebrationis* are such as the parties cannot conscientiously comply with or the solemnisation is in a barbarous or semi-civilised land (*n*).

Foreign Law.—This was also the former law of France, although Bouhier and Boullenois were of opinion that the *lex loci celebrationis* should be set aside as regards the intrinsic conditions of marriages contracted by persons resorting to foreign countries, and that whether their purpose was fraudulent or not the law of the domicil

Scrimshire *v.* Scrimshire (1752), 2 Hagg. Cons. Rep. 395; Middleton *v.* Janverin (1802), *ibid.*, 437; Herbert *v.* Herbert (1819), 2 Hagg. Cons. Rep. 263, 271; Montague *v.* Montague (1824), 2 Add. 375.

(*i*) Compton *v.* Bearcroft, Arches, February 16th, 1767, 2 Hagg. Cons. Rep. 444, n.; Delegates, February 4th, 1769. The exact counterpart of this case is the case of Simonin *v.* Mallac (1860), 2 S. & T. 67, decided on the same ground; Grierson *v.* Grierson, Lib. Reg. A. 1780, F. 552; Bedford *v.* Varney (1762), before Lord Northington, Brook *v.* Oliver, at the Rolls, before Sir Thos. Clarke (1759), 2 Hagg. Cons. Rep. 376, n.

(*k*) Dalrymple *v.* Dalrymple (1811), 2 Hagg. Cons. Rep. 54, 59.

(*l*) Fraser, Husband and Wife, 1878, ii., 1300, 1301; Bar, Gillespie, 373.

(*m*) 2 Kent's Comm. 93. See Story, ss. 81—113.

(*n*) Bishop, M. & D., i., s. 843; Dicey, C. L., 1st ed., Amer. Notes, 656.

should govern the validity of the contract (*o*). In recent times the laws of Argentina and Brazil have adopted the *lex loci celebrationis* for this purpose (*p*), and the Federal law of Switzerland also recognises it (*q*).

Limitation of this Rule by Recognising Incapacities imposed by Personal Law.—English Law.—The English Courts, although they thus did not distinguish between capacity of the parties for marriage and the formalities of marriage, but applied the *lex loci* as governing the validity of the marriage generally, in later times made an important qualification of the rule by recognising prohibitions imposed on the parties by their personal law as incapacities which followed them everywhere (*r*). This limitation in applying the *lex loci* as the governing law, met the case of parties going abroad to contract marriage so as to avoid the requirements of the law of their country and then returning, which has led to the doctrine that fraud on the personal law of the parties, or evasion of it, should invalidate a marriage (*a*). The English Courts refused to accept this doctrine, although it had considerable support

(*o*) Weiss, C. L., iii., 404—406.

(*p*) *Ibid.*

(*q*) Weiss, *ubi sup.;* Bar, 346, s. 157; Swiss Federal Constitution, art. 54; Law of Civil Status and Marriage, 1874, art. 25. By art. 54 of this law, "a marriage celebrated abroad under the law in force there shall not be declared invalid unless the action of nullity would lie both under the law under which the marriage was celebrated and under the present law." This is repealed by the Federal Code as from the date when the Code comes into force, and is replaced by the addition in art. 61 of the Final Title of the Code of the following article (No. 7 f) to the Federal Law of 1891: "The validity of a marriage celebrated abroad according to the laws which are in force there is recognised in Switzerland, unless the parties have celebrated it abroad with the manifest intention of avoiding the causes of nullity provided by Swiss law.

"A marriage which is invalid according to the foreign law under which it was contracted, shall not be avoided in Switzerland, unless it is voidable according to Swiss law."

(*r*) Conway *v.* Beazley (1831), 3 Hagg. Eccl. Rep. 639; Harford *v.* Morris (1776), 2 Hagg. Cons. Rep. 423; Brook *v.* Brook (1861), 9 H. L. C. 193; Burge, i., 190; citing Huber, De Conflictu Legum, lib. i., tit. 3, n. 8; Muller's Promptuarium, tit. Matrimonium, n. 81, p. 565.

(*a*) Burge, i., 191—195; Story, s. 123; citing Huber, *ubi sup.;* Pothier, Traité de Mariage, part 4, c. 1, n. 363; Merlin, Rep. Univ., tit. Mariage, ss. 4, 11; Bouhier, Cout. de Bourgogne, c. 27, ss. 59—66; Brouwer, De Jure Connub., lib. 2, c. 2, n. 10; P. Voet, c. 2, s. 9, n. 9; Mascard, De Interpr. Stat. Concl., 6, n. 134; J. Voet, lib. 23, tit. 2, n. 4; see per Lord Mansfield, Robinson *v.* Bland (1760), 2 Burr. 1077, at p. 1079.

from the jurists, for any other requirement of the personal law, *e.g.*, consent of parents to the marriage of minors, or formalities, and thus the Gretna Green marriages were held valid (*b*). The Courts of Massachusetts similarly allowed the *lex loci celebrationis* to govern, without, however, the qualification as to the law of the domicil provided by the English law; and this seems to be confirmed by later opinion and decisions in the United States (*c*). All such questions, therefore, as consents and formalities were left to the *lex loci*, though by the personal law of the parties evasion of these might entail the avoidance of the marriage in their own country or would prevent the marriage taking place there (*d*). Lord Wensleydale, in 1861, stated the rule to be that a marriage, if valid where celebrated, is valid everywhere as to the constitution of marriage and its formalities, but as to the rights, duties, and obligations thence arising the law of the domicil must be looked to (*e*). In America, the *lex loci* has been held to determine capacity with two exceptions, namely, where that law violates the Christian view of marriage and where the legislature of the *forum* has plainly indicated a distinctive national policy opposed to it (*f*).

Scots Law.—The Scotch Courts still continue to hold that the *lex loci celebrationis* governs the validity of marriage generally, even though the parties contract it abroad in order to avoid the

(*b*) Fraser, Husband and Wife, ed. 1878, ii., 1302; Harford *v.* Morris, above, and various cases cited 2 Hagg. Cons. Rep. 376, and pp. 242, 243, above. Burge (i., pp. 192, 193) thought that the Gretna Green marriages were not against the doctrine, on the ground that there was no prohibition or avoidance of Scotch marriages for English subjects; and cited Sanchez, who would allow a *fraus licita* for parties *uti jure suo* in marrying abroad in order to avoid ceremonies required by their country's law, and distinguishing the personal incapacity imposed by the law of the domicil which would accompany the party in whatever country he contracted from one imposed by a law which attaches to the act only in respect of its taking place in the country in which that law prevailed: lib. 3, disp. 18, nn. 29, 30; and Digest, lib. 50, tit. 17, De divers. reg., i., 55.

(*c*) Fraser, ii., 1300, 1301, citing Commonwealth *v.* Lane (1873), 18 Amer. Rep. 514 (Mass.); and see 2 Kent's Comm. 92, 93. See cases cited by Burge, i., pp. 194, 195.

(*d*) Scrimshire *v.* Scrimshire, *ante;* Swift *v.* Kelly (1835), 3 Knapp, 257; Harford *v.* Morris, *ante;* Compton *v.* Bearcroft (1767), 2 Hagg. Cons. Rep. 444, n.; Fraser, ii. 1302; Dicey, 615, 616; Simonin *v.* Mallac (1860), 2 S. & T. 67; Ogden *v.* Ogden, [1908] P. 46.

(*e*) Brook *v.* Brook (1861), 9 H. L. C. 193, 241.

(*f*) Wharton, 1905, pp. 356, 357, citing cases.

requirements of the law of their domicil, but presumably not if by Scots law there was a distinctive impediment, *e.g.*, the parties being within prohibited degrees of relationship (*g*). It may not, however, be imperative to follow the forms of the foreign law, and perhaps a marriage celebrated in such a way as to be equivalent to a marriage in Scotland, the parties to it being Scotch, would be recognised as valid in Scotland, *e.g.*, a marriage without other ceremony than exchange of consents. It has been held that evidence of a party's conduct abroad may be looked to for seeing whether the contract has been made: and to establish a marriage by habit and repute evidence of cohabitation abroad is admissible to prove the fact of consent having been given in Scotland, and similarly for a promise of marriage *subsequente copulâ* (*h*).

Foreign Law.—In French law the doctrine is upheld by the Courts that marriages are invalidated for clandestinity or intention to evade the formal requirements of French law, although the mere omission of these *per se* does not have any effect on a marriage contracted by French persons abroad (*i*), but in Belgium it is not accepted. In Russia this doctrine has been acted on (*j*). In Germany the Courts have held such marriages valid, and under the present law their validity is secured by statute (*k*). In all these cases, however, the results are more properly ascribed to violations of the personal law invalidating *per se* the marriage as *impedimenta dirimentia*, as will be seen later with special reference to prohibited degrees (*l*). In the marriage law of Argentina there is an express provision allowing the validity of such marriages for Argentine citizens, if not bigamous (*m*).

II. **Present View.—Personal Law Governs Capacity for Marriage.**—The modern view is to distinguish capacity and form as separate

(*g*) Fraser, ii., 1300, 1301, 1309; Bar, Gillespie, 373; Johnstone *v.* Godet (1813), Fergusson, Cons. Law Rep. 8; Beattie *v.* Beattie (1866), 5 Macph. (Sess. Cas. 3rd) 181.

(*h*) Countess of Strathmore's Case (1750), 6 Paton, 681; Napier *v.* Napier (1801), Hume, 367; Breadalbane Peerage Case (1867), 5 Sess. Cas. (3rd) 115.

(*i*) 1892, J. 992, 994, 1163, 457; 1894, J. 138; 1893, J. 1170; 1899, J. 799; 1901, J. 153, 351, 357; 1903, J. 639, 360.

(*j*) 1898, J. 95, 1080; for Roumanian law see 1899, J. 56, 687; 1900, J. 509.

(*k*) Bar, Gillespie, 366; S. C. of Berlin, 1855, Dec. xxix., 300; Civil Code, ss. 1332, 1333, 1339; Introd. Law, art. 11; and see Hague Convention on Marriage, art. 5.

(*l*) See pp. 251, 252, 256, 259 *et seq.*

(*m*) 1886, J. 291, paper by Daireaux.

factors in the constitution of a valid marriage, for which different governing laws may be recognised. The majority of legislations at the present day have thus definitely accepted the rule that the personal law of the parties intending marriage determines their capacity for entering into the contract; and almost all the States of Continental Europe have undertaken by treaty to observe this principle as regards each other's subjects. The Hague Convention for determining conflicts of law in marriage provides that the right to contract marriage is governed by the national law of each of the spouses unless that law refers expressly to another law (*n*), and in order to marry, foreigners must show that they are capable of marrying under the provisions of their national law by producing a certificate from a proper authority (generally a consular authority) to that effect (*o*).

English law adopts for this purpose the law of the parties' domicil (*p*); and a similar certificate of capacity has been required by the ecclesiastical authorities for foreigners, desiring to marry here, but who are not domiciled in this country, as a condition of

(*n*) Hague Convention on Marriage Law, 1902 (ratified June 13th, 1902, 1902, J. 949), art. 1. English translation in Meili & Kuhn's "Int. Civ. and Commercial Law," 1905, Appendix. See law of France (Code Civil, arts. 3 (3) and 170); Germany (Introd. Law, art. 13); Hungary (Law of 1894, art. 108); Netherlands, art. 138 of Code); Italy (Code Civil, arts. 100, 102); Portugal (Code Civil, arts. 1065, 1066); Roumania (Code Civil, art. 152); Spain (Law of June 18th, 1870, art. 141); Switzerland (Federal Law of June 25th, 1891, art. 7 c) amendment introduced by the Final Title of the Code, art. 61; law of Denmark, Sweden and Norway, 1901, J. 197, 1077; Siam, 1901, J. 188; Institute of International Law (1888, Ann. x., 75); Weiss, C. L., iii., 407.

(*o*) Hague Convention, art. 4; France (Sirey, Code Civil, art. 143) has treaties to this effect with Belgium, Luxemburg and Germany as to Alsace Lorraine (1896, J. 714); for Hungarians in France (1896, J. 1130, 1897, 441); for foreigners in France (Foelix, Demangeat, ii., 382); for Italians in France (1895, J. 693), Germany (1902, J. 924; 1893, J. 257), Italy (Code Civil, art. 103, 1892, J. 513), Hungary (Law of 1897, art. 113), Switzerland (Federal law of 1874, ss. 31, 37, replaced by art. 7 e, added to the law of 1891 by art. 61 of the Final Title of the Civil Code; 1897, J. 738, 743; 1892, J. 1100) has treaties to this effect with Germany (1900, J. 687), with Holland (1900, J. 223), with Italy (1900, J. 215), with France (1877, J. 573); so law of Sweden (1883, J. 343, 355), laws of Austria-Hungary and Venezuela (Ann. de Lég. Etr., 1890, 961); Bar, Gillespie, 348; and Turkey (1903, J. 93); and "Parliamentary Return of Marriage Laws of Foreign Countries," P. P. Misc., 1894.

(*p*) Udny *v.* Udny (1869), L. R. 1 H. L. Sc. & D. 441; Brook *v.* Brook (1861), 9 H. L. C. 193; Dicey, 613; Foote (3rd), 73 *et seq.*

obtaining a marriage licence in the diocese of London (*q*). A recent statute (*r*) has provided for a similar certificate being obtainable, upon complying with certain conditions (*s*), by a British subject desiring to be married in a foreign country to a foreigner according to the law of that country, upon giving notice of the marriage if resident in the United Kingdom to a registrar, and if resident abroad to the marriage officer, to the effect that after proper notices have been given, no legal impediment to the marriage has been shown to the registrar or officer to exist, unless the certificate is forbidden or a *caveat* is in force, or some legal impediment to the marriage is shown to the registrar or officer to exist (*t*).

A similar provision is made in the case of foreigners marrying with British subjects in the United Kingdom, where arrangements have been made by the British authorities with any foreign country for the issue by its officers of certificates that after proper notice no impediment according to the law of that country has been shown to exist to the marriage; and regulations may be made by Order in Council requiring such a foreigner to give notice that he is subject to the marriage law of that country to the person by or before whom the marriage is to be solemnised, and forbidding any person to whom such notice has been given to solemnise the marriage or allow it to be solemnised until such a certificate is produced to him (*u*). The Act does not extend to Jewish marriages, and there

(*q*) See 1902, J. 642.

(*r*) 6 Edw. VII. c. 40 (Marriage with Foreigners Act). This Act has not yet been applied.

(*s*) The conditions include signing a notice stating the name, surname, profession, condition and nationality and residence of each of the parties, and whether each is or is not a minor; an oath that the applicant believes that there is no impediment to the marriage by reason of kindred or alliance or otherwise; that he has for three weeks immediately preceding had his usual residence within the registrar's or officer's district; that if the applicant, not being a widower or widow, is under twenty-one years of age, the consent of the persons required by law to the marriage has been obtained, or that there is no such person.

(*t*) The certificate may be forbidden by any person whose consent is required by law to marriages solemnised in England; or a *caveat* may be entered against it by any person; and the registrar or officer must examine into the matter of the *caveat* and decide whether it ought to obstruct the giving of the certificate or not, or may refer it to the Registrar-General to decide; and if the registrar or officer decides that the *caveat* should have effect, the applicant for the certificate may appeal to the Registrar-General.

(*u*) S. 2.

are special provisions in its application to Scotland (*x*). A similar certificate is required by statute in Gibraltar (*y*).

It has been suggested that English law also requires that the parties should have capacity according to the *lex loci celebrationis*, but this has not been so decided (*z*). The law of Scotland and the United States continue to regard the question of capacity as determined by the *lex loci celebrationis*. Kent, after citing decisions upholding the *lex domicilii* and the *lex loci celebrationis* respectively, concludes that the sounder rule appears to be that a status legally created in one country and not being one generally recognised as *contra bonos mores*, is to be held valid everywhere for all purposes (*a*).

Recognition of Personal Law.—The personal law, therefore, primarily governs the capacity or incapacity of the parties. On this principle, on the one hand, a foreigner legally divorced in his own country should be regarded as capable of marrying in a country where divorce is unknown (*b*). On the other hand, any incapacity imposed by the personal law on a person for marriage

(*x*) The period of residence is fixed at fifteen days, and the notice to the registrar must, besides the particulars required by the Marriage Notice (Scotland) Act, 1878, state the nationality of the parties, and the public notice of the intended marriage made by the registrar must give similar particulars. The persons to whom the notice of the person's nationality mentioned above must be given, and who are prohibited from assisting in the celebration of the marriage after receiving such notice and until the certificate is produced to them, include a registrar, law agent, or other person whom he desires to draw up any declaration of irregular marriage between him and a British subject. A certificate is not to be forbidden, and objections take the place of *caveats*: see s. 5 and sched.

(*y*) Gibraltar, 1902, Ordinance No. 7, "Journal Soc. of Comp. Leg.," N. S., xii., 457.

(*z*) Westlake, 58; Dicey doubts, 627; but by the rules of the Institute the provisions of the *lex loci* as to prohibited degrees must be complied with; and so Mr. Justice Phillimore, Paper on Marriage Law, Int. Law Ass., Glasgow Report, p. 232. Bar thinks not unless it is a criminal delict, 349—351.

(*a*) 2 Kent, Comm. 93; Fraser, Husband and Wife, 1297, 1299; Bishop upholds the *lex loci celebrationis* (843) and rejects domicil, as "having a grain of truth in it, and when properly understood in most cases harmless" (873), though he adopts the law of domicil for divorce (848, 849).

(*b*) He can in France and Italy, Weiss, C. L., iii., 423, 424, citing Amiens, 1880, J. 298; Rome, 1886, J. 620; Milan, 1889, J. 168. Fiore thinks so doubtfully as regards Italy, 1886, J. 170, Italian Civil Code, art. 56, prel. art. 12; though not where a spouse has been declared dead for continued absence, 1887, J. 156. Laurent thinks not (D. C. I., v., 139); and it has been so held in Guernsey, where divorce is unknown, 1889, J. 130. Bar thinks he can, Gillespie, 351.

generally or marriage with any particular person should thus be given effect to in other countries, *e.g.*, persons within the prohibited degrees of kinship or affinity (*c*) or want of age (*d*). The personal law may, however, also impose a prohibition against marriage with particular persons or without the fulfilment of particular conditions, which are not so clearly entitled to recognition abroad. In two recent decisions in England dealing with the case of a marriage in England between a foreigner domiciled abroad and an Englishwoman domiciled in England, alleged to be invalid for infraction of the foreigner's personal law as regards capacity, in the one case for want of the consent of the husband's parents, in the other for a prohibition by his religion against marriage with a person of a different religion, the title of the personal law to decide the question of marital capacity has been disputed, and the marriage has been upheld as being in compliance with the *lex loci celebrationis*, though in the former case the requirement of consent was absolute and the husband was not of age. As regards this case there is, however, precedent in England for holding that the want of proper consent of a third person which was dispensable in such a case, falls under the head of formalities rather than of capacity. But the latter decision suggests (unless it be justified as a refusal to recognise a peculiar foreign religious incapacity for marriage or, as stated in the judgment, on the ground of there being no evidence upon which the Court was bound to find that the alleged incapacity of the foreigner existed) that a qualification should be imported into the general rule, to the effect that the foreigner in such a case cannot set up an incapacity imposed by his personal law for entering into a marriage voluntarily and duly celebrated according to English law, or repudiate the marriage on the ground of such incapacity, which is not recognised by English law; and that different considerations may apply to a case where both parties belong to a country the laws of which forbid them to marry, from those which apply in a case where only one of the parties belongs to a country whose law is to that effect (*e*). It is to be remarked that these decisions, so

(*c*) Even though the degrees prohibited by the parties' personal law are lawful by English law: Sottomayor *v.* De Barros (1877), 3 P. D. 1.

(*d*) See Sottomayor *v.* De Barros, *ante; contra*, Simonin *v.* Mallac, *ante;* Ogden *v.* Ogden, [1908] P. 46, for English law, and Milliken *v.* Pratt (1878) 125 Mass. 374, for American law.

(*e*) Ogden *v.* Ogden, [1908] P. 46,

far as they support the older principle, that the *lex loci celebrationis* has the final word as regards capacity, are opposed to the recent legislation requiring proof of the foreign husband's competency to marry according to the law to which he is subject (*f*).

III. **Incapacities Imposed by Personal Law.—Impedimenta Dirimentia and Impedientia.**—The distinction (already referred to) between the two classes of impediments to marriage, the *impedimenta dirimentia* and the *impedimenta impedientia*, recognised in the canon law and adopted in the different municipal systems of law, is of importance for this purpose. The former make the marriage contract either in terms or impliedly null and void if they are disregarded; the latter merely have the effect that the person performing the ceremony with knowledge of their existence commits a breach of duty, and a penalty is imposed on the parties or the person performing the ceremony. Some of these impediments have been generally admitted to affect the capacities of the parties, such as the marriage being within certain prohibited degrees of relationship or affinity, error, or want of age of parties; or resting on religious considerations, *e.g.*, divorced persons remarrying, or racial feelings, *e.g.*, marriages between black and white persons in the United States; or again *privilegia* or particular prohibitions affecting persons, *e.g.*, descendants of King George II. marrying without the consent of the sovereign; or (perhaps) formerly persons attainted (*g*); and all these are acknowledged as *impedimenta dirimentia* in the country to which the persons belong. Other prohibitions have been treated by some laws as belonging to the former class and others as belonging to the latter, for example, want of consent of parents or guardians for minors or majors marrying, and there are others admitted to be impeditive only. In the present state of English law on the subject, both these last fall more appropriately under the head of formalities of the contract. For the present purpose, *i.e.*, capacity of the parties to contract marriage, the right view of *impedimenta dirimentia* imposed by the personal law of the parties when they come to be considered by the Courts of another country, whether it is the *locus celebrationis* or

C. A.; Chetti *v.* Chetti, [1909] P. 67; and see Dicey, Law Quarterly Review, 1909, p. 202; and Baty, L. M. & R., 1907, p. 337; 1908, p. 218; 1909, p. 207.

(*f*) Marriage with Foreigners Act, 1906, and the Colonial Marriages (Deceased Wife's Sister) Act, 1906.

(*g*) See p. 255, *post*.

not, seems to be that they should be recognised as having the same character as they would have in the country of the parties. Thus, our Courts recognise and apply the law of a foreign country as regards prohibited degrees of marriage, or the age for marriage, in deciding the validity of a marriage contracted by parties belonging to that country. But, as indicated above, it is a question whether our Courts will give effect to a religious incapacity imposed on a foreigner marrying an English person in England which is not recognised by English law (*h*).

The subdivision of *impedimenta dirimentia* into those *privati juris* and those *publici juris* is of importance in countries where prohibited marriages are not deemed void unless a decree of nullity is obtained in the proper Court. In the case of private impediments the nullity is not declared except on the application of an interested party; in the case of public impediments proceedings for nullity have to be taken by a public authority. It has already been pointed out that the present English law differs from that of the Continental States in regarding all prohibited marriages as void *per se* and not merely as voidable by the decree of a competent Court, as the latter do, except where no marriage has taken place.

Religious Incapacities not Generally Recognised.—Where, however, the personal law imposes on its subjects an *impedimentum dirimens* based on motives of a religious character, *e.g.*, prohibiting persons under vows of chastity or celibacy from marrying, other countries do not generally recognise them. Thus, in Austria a Christian cannot marry a non-Christian; and an ecclesiastic in major orders in the Catholic or Greek Church cannot marry a religious person under vows of celibacy or chastity. In Russia, Greece, and Roumania an orthodox priest of the Eastern Church cannot marry after ordination, nor can a bishop (*i*). But in England, France, and Belgium, the United States, and perhaps Italy, such marriages would be regarded as valid (*k*). Similarly, an incapacity imposed by the personal law of the parties on divorced persons re-marrying

(*h*) Chetti *v.* Chetti, [1909] P. 67.

(*i*) Weiss, iii., 389; Austria, 1879, J. 500; 1903, J. 450; 1907, J. 460, 797; 1908, J. 554; Russia, 1902, J. 243, 244.

(*k*) France, 1880, J. 124; 1884, J. 628; 1893, J. 655; Sirey, 1888, i., 193; 1889, J. 638; 1892, J. 122. Formerly it was held that a priest could not marry, 1887, J. 66, 67; in Italy there are opposing views, but the Code does not forbid it, 1880, J. 120; Wharton, C. L., s. 154.

would not be recognised by the Courts of other countries where divorce is allowed, *e.g.*, in England and in most of the American States such a marriage would be good, irrespective of the domicil of the parties, except where this is done to evade the laws of their own country, when it will be invalid, certainly in New York and North Carolina (*a*). Similarly, incapacities based on racial considerations or grounds of policy which are contrary to rules of public policy in another State, such as the prohibitions in certain of the United States against black and white marriages, will not prevent such marriages taking place in other countries or being recognised there (*b*). The Hague Marriage Law Convention thus permits a marriage to take place in a country not that of the parties who are prohibited by their personal law from marrying, if such prohibitions are based on motives of a religious character, although the Courts of other signatory States may refuse to recognise it (*c*).

Dispensations.—In many States certain *impedimenta dirimentia* may be removed by dispensation from ecclesiastical or public authorities, and if this has been obtained the parties are as capable of marrying abroad as they would be at home. It has been discussed whether the authorities of the *locus celebrationis* can remove such difficulties by granting dispensation themselves, and the better view seems to be that they can only do so in the cases allowed by the personal law of the parties (*d*). In certain States, *e.g.*, Russia, the dispensation granted by a foreign Government to foreigners to marry in Russia will not be recognised by the authorities (*e*). Examples of such dispensable impediments are marriages within prohibited degrees, such as those of uncle and niece, aunt and nephew, in certain systems (*f*).

Consent of State Authority.—In some States the consent of the Government is required for the marriage of its citizens abroad (*g*). In Germany and Austria military officers must obtain the leave of their superiors before marrying, and the absence of such consent is

(*a*) Wharton, s. 135; Bishop, s. 869.

(*b*) France, 1885, J. 296; Dicey, 634; Wharton, s. 159; Bishop, s. 865.

(*c*) Arts. 1, 3, 4.

(*d*) Bar, 357; France, 1877, J. 573; Weiss, iii., 427; Laurent, D. C. I., iv., 327.

(*e*) 1902, J. 244.

(*f*) France, Code Civil, arts. 162—164; Weiss, iii., 426; so Germany, Code Civil, arts. 1303, 1312, 1313; Denmark, Martens, Rec. Gen. de Traités, 1898, 502; Belgium, *ibid.*, 465; British Parl. Pap. Misc., No. 2, 1894 (144, 145), 53, 28.

(*g*) *E.g.*, Lichtenstein, 1892, J. 1099.

an *impedimentum impediens ;* and a similar rule prevails in France, the penalty being retirement. This consent may be required for any subject generally or for particular classes or individuals only, *e.g.*, members of a reigning Royal House or nobles. It is not clear whether such marriages should be held void in any other country than that to which the parties belong, but it is probable that only a condition of consent which is of universal application will be given this effect (*h*).

Privilegia.—British Royal Marriage Act.—Burge cited as the most prominent instance of a *privilegium* or impediment affecting particular individuals in our law the Royal Marriage Act of 1771, which enacts that "no descendant of King George II., male or female (other than the issue of princesses who have married or may hereafter marry into foreign families), shall be capable of contracting matrimony without the previous consent of his Majesty, his heirs or successors, signified under the Great Seal and declared in Council, and that every marriage or matrimonial contract of any such descendant without such consent first had and obtained shall be null and void to all intents and purposes whatsoever" (*i*). This Act does not in express terms restrain nor can it from the nature of its provisions be construed to restrain its operation to a matrimonial contract made in England only. The conditions which it enjoins admit of a performance in whatever place the marriage is celebrated (*k*). The Courts of England must necessarily be bound by this statute, and could not recognise a marriage contracted in contravention of its provisions. But if this Act be considered as affecting those who are the objects of legislation by the British Parliament and without regard to the relation in which the descendants of George II. formerly stood to the kingdom of Hanover (until that kingdom ceased to exist in 1866), foreign tribunals would not, consistently

(*h*) France, 1882, J. 539; but such marriage will be treated as putative if *bonâ fide* for spouses and issue. Fiore thinks that in Italy a condition of consent, even though applicable only to individuals, would be recognised by the Courts as affecting capacity of parties: 1887, J. 54. In the United States this impediment would not, it seems, be recognised, Wharton, C. L., 1905, pp. 304, 357, 358; although this author admits (p. 364) that there is a dearth of adjudicated cases directly upon the point and that no exceptions have as yet appeared varying the rule that a marriage invalid where celebrated for want of capacity is invalid everywhere.

(*i*) 12 Geo. III. c. 11, s. 1; Burge, 1st ed., i., 198.

(*k*) Sussex Peerage Case (1844), 11 Cl. & F. 85.

with the principles on which the *comitas gentium* is adopted, treat it as valid (*l*).

British Act of Attainder.—Another alleged instance of a special incapacity imposed by English law on an individual is an Act of attainder, which caused corruption of blood and an incapacity to take or transmit an inheritance, but not an incapacity to contract. It seems that a person attainted is not incapable of contracting a valid marriage within British dominions, and *à fortiori* not incapable of contracting such a marriage abroad (*m*), and such a marriage in the former case is only voidable, not void (*n*).

Marriage Legalised by Special Act of Parliament.—Another instance of the same principle is afforded by the validation of a marriage by Act of Parliament in case of any doubt as to its legality, which acts as a ratification of the marriage and makes it good *ab initio* (*o*).

IV. **Must both Parties be Capable by their respective Personal Laws?** —It has been suggested that both parties need not be capable by their personal laws of marrying each other, and that the requirements of the husband's law only need be satisfied (*p*), but on principle this seems incorrect. The Hague Convention declares for this view (*q*), and in France it has been so determined by the Courts (*r*). In Belgium a recent law requires that as regards capacity for marriage *quâ* age the husband must be qualified by Belgian law and the wife by the law of her country (*s*). In Germany the new Code requires that each party should have capacity by his or her respective personal laws; and the wife who has been a German before her marriage or become a German after her foreign husband has been declared dead, cannot re-marry except so far as the German

(*l*) Fiore, however, thinks that the Italian Courts would recognise this impediment as affecting the capacity of the particular class of persons, 1887, J. 54; and see Bar, s. 168, n., to the same effect, and *ante*, p. 251. Weiss expresses a contrary opinion as regards its effect in France: iii., 421.

(*m*) Kynnaird *v.* Leslie (1866), L. R. 1 C. P. 389; Erle, C.J., and Willes, J.

(*n*) *Ibid.*, per Willes, J., p. 400, who distinguishes them from French provisions as to marriages of persons civilly dead and German morganatic marriages: Foote, 110.

(*o*) Dicey, 635; *e.g.*, 1888 (51 & 52 Vict. c. 28).

(*p*) Dicey, 634, citing Sottomayor *v.* De Barros (1877), 3 P. D. 1, 6, 7 (but only with reference to the case of the husband being a British subject); Bar, 352, 355.

(*q*) Art. 1.

(*r*) 1880, J. 300, Clunet; Sirey, 1845, ii., 218; *contra*, Weiss, iii., 428.

(*s*) Law of May 20th, 1882.

law authorises her to do so (*t*). The Hungarian marriage law makes a distinction between impediments based upon the age and contractual capacity on the one hand and all other impediments on the other; the requirements of age and contractual capacity are governed by the respective personal laws of each party, and all other requirements by the personal laws of both of them; except when a Hungarian bridegroom marries a foreign bride, in which case the Hungarian law alone governs, but otherwise the age and contractual capacity of the foreign bride are determined by her personal law (*u*). The English decisions seem to require capacity on the part of each spouse (*v*).

V. **Personal Law may prevail over Lex Loci Celebrationis.**—For certain prohibitions, the fact that they are constituted by the *lex loci celebrationis* is not enough to prevent a marriage contracted in spite of them being held good in other countries, if it is good by the personal law of the parties. The Hague Convention specifies the following prohibitions by the personal law as entitled to recognition: (a) The marriage being within certain degrees of relationship or affinity (*x*); (b) if the parties have been guilty of adultery on account of which the marriage of one of them has been

(*t*) German Civil Code, Introd. Law, art. 13; Bar, 352.

(*u*) Marriage law of 1894, arts. 108—109.

(*v*) Mette *v.* Mette (1859), 1 S. & T. 416; 28 L. J. P. & M. 117; In re Alison's Trusts (1874), 31 L. T. 638, wife's incapacity under *lex loci* which referred the question to the religious denomination of the parties and thus under national religious law; but see Chetti *v.* Chetti, [1909] P. 67.

(*x*) English law does not now recognise illegitimate affinity (28 Hen. VIII. c. 7; Wing *v.* Taylor (1861), 2 S. & T. 278; 30 L. J. P. 258), but it applies the prohibited degrees to illegitimate blood relations of a spouse, *e.g.*, a man may marry the daughter of a woman with whom he has cohabited, but cannot marry his wife's illegitimate sister or the latter's daughter (R. *v.* Brighton (1861), 1 B. & S. 447; 30 L. J. M. C. 197). For the English law as to marriage of deceased's wife's sister, see Merignhac, 1902, J. 5; and *Lex Fori*, below. In German law illegitimate affinity is a bar (Civil Code, s. 1310). The same rule applies in France: Civil Code, ss. 161, 162. So for relations by adoption: German C. C., s. 1311. In the United States, the wording of the statute in sixteen States and Territories would seem to forbid both cases of illegitimate affinity: Stimson, Amer. Stat. Law, s. 6111. See as to prohibited degrees, Commonwealth *v.* Lane (1873) (Mass.), 15 Amer. Rep. 509; Fraser, H. & W. 130, 131. Marriage within prohibited degrees (see *post*) in Scotland is a criminal offence punishable with penal servitude, *e.g.*, marriage of uncle and niece: L. A. *v.* Stewart and Wallace (1845), 2 Broun Justiciary Cas. 544.

dissolved (*y*); (c) if the parties have together attempted the life of the spouse of one of them (*z*). This principle seems to rest on the local character of these prohibitions. Similarly, by the same treaty, a signatory State may decline to allow a marriage to be celebrated within its jurisdiction which is contrary to its laws by reason of a religious obstacle or a previous marriage, but other signatory States cannot treat it as invalid. Thus a State is not bound to allow divorced persons entitled by their personal law to marry to do so within its jurisdiction if its law does not recognise divorce, though a later clause of the Convention provides that it must in such a case allow the marriage to take place before a diplomatic or consular agent of the State to which the parties belong (*b*).

VI. **Impediments by Lex Fori.—Polygamy.**—Where the validity of a marriage celebrated in one country is brought before the Courts of another it is necessary to consider the effect of the law of the tribunal as well as the personal law and law of the place of contract; and the Court is entitled to apply the *impedimenta dirimentia* of its own law to the question whether a valid marriage has been created. It can refuse to give effect to the law under which the marriage was contracted if that sanctions a violation of the precepts of the Christian religion or of public morals or of its own policy. A marriage founded on polygamy or which is incestuous (*c*) will not be recognised in any Christian country although it may be warranted by the municipal law of the country in which it was contracted or by the personal law of the parties (*d*). English Courts have

(*y*) So provided in the German Civil Code, ss. 1312, 1322, though dispensable (1902, J. 920; and see Code Civil, s. 298); Austria, 1898, J. 179, 942 (Catholics); Portugal, Martens, Recueil, 1898, 561; Brazil, *ibid.*, 487; Roman-Dutch law in Cape Colony (Scott *v.* A.-G. (1886), 11 P. D. 128, 130); law of Tennessee, 1889, J. 903. A seducer cannot marry by Swedish law: Martens, 1898, 611. So the law of Scotland forbids it, and it is doubtful whether the Scotch Court would recognise a foreign marriage of such parties if valid by their personal law. It certainly would not as regards land in Scotland: Beattie *v.* Beattie (1866), 5 Macph. 181; Lord Brougham in Fenton *v.* Livingstone (1859), 3 Macq. 497, at p. 534.

(*z*) So the law of Argentina (Martens, 1898, 432) and Brazil (*ibid.*, 487); and see British Parl. Paper, Misc., No. 2, 1894, 2, 42, 103, 142, as to foreign laws.

(*b*) Arts. 3, 6. See paper by De Leval, Int. Law Ass., Antwerp Report, 400. Austria does not recognise divorce for Catholics, 1898, J. 942, 179; and see above; also see Meili, International Civil and Commercial Law, by Kuhn, 1905, pp. 226, 227.

(*c*) See p. 259.

(*d*) Burge, 1st ed., i., 188, citing Huber, de Conflictu Legum, lib. i., tit. 3, n. 8.

thus declined to exercise jurisdiction over marriages which do not fulfil the essential condition of being "an union for life of one man and one woman to the exclusion of all others," but will take cognisance of those having this characteristic whether Christian or not. They have accordingly refused to dissolve a polygamous marriage, such as that of Mormons, or an African native marriage, but have recognised a marriage according to Japanese rites (*e*). Foreign Courts take the same view, though contracting a polygamous marriage is recognised as a lawful act and not bigamous where the parties' personal law allows it. A Frenchwoman marrying a Turk naturalized in France, who afterwards resumes Turkish nationality in Turkey and marries several wives there, is regarded as his wife by a French Court (*f*); and an English subject domiciled in Turkey has been held liable by our Courts for breach of promise to marry when he was already married (*g*). Polygamy is recognised in Algeria for native Algerians by French law (*h*). In Russia it has been held that the personal law of the man determines its validity (*i*). In China and Formosa polygamy is forbidden, but concubinage is allowed (*k*). In Egypt a Mussulman may marry a Christian wife and place her in his harem (*l*). In the United States polygamy has been forbidden by Congress, though allowed by the

(*e*) Hyde *v.* Hyde and Woodmansee (1866), L. R. 1 P. & D. 130, 133; In re Bethell (1888), 38 Ch. D. 220; Brinkley *v.* A.-G. (1890), 15 P. D. 76. See Warrender *v.* Warrender (1835), 2 Cl. & F. 488, 531; Ardaseer Cursetjee *v.* Perozeboye (1856), 10 Moo. P. C. C. 375, 418; In re Ullee, the Nawab Nazim of Bengal's Infants (1885), 54 L. T. 286; Armitage *v.* Armitage (1866), L. R. 3 Eq. 343; 2 Kent, Comm. 81. In Italy a wife escaping from the harem of an ex-Egyptian prince was held capable of marrying an Italian: 1880, J. 338, n. In the United States, the State Courts have upheld marriages of American Indians when contracted while living in a separate community, notwithstanding that such marriages are dissoluble at the will of one or both of the parties: Earl *v.* Godley (1890), 42 Minn. 361; 44 N. W. 254. A recent decision throws doubt upon whether such a union may be deemed a marriage in the international sense, but the precise ground for denying it recognition was that the tribe had lost territorial jurisdiction at the time of the marriage: Kalyton *v.* Kalyton (1904), 74 Pac. 491 (Ore.).

(*f*) 1888, J. 243.

(*g*) Hattena *v.* Joseph, 1893, J. 915.

(*h*) 1892, J. 227. To constitute bigamy in English law the first marriage must be valid, though it may be made abroad: In re Harris Winberg (1899), J. 165; Earl Russell's Case [1901], A. C. 446; 1901, J. 190.

(*i*) 1902, J. 260.

(*k*) 1903, J. 117.

(*l*) 1902, J. 650.

legislature of a State and by the tenets of a religious community (*m*). In the case of a spouse declared dead and reappearing after the other has re-married in Roman Catholic countries the second marriage is treated as a nullity, *e.g.*, in France or Austria; while in Protestant countries judicial declaration of the first husband's death has the effect of dissolving the marriage, *e.g.*, in Germany (*n*).

Prohibited Degrees.—Ascendants and Descendants.—Brother and Sister.—*A fortiori* the *lex fori* may apply its own theory of prohibited degrees of marriage to a foreign marriage contracted between parties related to each other within those degrees which all Codes concur in treating as prohibited, as marriages between relations by blood in the ascending or descending line and between brother and sister by blood, because marriages between such relations are universally regarded as incestuous and void (*o*). The term "incestuous" has different meanings in different countries.

Collaterals.—But there is a great difficulty in determining when the prohibition of marriages between persons related in the collateral line in any degree beyond that of brother and sister can be sustained on the ground of their repugnancy to the law of nature and therefore that the prohibition is of universal obligation. "De conjugiis eorum qui sanguine aut affinitate junguntur satis gravis est quæstio et non raro magnis motibus agitata. Nam causas certas et naturales cur talia conjugia, ita ut legibus aut moribus vetantur, illicita sint, assignare, qui voluerit experiendo discet quam id sit difficile, immo præstari non possit" (*p*).

Marriage with Deceased Wife's Sister.—On the other hand, other marriages within the prohibited degrees are variously regarded by different systems of law, by some as incestuous, by others as merely prohibited for their citizens. Marriage with a deceased wife's sister was formerly forbidden and void by the law of England (*q*)

(*m*) In 1862, Wharton, ss. 130, 131; Reynolds *v.* U.S., 98 U.S. 145.

(*n*) Wharton, s. 133; Bishop, s. 283; in New York after five years' absence the marriage is voidable from then and the other spouse can marry.

(*o*) Burge, 1st ed., i., 188, citing Grotius, De Jure Belli & Pacis, lib. ii., c. 5, ss. 12, 13, 14; 2 Kent, Comm. 83, 84; Wightman *v.* Wightman, 4 Johns. Ch. 343; Harrison *v.* Burwell (1671), 2 Ventr. 9; Vaughan's Rep. 206; Butler *v.* Gastrill (1722), Gilbert's Eq. R. 156, Delegates; Heineccius, Elem. Jur. Nat. et Gent., lib. 2, c. 2, ss. 40, 41; Blackmore and Thorp *v.* Brider (1816), 1 Hagg. Cons. 393, n.; Burgess *v.* Burgess (1804), *ibid.*, 384; Bishop, s. 861.

(*p*) Burge, 1st ed., i., 188, citing Grotius, De Jure Belli & Pacis, lib. 2, c. 5, s. 12.

(*q*) Burge, 1st ed., i., 189, citing

and regarded as incestuous by the law of Scotland (*r*), but is now legalised by 7 Edw. VII. c. 47. It is also legal by the laws of most of the United States, Canada and other British Colonies and Protectorates (see above), Austria-Hungary, Germany, Brazil, Mexico, Portugal, Sweden, and Switzerland, and by dispensation in Belgium, Denmark, France, Holland, and Luxemburg, but illegal by the law of Argentina, Greece, Roumania, Russia, and Servia (*s*). It was held in England (before the recent Act) that such a marriage celebrated abroad between persons whose personal law allows of it, although one of them is an Englishwoman by origin, is valid in our Courts (*t*). But only the domicil and not the religious faith of the parties can be looked to for this purpose, and Jews domiciled in England cannot marry abroad within the degrees prohibited by English law although allowed by the Jewish ritual (*u*). In France it has been held that a marriage between a brother and sister-in-law of French nationality in England is null in France unless preceded by dispensation from the French authorities (*v*). In Massachusetts the Courts gave a similar ruling, laying it down that such a marriage not being naturally unlawful but prohibited by the law of one State and not of another, if celebrated in a State where it was lawful, should be held valid in any other State (*x*). In Kentucky it has been held that a marriage of two Kentuckians so related in Tennessee, where they had gone to evade their own law, as it was not prohibited there, is good in Kentucky (*y*).

Uncle and Niece.—This marriage is forbidden and void in England, and in many States and Territories of the United States, and it

Harris *v.* Hicks, 4 & 5 Will. & Mar., 2 Salk. 548; Hill *v.* Good (1673), Vaughan, 302; Ray *v.* Sherwood (1836), 1 Curt. 173; Butler *v.* Gastrill (1722), Gilbert's Eq. R. 156; and see 2 Kent, Comm. 85, n.; Mette *v.* Mette (1859), 1 S. & T. 416; 28 L. J. P. & M. 117; Brook *v.* Brook (1861), 9 H. L. C. 193, 212, 213.

(*r*) Fenton *v.* Livingstone (1859), 3 Macq. 497.

(*s*) 1902, J. 5; British Parl. Paper, 1894; and Martens, Recueil de Traités, 1898, xxiii., 430 *et seq.*, *passim*.

(*t*) Bozzelli's Settlement, [1902] 1 Ch. 751; see Dicey, 615, 626; Mette *v.* Mette (1859), 1 S. & T. 416; 28 L. J. P. & M. 117; Brook *v.* Brook (1861), 9 H. L. C. 193, 212, 213.

(*u*) De Wilton *v.* Montefiore, [1900] 2 Ch. 481.

(*v*) 1875, J. 21.

(*x*) Greenwood *v.* Curtis, 6 Mass. R. 378, 379; Medway *v.* Needham, 16 Mass. 157, 161; Wightman *v.* Wightman, 4 John. Ch. Rep. 343; Stevenson *v.* Gray, 17 B. Monr. Ky. 193, 210.

(*y*) Stevenson *v.* Gray, *ubi cit. sup.*

has been said to be incestuous (*z*), but it is allowed by the laws of some of the United States, Argentina, Germany, Brazil (though community of marital property is not created in such a case), and by dispensation in Austria, Belgium, Denmark, France, Italy, Luxemburg, Netherlands, and Portugal, though forbidden by the laws of Greece, Hungary, Roumania, Spain, Servia, Sweden, and Switzerland (*a*). In Switzerland, as with us, a great-uncle or great-aunt can marry niece or nephew respectively, though they cannot in France (*b*). It therefore seems to fall within the category of prohibitions founded on municipal laws and not therefore of universal obligation (*c*); and in the case of foreigners, uncle and niece, married by dispensation abroad validly according to their personal law, it seems that such a marriage would be recognised as valid in England, except for succession to real property (*d*).

In the United States, at common law, such a marriage is voidable and not void as with us, but in many States, *e.g.*, Maryland, it is void by statute; but it has been held that restrictions beyond the first degree of lateral consanguinity should not be recognised, and that although such a marriage between two foreigners abroad, which is incestuous by their law, is not valid here, still such a marriage between them in the United States under those circumstances would be valid (*e*); and in Kentucky it has been held that the marriage of two Italians in Switzerland, although by Italian law such marriage was illegal, and no evidence was given of the Swiss law on this point, was valid in Kentucky (*f*).

Exterritorial Recognition of Prohibited Degrees.—Burge's View.—In considering prohibitions which are founded on municipal laws, and are not therefore of universal obligation, the question arises, how far a marriage contracted within degrees not prohibited by the *lex loci contractus*, will be recognised in another country, where persons within those degrees are prohibited from marrying. In one of the American Courts it was decided that such a marriage

(*z*) Burgess *v.* Burgess (1804), 1 Hagg. Cons. 384; Woods *v.* Woods (1840), 2 Curt. 516; Stimson, Amer. Stat. Law, s. 6111.

(*a*) Martens, Recueil, 1898, xxiii., 430 *et seq.*, *passim*.

(*b*) 1876, J. 514, 418; Swiss Federal Law, 1878, art. 28; Civil Code, art. 100.

(*c*) Dicey, 631.

(*d*) Birtwhistle *v.* Vardill (1840), 6 Bing. N. C. 385; though, not perhaps in Scotland for any purpose: Fenton *v.* Livingstone, *ubi cit. sup.*

(*e*) Wharton, ss. 136, 137.

(*f*) In 1868; Wharton, s. 140.

ought to be recognised. On that occasion the following opinion was expressed:

"If a foreign State allows of marriages incestuous by the laws of nature as between parent and child, such marriage would not be allowed to have any validity here. But marriages not naturally unlawful, but prohibited by the law of one State and not of another, if celebrated where they are not prohibited, would be holden valid in a State where they are not allowed. As in this State, a marriage between a man and his deceased wife's sister is lawful, but it is not so in some States; such a marriage celebrated here would be held valid in any other State, and the parties entitled to the benefits of the matrimonial contract" (*g*).

The doctrine thus stated by the Court of Massachusetts, if it be confined to cases in which the party had acquired a *bonâ fide* domicil in the country which sanctions a marriage prohibited by the law of his former domicil, may be readily admitted. It ought not, however, to be extended to cases in which the party retains his domicil in the country where the prohibitory law prevails, but quits it and resorts to another country, for the single purpose of evading that law, and of doing that which the law of the latter country permits, or rather does not prohibit. The opinion of Huber is very decided against such an extension of this doctrine. "Brabantus uxore ductâ dispensatione Pontificis, in gradu prohibito, si hùc migret, tolerabitur; at tamen si Frisius cum patris filiâ se conferat in Brabantiam ibique nuptias celebret, hùc reversus non videtur tolerandus; quia sic jus nostrum pessimis exemplis eluderetur" (*h*).

In Muller's "Promptuarium" a similar opinion is to be found: "Si in loco ubi sponsus domicilium habet, matrimonium in eo gradu, quo sponsus sponsæ junctus, prohibitum, in domicilio sponsæ verò permissum est, et sponsus ut legibus domicilii sui se subducat, in domicilio sponsæ nuptias contrahit, sponsus à principe suo punitur, et matrimonium irritum declaratur. Sponsa puniri nequit, quia tempore initarum nuptiarum istis legibus nondum obstricta erat, nisi se autem iisdem subjecerit" (*i*).

The law which prohibits persons related to each other in a certain

(*g*) Burge, 1st ed., i., 189, citing Greenwood *v.* Curtis, 6 Mass. R. 378, 379; Medway *v.* Needham, 16 Mass. R. 157, 161; Wightman *v.* Wightman, 4 John. Ch. Rep. 343

(*h*) Huber, de Conf. Leg., lib. 1, tit. 3, n. 8.

(*i*) Muller, Prompt. tit. Matrimonium, n. 81, p. 565.

degree from intermarrying, and declares their intermarriage to be null, imposes on them a personal incapacity *quoad* that act; and that incapacity must continue to affect them so long as they retain their domicil in the country in which that law prevails. The resort to another country where there was no such prohibitory law, for the mere purpose of evading the law of their own country and with the intention of returning thither when their marriage had taken place, cannot be considered a change of their former domicil or the acquisition of a domicil in the country to which they had resorted. They must, therefore, be regarded as still subject to the personal incapacity imposed by the law of their real domicil.

This is the view now adopted by the English Courts (*j*).

VII. **Form of Marriage: Governed by Lex Loci Celebrationis.**—It has always been admitted as the general rule that the form of marriage is governed by the law of the country where it is celebrated (*k*); and a marriage is recognised as valid in most countries if it has satisfied the formalities of the local law, subject to the qualifications of this rule indicated below. The statements of the jurists cited by Burge, as supporting the *lex loci* as the governing law of the validity of a marriage generally, amply bear out this proposition; and it is now firmly established in the positive laws and even international agreements of the Continental States as well as in the jurisprudence of Great Britain and the United States. This rule has been applied even to marriages of Europeans in Oriental or Muhammadan countries (*l*). The converse proposition that a marriage

(*j*) See p. 244.

(*k*) Lord Stowell, Ruding *v.* Smith (1821), 2 Hagg. Cons. 371, at p. 378; Story, ss. 113—116; Sottomayor *v.* De Barros (1877), 3 P. D. 1; Simonin *v.* Mallac (1860), 2 S. & T. 67; 29 L. J. P. & M. 97; Lightbody *v.* West (1902), 87 L. T. 138. The principle *locus regit actum* is recognised in the law of France, 1881, J. 516; 1890, J. 914; 1902, J. 334; Code Civil, s. 170; Germany, 1903, J. 882; Civil Code, Intr. Law, art. 13. Italy, Prel. Disp., art. 9, and C. C., art. 100; Spain, C. C., arts. 53—55; 1902, J. 197; Hungary, Law of 1894, art. 113; Russia, 1902, J. 472; Switzerland, Federal Constitution, art. 54; Law of 1874, art. 25. The rules of the Institute seem to make the adoption of the *lex loci* compulsory (Heidelberg, 1887, Ann., ix. 126). The Courts of the *lex loci celebrationis* may refuse to acknowledge the formal validity of a marriage performed according to the personal law of the parties, *e.g.*, by mere consent, although followed by cohabitation: 1897, J. 1029; 1898, J. 366. They may require a particular form of marriage, *e.g.*, in Austria formerly marriages celebrated by Old Catholic priests were invalid, 1879, J. 504.

(*l*) 1890, J. 914; 1903, J. 94; 1889, J. 23—39.

invalid by the *lex loci* is invalid everywhere else is not, however, equally accepted (*m*); and the present tendency is to allow the parties' personal law to validate a marriage not valid in form by the local law in other countries (*n*). There are also certain definite exceptions to the operation of the *lex loci* necessitated by the considerations that certain States require distinctive religious or civil ceremonies for the marriage of their subjects everywhere, or that the local form of marriage is inapplicable to foreigners owing to their religious beliefs or different civilization; and a concession is made in favour of the parties being allowed to adopt the form of their own law. Where the personal law of the parties prescribes certain formalities to be observed, and these are neglected, the penalty imposed by it may be nullity of the marriage (*impedimentum dirimens*) if affecting the capacity of the parties to marry, or it may be merely punishment of the parties without invalidating the marriage (*prohibitivum*) (*o*).

But Forms Prescribed by Personal Law Essential.—Burge's View.—Every State retains the power of making a law requiring its own subjects to conform to it in whatever country they may reside. It may, therefore, by its marriage law, expressly enjoin that the marriage of its subjects shall be preceded or accompanied by certain ceremonies, which are capable of being performed in whatever country the marriage is celebrated, and it may declare, that unless these ceremonies are performed the marriage shall be void. "Quòd statuentes possint statuto ligare cives etiam extra territorium actum conficientes, apud me est certum: et passim sine controversiâ admittunt. Dd." (*p*).

The law of Holland, it has been seen, requires the publication of the banns in the domicil of the parties, and declares the marriage

(*m*) Lord Stowell, Ruding *v.* Smith, above, at p. 390; in Roumania a foreigner may marry according to the forms of his personal law, 1902, J. 916; in the United States (Mississippi) a marriage of Indian natives performed according to Indian tribal customs has been upheld, Boyer *v.* Dively, 58 Miss. 110; Greek law leaves foreigners to marry in Greece according to their own laws: 1896, J. 60.

(*n*) This is especially the case with religious marriages: see *post*. In Catterall *v.* Catterall (1847), 1 Robertson, 580, Dr. Lushington held that a marriage of English Presbyterians in an Australian colony by a Presbyterian minister was valid in England in spite of R. *v.* Millis (1844), 10 Cl. & F. 534, and of this being contrary to the law of the Colony.

(*o*) See above.

(*p*) Burge, 1st ed., i., 196, citing Menochius, de Præs. lib. 2, præs. 2, n. 5.

to be void if such publication has not taken place. J. Voet puts the case of an inhabitant of Holland contracting a marriage in Flanders or Brabant, with a female of either of those countries; all the ceremonies required by the laws of the two latter places have been observed, but there has been no previous publication of banns in the place of his domicil in Holland. This jurist admits that such a marriage would, at first sight, seem to be valid, on the principle that it is sufficient to have adopted the forms prescribed by the law of the place where the contract is made, although it may be at variance with the law of the domicil or the situs, and that this has been sanctioned by the decisions in the Courts of Holland (*a*). But he observes, "Sed eo non obstante magis est, ut matrimonia, eo modo extra Hollandiam, ab Hollando celebrata, infirma per judicem Hollandicum pronunciari debeant, propter edicti verba, quibus nuptiæ, per Hollandum sine denunciationibus publicis in domicilii loco interpositis contractæ, irritæ esse jussæ sunt. Nihil in contrarium faciente illo axiomate, quòd sufficiat in negotiis contrahendis adhiberi solemnia loci in quo actus geritur: cùm ista regula locum inveniat, si non in fraudem statuti quis aliò se contulerit ad actum celebrandum, aut statutum nominatim irritum declaraverit actum à suo subjecto peregrina solemnitate gestum" (*b*).

Modern Opinion. — The Hague Convention provides that a marriage celebrated according to the law of the country where it takes place is recognised everywhere as valid as regards form; but it saves the right of the State to which the parties belong, if its law requires a religious celebration of marriage, to refuse to recognise the validity of a marriage made by its subjects abroad without regard to this condition. Similarly, if the national law of the parties requires publications by the parties of their intended marriage and these are not made, this default may make the marriage null in the State to which the parties belong but will not

(*a*) Politic. Ordinat. Ord. Zelandiæ, anni 1583, arts. 6 *et seq.*; Placit. Holl., i., pp. 351 *et seq.*; Placit. Ord. General, February 5th, 1643, and April 8th, 1644; Placit. Holl. i., pp. 359 *et seq.*; et 31 Decembris, 1647; Placit. Holl., ii., p. 1223; et Echtreglement van de Staten Generaal, 18 Martii, 1656, arts. 1 *et seq.*, ii., p. 2429; Sande, Decis. Fris., lib. 2, tit. 1, defin. 1; Respons. Jurisc. Holl., part 3, i., Consil. 184; Abraham Wesel. ad Novel. Constitut. Ultaject., art. 14, n. 47 *et seq.*, cited by Burge, 1st ed., i., 197.

(*b*) Voet, lib. 23, tit. 2, n. 4; lib. 1, tit. de Statut. n. 14.

do so in any other signatory State (*c*). A marriage, however, which is invalid as regards form in the country where it has been celebrated, may nevertheless be recognised as valid in the other signatory States, if the form prescribed by the national law of each of the spouses has been observed (*d*).

Various Classes of Marriage Ceremony.—The *lex loci* may require a religious marriage. As already pointed out, there are three main classes of marriage ceremonies established in the legislations of the different States: (1) Compulsory civil ceremony; (2) compulsory religious ceremony; (3) mixed civil or religious ceremony. The present article of the Hague Treaty deals with classes (2) and (3), because in some States a religious ceremony is imperative on persons professing particular religious opinions, and there is not an option given to the parties, as in British dominions, to choose either a civil or religious ceremony.

A civil ceremony is compulsory in France, Germany, Belgium, Italy and Switzerland (*e*). In France, consequently, a religious ceremony of marriage is void, even though that be required by the personal law of the parties (*f*); and though in case of impossibility all the conditions of the French law need not be complied with (*g*), all its forms otherwise must be complied with (*h*). On the other hand, a religious ceremony is required for any marriage of Christian persons in Austria, Russia, Greece, and in Servia no civil ceremony is recognised for any persons. As regards subjects of these States marrying abroad, Russia requires an orthodox religious ceremony to be performed for marriage of orthodox Russians abroad, and also apparently a religious ceremony for Russian Catholics or Protestants marrying abroad, as would be necessary for a marriage in Russia, except in the case of Nonconformists (*i*). For marriages of Greeks abroad, however, episcopal sanction is not required as in Greece, but a religious ceremony is required (*k*).

(*c*) Art. 5; Meili, by Kuhn, 528.

(*d*) Art. 7. See 1907, J., 93.

(*e*) See *ante*; Italy, C. C., art. 93; 1903, J. 987.

(*f*) 1891, J. 223, 226.

(*g*) 1897, J. 348.

(*h*) 1890, J. 488; and see Weiss, iii., 486. Bar thinks local forms should be optional only, Gillespie, 359, differing from Savigny, s. 381; Guthrie, 323. Meili (Kuhn's translation, p. 222), concurs with Bar, and see p. 161, *post*.

(*i*) 1902, J. 254, 257; but cf. *ibid.*, 472, and see p. 62, *ante*.

(*k*) 1903, J. 910; 1896, J. 60; 1898, J. 212.

Publications.—It has been already seen that most of the modern Codes require publications of intended marriages to be made by giving full particulars of the parties and their domicils and those of their parents, and published in the place of such domicil, even in cases where the marriage is to take place abroad; and some countries require evidence from foreigners intending to marry in their jurisdiction that such publications have been made in their own country (*l*). It is now established by the French, Belgian, German, and Swedish jurisprudence that omission of such publications, if made in good faith, will not have the effect of nullifying the marriage, being an *impedimentum prohibitivum*, not *dirimens* (*a*), this not amounting *per se* to fraud or evasion of the domestic law, though it may be evidence with other matters of *clandestinitas* which will make the marriage void, and collaterals cannot plead it against the marriage (*a*). In France it has been held that such publications are not required to be made outside France by persons of French nationality not domiciled there, nor in France in the case of a Frenchman who has never resided in France (*b*). So in English law the parties are required to give similar notice in the publication of banns or declarations necessary before obtaining a licence from an ecclesiastical or civil officer, and only if these are false to the knowledge of both parties the marriage will be void (*c*). In Austria, if false names are used in the publication, which is otherwise good, the marriage is void (*d*); and omission of publication nullifies the marriage (*e*).

Registration.—Another formality required by the modern Codes for the validity of marriage celebrated by their subjects abroad is registration or inscription (*f*). It has the same character as the requisite of publication. Its omission will not *per se* constitute

(*l*) France and Belgium, Code Civil, ss. 63, 170; Germany, 1893, J. 257; Italy, C. C., 70, 71, 100; 1876, J. 238.

(*a*) 1891, J. 1214; 1890, J. 914; 1880, J. 478; 1882, J. 531; *contra*, 1886, J. 448; Weiss, iii. 413; and see 1900, J. 592, 350. So Sweden, 1875, J. 240, and so Holland, 1895, J. 655.

(*b*) 1895, J. 616; 1898, J. 138.

(*c*) Marriage Act, 1824 (4 Geo. IV. c. 76), s. 22; 1837 (7 Will. IV. & 1 Vict. c. 22), s. 33; Phillimore, Eccl. Law, i., 582—587, citing for the law previous to this Act, Sullivan *v.* Sullivan (1818), 2 Hagg. Cons. 239, 253, and subsequent to it, Wright *v.* Elwood (1837), 1 Curt. 662, 669.

(*d*) Austria, 1879, J. 502.

(*e*) Code Civil, art. 74.

(*f*) Code Civil, s. 171; Dutch C. C., art. 139; Italian C. C., art. 101.

clandestinitas or invalidate the marriage, though it may afford evidence of it in conjunction with other matters (*g*).

Actes Respectueux.—Another similar formality is the requirement found in some systems (French and Belgian) for children who have attained majority to demand by *acte respectueux et formel* the counsel of their parents, or that of their grandparents if their parents are dead or cannot signify their wishes, and failing their consent the marriage may be celebrated in a month's time, if no opposition is lodged against the marriage. If it is so lodged the Court decides (*h*). It is now settled law that the omission of an *acte respectueux* will not *per se* be a ground for annulling the marriage; and collaterals cannot take advantage of this or of non-publication to attack the marriage (*i*). But either may be evidence of fraud, and thus may be a ground of nullity (*k*). In Italian law no *actes respectueux* are required.

Want of Consent.—Another requisite specified by all the Codes for marriage in the case of persons under a certain age is the consent of parents or guardians, which on principle should be an *impedimentum dirimens* as affecting the capacity of the parties (*l*). This is the view taken by the Courts of every country but Great Britain and the United States (*m*). The English Courts have regarded the condition as one of form only, and foreigners marrying in England without the consent of parents required by their

(*g*) 1881, J. 515, 516; 1884, J. 67, 627; 1897, J. 643; 1898, J. 912; 1902, J. 613; Demangeat on Foelix, 306; Weiss, iii. 470 *et seq.* Registration may be made after death of spouses: 1900, J. 592.

(*h*) Code Civil, s. 151; French law of June 20th, 1896; Belgian law of April 30th, 1896, which does not include grandparents. Since the French law of June 21st, 1907, children of either sex between the ages of twenty-one and thirty inclusive, in default of the consent of father and mother, must serve them with a "notification" drawn up by a notary, and thirty days after service the marriage may be proceeded with (arts. 151 and 154, Code Civil, new). See Rev. Trim. 1907, p. 657.

(*i*) 1890, J. 914; 1900, J. 148; 1882, J. 531.

(*k*) 1893, J. 1170; 1891, J. 227, 1213—1215; 1890, J. 487; 1900, J. 148.

(*l*) Code Civil, s. 148; German C. C., ss. 1305, 1306; Italian C. C., art. 63 (adoptive children): Hungarian law of 1894, arts. 8, 9. The Swiss Code, art. 128, following art. 52 of the law of 1874, does not allow a marriage to be annulled on the ground of absence of parental consent after the spouse has attained full capacity or the wife has become pregnant.

(*m*) France, J. 1887, J. 476; 1882, J. 308; 1883, J. 388; 1888, J. 90; Austria, 1894, J. 1074; Germany, 1893, J. 604; and consent may be supplied by ratification by parents.

personal law are validly married here although their marriage is void in their own country; and in the United States this is true even where the intention was to avoid the personal law (*n*). Historically, this view is the more correct, as by the canon law the want of consent of parents or guardians did not invalidate the marriage of minors if they were of marriageable age, and it was only a private impediment which could be removed by subsequent cohabitation or consent. Want of it was indeed made an *impedimentum dirimens* by Lord Hardwicke's Act, 1753, though altered again by the present Act of 1824. In Ireland want of consent to the marriage of minors under twenty-one formerly made the marriage voidable within a year, but after that time it was good (*o*). In California consent of parents has been held essential for such marriages. In France the marriage of Jerome Buonaparte with an American lady in Baltimore was held invalid for clandestinity and want of consent, as contrary to French law, but it was upheld by the Pope on the ground that secrecy was only fatal to a marriage by the Council of Trent, and this had never been proclaimed in Baltimore (*p*). The *lex loci* cannot impose upon a foreigner wishing to marry in its jurisdiction a condition that he should obtain the consent of ascendants when by his personal law that consent is not necessary (*q*).

Where Parties are of Distinctive Faiths.—Many legislations allow members of particular sects, Jews, Quakers, Dissenters, and the like, to use their special forms of marriage; but the effect of such a marriage is of course subordinate to the general local law (*r*). This

(*n*) Simonin *v.* Mallac (1860), 2 S. & T. 67; 29 L. J. P. & M. 97; U.S. (Calif.) 1899, J. 908; Com. *v.* Graham (1893), 157 Mass. 73; Courtright *v.* Courtright, 26 Ohio L. J. 309; Ogden *v.* Ogden, [1908] P. 46, where it was pointed out that a marriage without consent under French law is voidable, not void, and valid unless proceedings are taken for that purpose.

(*o*) Lord Stowell, Dalrymple *v.* Dalrymple (1811), 2 Hagg. Cons. 54; Lindo *v.* Belisario (1795), 1 Hagg. Cons. 216; Horner *v.* Horner (1799), *Ibid.* 337; Wharton, ss. 154, 165—174; Steele *v.* Braddell (1838), Milward's Eccl. Rep. Ir. 1.

(*p*) Wharton, s. 152.

(*q*) Stoerk, 1883, J. 6. In France consent need not be given if not required: 1883, J. 397.

(*r*) Thus English law (see p. 51, above), in the case of Jews requires registration as well as Jewish form of marriage; and a Jewish betrothal is not equivalent to marriage in England, 1899, J. 1032; and 1902, J. 379, Szapira Case. For Russian law as to marriage of Jews, Mussulmans, and pagans in Russia, see 1879, J. 547. For American law see Meister *v.* Moore, 96 U.S. 76, and Com. *v.* Munson, 127 Mass. 459.

does not as a rule affect the question of the parties' capacity to marry each other; although in Austria different prohibited degrees of affinity are recognised for Jews than for other Austrian subjects (*s*), this is not so in English law (*t*). In the United States, the laws of Massachusetts and Rhode Island except Quakers from the operation of the statutes as to the formalities of marriage (*u*).

VIII. **Exterritorial Marriages, Diplomatic or Consular.**—Besides those cases in which a State requires from its subjects marrying abroad the fulfilment of certain conditions and formalities required by its law, there is another case in which a marriage not in accordance with the *lex loci* will be valid, certainly in the State to which the parties belong, and also according to many systems in the State where the marriage is performed, namely, a marriage between foreign subjects performed according to the forms of their law before diplomatic or consular officers of their country.

The Hague Convention adopts this principle as binding on its signatories; "a marriage celebrated before a diplomatic or consular officer conformably to its legislation should be recognised everywhere as valid in point of form if neither of the two contracting parties is a subject of the State where the marriage takes place and that State does not forbid it. It cannot forbid it in the case of a marriage which by reason of a previous marriage or an obstacle of a religious character would be contrary to its law." The proviso of art. 5, namely, the saving of the right of a State to refuse to recognise a marriage contracted by its subjects abroad in disregard of its own law prescribing a religious ceremony, is also applicable to diplomatic and consular marriages (*x*). This provides for the case of persons lawfully divorced according to their personal law who wish to marry again in a country where divorce is not recognised, and secures for them the right to be married before their diplomatic officer there.

In nearly all States, where both parties are, as in this case, of the same nationality, such a marriage is recognised as valid by the *lex loci* (*y*).

(*s*) Austria, C. C., art. 125.

(*t*) De Wilton *v.* Montefiore, [1900] 2 Ch. 481.

(*u*) See note (*r*), p. 269.

(*x*) Art. 6.

(*y*) Bailet *v.* Bailet (1901), L. M. & R., xxvi. 347. Holland only gives its consuls power to marry Dutch persons, 1889, J. 36, and so does Italy, for Italians, except in Turkey; see *post*.

The laws of Hungary (*z*) and Switzerland (*a*), however, do not allow to such marriages performed within their jurisdiction any validity, but insist on the local form being followed and the ceremony taking place before the ordinary civil officer. In Germany the same rule applies on principle (*b*), but it has been modified by the Hague Convention as regards the subjects of any countries members of that Convention, as well as regards the subjects of other countries by separate international treaties.

Where only one of the parties to such a marriage is a subject of the country of the diplomatic officer, and the other is a subject of the country where the marriage takes place such a marriage will not be recognised in the latter country (*c*); nor, it seems, according to the later view, should it be in the former country (*d*). *A fortiori*, where neither party is a subject of the diplomatic officer's country, no country recognises the marriage as valid, though it seems possible under the United States' legislation, which only requires parties to have capacity to marry as if resident in the District of Columbia. In England, however, it has been held that a marriage between an Englishman and a Frenchwoman in France before a British consular officer is valid, although it is void in France (*e*). In many countries, even those which do not admit the validity of such marriages when performed within their jurisdiction (*f*), consular officers abroad are given power to marry subjects and persons of another nationality (*g*). The British Foreign Marriage Act, 1892,

(*z*) The Hungarian law expressly admits as valid the diplomatic marriage of a Hungarian man with a foreign bride (arts. 29, 31).

(*a*) 1893, J. 664. For Switzerland, Feuille Fédérale (Bundesblatt), 1888, ii., 519; Roguin, Conflits des Lois Suisses, 63, 64; 1897, J. 741, 742.

(*b*) German C. C., Introd. Law, art. 13, except by special conventions.

(*c*) So held in France, 1874, J. 71—75; 1898, J. 911; 1899, J. 825; Belgium, 1881, J. 84; and it would be so in England: Dicey, 620. Brazil allows Holland the privilege of the Dutch consul being able to marry Dutch persons to persons of any nationality except Brazilians: Ann. de Lég. Etrang. 1880, 568.

(*d*) Pertreis *v.* Tondear (1790), 1 Hagg. Cons. 136; Lautour *v.* Teesdale (1816), 8 Taunt. 830; R. *v.* Brampton (1808), 10 East, 282; Lehr, 1885, J. 657; Fiore, 1886, J. 304.

(*e*) Hay *v.* Northcote, [1900] 2 Ch. 262; 1902, J. 151. See 1907, J. 335.

(*f*) Germany, 1889, J. 37; Bar, 1887, J. 700; Italy, 1889, J. 36. in Turkey only.

(*g*) In Turkey consuls of Belgium, Germany, and Italy can marry their subjects and foreigners; consuls of Holland can marry their subjects, 1889, J. 33; but consuls of Austria, Greece, and Russia cannot do so: *ibid.*, 38; and those of Switzerland can only do so by express authorisation of the Federal Council: Federal Law of 1874, art. 13; see Roguin, Conflits des Lois Suisses, p. 71.

does so, but the Orders in Council regulating its administration seem to restrict this power to the case where both parties are of British nationality (*h*). Austria, however, does not allow her consuls the power of celebrating marriage even for Austrian subjects (*i*). Recent laws of France and Belgium allow their consuls to celebrate marriages between their subjects or a subject and a foreign wife, but not if the husband is not a subject but the wife is so only, but restrict its application to cases where the parties would not be able to marry otherwise (*k*). It is doubtful if by analogy this Belgian law would allow diplomatic marriage in Belgium before the consul of the wife's country only (*l*).

France allows a consular marriage in France to which a French person is a party to have the effect of a putative marriage (*m*). In Belgium there is a special law regulating marriages of Belgians in foreign countries, *i.e.*, diplomatic or consular marriages. In the United States it seems that such marriages by its consular agents will only be recognised at home as valid if satisfying the local law (*n*). But the effect of this rule has been varied in a few States by statutes providing that marriages solemnised by domiciled subjects abroad before American diplomatic agents will be regarded as valid (*o*). A committee of the American Bar Association on Uniform State Legislation has elaborated a draft statute providing for the recognition of consular marriages where one of the parties is a citizen of any State or Territory (*p*).

IX. **Marriage where Local Form cannot be used.**—English law also recognises the validity of marriages abroad celebrated according to English forms where the local form is inapplicable, *e.g.*, in the lines of a British army, in European settlements and factories in Eastern countries (*q*) ; and similarly in the United States Indians have been allowed to contract a valid marriage, following the forms prescribed by tribal customs (*r*). But the more general opinion is in favour of the local forms being followed ; in France the validity of a religious marriage of a French subject performed in the Levant

(*h*) *Ante*, pp. 185, 186.

(*i*) 1889, J. 31.

(*k*) France, 1902, J. 1113 ; 1908, J., 626 ; Belgium, 1885, J. 46, 51.

(*l*) 1892, J. 423.

(*m*) 1893, J. 880 ; 1900, J. 969 ; though not always : 1898, J. 911.

(*n*) 1886, J. 306, Fiore ; see Wharton, ss. 179, 180.

(*o*) Mass. Gen. Stat. c. 106, s. 23.

(*p*) 4 Columbia Law Rev., 1904, pp. 243, 246.

(*q*) Ruding *v.* Smith (1821), 2 Hagg. Cons. 371.

(*r*) Boyer *v.* Dively, 58 Mo. 510.

and recognised by the local law has been upheld (*s*); and as far back as 1809 the French soldiers of Napoleon's expeditionary force to Egypt were held to have contracted valid marriages there according to the local forms (*t*). In Turkey foreigners can marry validly according to the forms of Turkish law; but Christians in Turkey must marry before their priests (*u*). Non-Mussulman Turkish subjects must, it seems, marry abroad according to religious forms (*v*); while if Mussulmans, they can marry abroad according to the local forms or at their embassy; their consuls have not such power (*x*).

Conclusions.—The following propositions have been laid down with regard to the questions dealt with in this chapter (*y*):—

(1) The form of marriage is regulated by the *lex loci actus* or *celebrationis*, except in the case mentioned in (2), though some countries require a religious ceremony in all cases.

(2) When there is no form according to the *lex loci* the parties may adopt their personal law.

(3) The essentials of marriage should be regulated by the personal law and by the *lex loci*, both should be complied with.

(4) The essentials are always three: freedom from previous marriage, freedom from prohibited degrees of relationship and sufficient age. Many countries add a fourth, consent of parent or guardian.

(5) When the personal laws of the two parties differ as to any of the four essentials, an incapacity or prohibition created by one of the personal laws should make the marriage null.

(6) Special prohibitions arising from rank, colour, solemn vow, or punitive provisions, are not regarded as personal laws operating *extra territorium*.

(7) Dispensation removes a prohibition by nearness of degree of relationship. Whether dispensability should do so is an undecided question.

(8) Form includes not only the act or ceremony of marriage but previous publication and notices to relatives where necessary.

(9) The same law which regulates the form should also determine what cures defect of form.

(*s*) Clunet, 1890, J. 914; and see 1893, J. 412.

(*t*) Weiss, iii., 456.

(*u*) 1903, J. 94.

(*v*) 1903, J. 93.

(*x*) 1903, J. 93; Lloyd *v.* Petitjean (1839), 2 Curt. 251.

(*y*) So stated per Mr. Justice Phillimore, Paper on Marriage Law, Int. Law Ass., Glasgow Report, 1901, p. 238.

CHAPTER VI.

PERSONAL CAPACITIES OF HUSBAND AND WIFE.

Introductory.

Personal Capacities Incident to Status of Husband and Wife.—In the preceding chapters there has been given a general view of the matrimonial law prevailing under the several laws to which this work refers, and of the particular points in which they differ; and the question has been considered which law ought to decide whether the contract was valid, that is, whether the status of marriage was constituted.

The personal powers and capacities which the husband and wife enjoy, as incident to, and as the legal consequences of that status, and their rights in the property of each other, are next to be considered.

The personal powers and capacities of the husband and wife, as they exist under the different systems of jurisprudence, and the appropriate law which must determine their nature and extent will be first considered. The rights of the husband and wife in the property real and personal of each other, and the law to which their decision must be referred, will be the subject of a separate enquiry.

Arrangement of Subject.—The former subject in the different systems of law is here considered under the heads of (1) the limitations of the wife's capacity, including the incapacity of a woman sole or married to contract an obligation as surety for another person; (2) the marital power of the husband, or his right to represent his wife, which in certain systems, *e.g.*, the Roman-Dutch and the French, is independent of the rights which he enjoys with respect to her property and the personal rights and duties of the spouses towards each other; and (3) the limitation of the marital power. In connection with this last point Burge considered the question how far it is competent for the parties, by contract on their marriage, to alter the rights and capacities which by law are incident to the status of husband and wife, and to provide for their termination by mutual separation (*a*). Their right, under certain restrictions, to secure to

(*a*) Burge, 1st ed., i., 235.

themselves by ante-nuptial contract an interest in the property of each other, different from that which the law would have given them, is generally admitted. The power of the husband may be restrained so as to exempt the wife from liabilities which she might otherwise have incurred from its exercise. Thus, as will be seen hereafter, the husband may wholly or partially relinquish the right (*b*) which, under some Codes, he enjoys of binding his wife by his contracts and his *jus mariti* in regard to the administration of their estate; and he may stipulate that he will not fix his domicil in a certain place. But agreements by which the husband divests himself of his power over the person of his wife, or places himself in subjection to her, or stipulates that he would not change his domicil, are deemed by jurists to be illegal and void.

The doctrine on this subject is thus stated by Rodenburg:—

"Maritalem potestatem quod attinet, licet ea in totum tolli nequeat, quò minus tamen effectus ejus imminui, certâve in re coarctari possit, jus non est impedimento. Quemadmodum et ipsum jus naturale, per se firmum licet et immutabile permaneat, in particularibus tamen nonnunquam circumscribitur. Ita vulgata pacti dotalis cautio est, quâ maritis vel in totum vel pro parte administratio rerum adimitur, vel facultas inhibetur uxorem obligandi, qui tamen sunt hujus ipsius potestatis, seu naturales, seu civiles effectus, quâ de re suo loco agam pluribus. Cæterùm quòd hîc libertatis naturalis imminutionem invita queruntur fieri jurisprudentia, non omnino est de nihilo: constat namque de L. Titio rejici conditionem, tanquam libertati inimicam, quâ jubetur legatarius certo in loco commorari perpetuò. Proinde labi eos non putaverim, qui hâc promissione districtè alligari maritum negent futurum alioquin in eâ causâ, ut uni terræ tanquam glebæ adscriptus cogatur ætatem exigere; scriptores laudat et sequitur (*c*). Aliud tamen haud dubiè de eâ promissione dicturus, quâ certum aliquem in locum se non migraturum invitâ uxore spopondit maritus. Illa quippe promissio omnino libertatem tollit, imminuit duntaxat altera: manente hîc marito integrùm, extra illum locum pactis exceptum, sedes collocare quocunque locorum libuerit" (*d*).

(*b*) As to French law, see Brunet *v.* Rigaud-Labens (1902), C. Montpellier, Sirey, 1903, ii., 101, and nn.

(*c*) Mev. ad Jus. Lubecens, lib. 1, tit. 5, art. 10, n. 66.

(*d*) Rodenburg, de Jure Conj., tit. 4,

The personal effects of marriage in the Roman law and canon law may be first briefly mentioned.

Roman Law.—In the earlier period of the Roman law the marital power was as absolute as the *patria potestas*. It is not within the province of this enquiry to ascertain at what period, or from what causes, it was relaxed. At the time when the Digest was compiled it had assumed a very different character, resembling in some respects but quite different in others, from the authority which has been conferred on the husband by the other Codes of Europe.

In the right of the husband to compel the wife, and in the duty of the wife, to take up her residence with him, in enjoining her obedience to his lawful commands, in giving him the power of personal correction, in imposing on him the obligation of protecting his wife and providing for her necessary support and maintenance, and generally in the moral duties which they owed to each other, the doctrine of the civil law did not differ from that which has been adopted by the laws of all civilised countries (*e*); but as regards the civil rights and capacities of the husband and

c. 1, n. 1, p. 148. See Ab. Wesel, tr. 2, c. 1, p. 81; cited by Burge, 1st ed., i., 236, 237.

(*e*) Cf. now, as to these general rights and duties, the Civil Codes of Germany (ss. 1353, 1356, 1360, 1361), Italy (arts. 130—133), the Netherlands (arts. 158—162), Switzerland (arts. 159—161, 169—171), and Spain (arts. 56—58, 64). Article 64 of the Spanish Code provides that the wife has a right to enjoy her husband's honours except such as are strictly and exclusively personal, and to retain them so long as she has not contracted a new marriage: cf. Cowley *v.* Cowley, [1901] A. C. 450. See also Code Civil, arts. 212, 213, 214; Baudry-Lacan., ii., pp. 659 *et seq.*, s. 2162. As to the enforcement of the *puissance maritale manu militari*, see *ibid.*, p. 666, s. 2172. The power of personal correction or confinement is not provided for in any of these Codes, and has been expressly negatived in England in Reg. *v.* Jackson, [1891] 1 Q. B. 671, as having ever been part of the law. But, *semble*, there may be acts on the part of a wife, of proximate approach to misconduct, which would give the husband some right of physical interference with her freedom: S. C. Unreasonable refusal of marital intercourse is not in England a matrimonial offence: Forster *v.* Forster (1790), 1 Hagg. C. R. 144, 154. But a wife who refuses intercourse unreasonably cannot allege desertion without reasonable cause by the husband, if, in consequence, he refuses to live with her, and she is herself, in such circumstances, guilty of desertion without reasonable cause: Synge *v.* Synge, [1900] P. 180; affirmed, C. A., [1901] P. 317. As to French law, see X. *v.* X. (1902), Sirey, 1903, ii., 104. In Mauritius, the Supreme Court may enforce, by writ of *manu militari*, the return of a wife to the conjugal domicil. See R. S. C., 1903, form 80, for form of writ.

wife, there was a marked distinction between that law and the other systems of jurisprudence. It treated the husband and wife as distinct persons who might have separate estates. It enabled them to make contracts and incur debts in their own names, and permitted the wife to be sued without her husband (*f*).

By the civil law an obligation of a female, whether sole or married, to contract as surety for another was void. This was the effect of the *Senatus Consultum Velleianum*, "Ne pro alio feminæ intercederent." If any suit were brought to enforce the obligation, the woman might by exception successfully resist it. It was, however, competent for her to renounce the benefit of this exception, and its renunciation was generally obtained from her by those who took the security (*g*).

Besides the *Senatus Consultum Velleianum*, which extended to all women, married women were specially incapacitated from becoming sureties for their husbands, a privilege known as the *Authentica si qua mulier:* "Si qua mulier crediti instrumento consentiat proprio viro, aut scribat, et propriam substantiam aut seipsam obligatam faciat; jubemus nullatenus hujusmodi valere aut tenere, sive semel sive multoties hujusmodi aliquid pro eâdem re fiat; sive privatum sive publicum sit debitum; sed ita esse ac si neque scriptum esset: nisi manifestè probetur, quia pecuniæ in propriam ipsius mulieris utilitatem expensæ sunt" (*h*).

Canon Law.—Effects of Marriage as regards Spouses.—In the canon law, among the personal effects of marriage, so far as the spouses are concerned, the salient points are (a) the equality of the parties and (b) the mutual fulfilment of conjugal duties.

As regards the former, the canon law recognised no marital power over property; the wife could perform juridical acts without the husband's consent, except in the case of restrictions imposed by the dotal *régime;* but the husband's supremacy was maintained, *e.g.*, his consent was necessary for her undertaking religious obligations and vows; he could sue her criminally for her adultery, while she could only sue him in such case civilly, and obtain *divortium*

(*f*) Burge, 1st ed., i., 202, citing Pothier, Pand. i. 6. 2; Cod. vi., 46. 5; Cod. v., 12. 12; Dig. xlviii. 5. 20; Dig. xlvii. 10. 5; Cod. v., 14. 8; Cod. iv., 12. 1; Dig. xxxv. 2. 95; Dig. xxxiv. 1. 14.

(*g*) Burge, 1st ed., i., 234, citing Dig. xvi. 1, ad Senatus Consult. Vell.; Cod. iv., tit. 29 *ad eund.* tit.; Voet, xvi., 1, n. 1; Perez, iv., 29, nn. 1, 2, 3.

(*h*) Burge, 1st ed., i., 234, citing Auth. Collat. 9, tit. 17, Nov. 134, c. 8.

quoad torum; he could change the matrimonial domicil, which she had to follow, with certain exceptions, and he could compel her to take care of his person and household, and could (in theory) correct her. It was a question whether she could give evidence for or against him.

As regards the latter, either spouse could compel the other to perform his or her conjugal duties by resorting to the Ecclesiastical Courts. It was considered that either spouse had a bodily servitude over the other and could bring an action like that to enforce a *real* right, petitory and possessory. For these it was necessary to prove *legitima desponsatio*, and it was doubtful if *copula carnalis* was required to be proved. As a consequence of this view of its being a mutual servitude, a vow of continence by one spouse was not allowed without the other's consent. A simple vow of continence could be revoked. Entry into religion was allowed by Justinian to either spouse without the other's consent, but was a ground of divorce. The Church, however, declared for a contrary view, requiring the consent of one spouse to such a step by the other.

The Eastern Church followed the same view, but allowed it as a cause of divorce (*i*). The Western Church also so held, but declared the marriage unaffected, and allowed an action to bring back the spouse, which was not barred by lapse of time; but a spouse could enter into religion without the other's consent when the other was guilty of adultery (*j*).

Effect of Marriage as regards Children.—Among the effects of marriage as regards children the chief ones are (1) that it makes the children legitimate and (2) that it legitimises them if illegitimate, provided that the parents were capable of making a valid marriage. But if there was an impediment it was necessary to get a positive legitimation, which, however, was and is given with the dispensation from the impediment. But if the impediment were known, a dispensation had to be obtained or the marriage was null and the issue illegitimate (*k*).

Under the former head, children conceived and born, or at least conceived during lawful marriage, or born in it though previously conceived, are legitimate (*kk*), which forms part of the law of

(*i*) Milasch, 636, 660—661.
(*j*) Esmein, ii., 28.
(*k*) Milasch, 647—648.
(*kk*) Burge, ii., 266.

legitimacy. The latter head falls under the law of Legitimation (*l*) and Illegitimacy (*m*).

Children may also be born of putative marriages (*i.e.*, marriages null for an *impedimentum dirimens*, of which both or one party was not aware). These were not recognised in the civil law, or by the Eastern Church, or the Western Church till the eleventh century. In the next century the canon law recognised them. Besides good faith, a ceremony *in facie ecclesiæ* was required, and banns were made necessary by the Fourth Lateran Council (*n*). This privilege probably originated in the case of marriages subject to impediments of relationship and affinity, and was probably due to the Gallican Church. Good faith on the part of one spouse was enough, and its effect extended not only to children, but also to parents, who had the property rights which they would have had by a valid marriage preserved to them.

SECTION I.

Roman-Dutch Law.

Personal Effects of Marriage.—The husband was the head of the community of the marriage. If a minor at the time of his marriage, he became of age (*o*). In the ancient customary laws of the Germanic races the age of puberty was the same as the age of majority. Gradually this changed; the age of majority was removed to a later date, and the above-mentioned rule was established in nearly all the Provinces of the Low Countries (*p*).

An exception was made in the Province of Friesland (*q*), while in some of the towns of the Provinces of Holland and in Brabant and Limburg, though guardianship ceased, the husband, who was a minor, was unable to alienate immovable property unless he had obtained the sanction of the Court or release from the Orphan Chamber (*r*).

The wife's position was similar to that of the husband in so far

(*l*) Burge, ii., 347 *et seq.*

(*m*) *Ibid.*, 329 *et seq.*

(*n*) See *ante*, p. 18.

(*o*) Grotius, Introd., i., 10. 2; J. Voet, Ad Pand., xxiii., 2. 49; xxvii., 10, 15.

(*p*) Fock. Andr., Het Oud Ned. B. R., ii., 157—158; Bijdragen, i., pp. 33, 34, and the authors quoted on p. 34; ii., pp. 8, 13, 16, 20, 26, 37—38.

(*q*) J. v. Sande, Dec. Fris., ii., 4, def. 1; Huber, Hedend. Regtsgel., i., 10. 10 *et seq.*

(*r*) Fock. Andr., Bijdragen, ii., pp. 4, 28 *et seq.*, 35, 38.

that she, if a minor at the time of her marriage, was released from guardianship (*s*) with the same limitations as applied to her husband's coming of age (*t*).

The married woman came, however, under the authority (*mundium*) of her husband, and, in law, remained an infant during her marriage under his authority (*a*). He, if not an infant himself, exercised *tutela* over her, but a *tutela sui generis*, differing from the *tutela minorum* in more than one respect (*b*).

Following the arrangement of the subject already indicated, the first point to consider is the limitation of the wife's capacity to do valid acts which were binding on herself incidentally (*c*).

I. **Legal Proceedings.—Limitations of the Wife's Capacity.**—The wife could not appear in Court, unless assisted by her husband (*d*).

She followed her husband's *forum* (*e*), and the person who summoned the wife was obliged to summon her husband with her. If the husband did not appear, judgment was given against the wife by default (*d*).

There were, however, exceptional circumstances in which a married woman obtained authority, express or implied, to take or defend proceedings in her own name (*f*): (a) She could appear in Court by herself, if she had been expressly authorised by her husband by special mandate, or if he had tacitly consented to her appearance, or even if she had appeared without his consent, but he had afterwards ratified it (*g*). (b) If a married woman were a public trader with the consent of her husband, the husband's authority

(*s*) Fock. Andr., Het Oud Ned. B. R., ii., 157—158; Bijdragen, i., pp. 33, 34, and authors there quoted on p. 34; ii., pp. 8, 13, 16, 20, 26, 37—38.

(*t*) J. v. Sande, Dec. Fris., 4, def. 1; Huber, Hedend. Regtsgel., i., 10. 10 *et seq.*; Fock. Andr., Bijdragen, ii., 4, 28 *et seq.*, 35, 38.

(*a*) Grotius, Introd., i., 5. 19; Fock. Andr., Bijdragen, ii., 38, *loc. cit.*; Het Oud Ned. B. R., ii., 158.

(*b*) Schorer, Notes ad Grot., Introd., i., 5. 19; and cf. p. 291.

(*c*) Fock. Andr., Het Oud Ned. B. R., ii., 158.

(*d*) Fock. Andr., Bijdragen, ii., pp. 5 *et seq.*, 10, 12, 14, 16, 18, 21, 30, 38; Het Oud Ned. B. R., ii., 158; Grotius, Introd., i., 5. 23; Schorer, Notes ad Grot., Introd., i., 5. 23; J. Voet, Ad Pand., v., 1. 14—16; xxiii., 2, 41, 42.

(*e*) Burge, ii., p. 52.

(*f*) J. Voet, Ad Pand., xxiii., 2. 40; V. d. Keessel, Thes. Sel., Thes. 95, maintains that these exceptions were created by local statutes, and did not form part of the common law.

(*g*) Schorer, Notes ad Grot. Introd., i., 5. 23; J. Voet, Ad Pand., xxiii., 2. 42.

to carry on a public business was considered to imply an authority for her appearing in Court by herself with regard to all questions concerning the trade so carried on by her (*h*). (c) If the husband were absent for some reason or other and not within easy reach, the wife might—in cases which did not suffer delay (where there was *periculum in mora*)—obtain the authority of the Court to appear by herself and without the assistance of a *curator ad lites* (*i*). (d) In case by ante-nuptial contract the community of property had been excluded between husband and wife, and the wife had reserved for herself the administration of her own property, she could appear in Court by herself in all questions which concerned her own separate property (*k*). (e) Similarly she could appear in Court by herself in an action brought by her against her husband for separation *a mensa et toro* or for divorce (*l*). (f) She could also do so, if the husband maliciously or fraudulently refused to defend an action on behalf of his wife, or to commence one for his wife, although he had obtained the authority of the Court to do so (*m*). If she nevertheless appeared without her husband and obtained judgment in her favour, the husband was bound, in so far as he had benefited by his wife's action (*n*). (g) A married woman might be criminally prosecuted, and if she were condemned to pay fines these had to be paid out of her dotal property, or out of her half of the community (*o*).

Alienation of Property.—A married woman could not, *inter vivos*, alienate (whether under gratuitous or onerous title), or encumber her own property without the assistance and consent of her husband. In some Provinces a distinction was made between movable

(*h*) Regtsgel. Observ., iv., Obs. 7.

(*i*) Schorer, Notes ad Grot. Introd., i., 5. 23; J. Voet, Ad Pand., v., 1. 16; Huber, Hedend. Regtsgel., i., 10, par. 19.

(*k*) Regtsgel. Observ., iv., Obs. 7; contra, J. Voet, Ad Pand., i., 4, pars. 2—18, and v., 1. 14, who is of opinion that the common law which created the marital power could not be set aside by private acts. But the authority of the husband is considered to have been impliedly given when he gives consent to his wife administering her own property, having regard to the fact that his authority over her serves as much to protect himself against liabilities incurred by the wife, as to protect her against the acts of third persons. If the separate property of the wife only were concerned, and she were, with his consent, allowed to bind that property by her own acts, there was no reason why she should be prevented from prosecuting her own rights in the Courts of Law in her own name.

(*l*) Regtsgel. Observ., iv., Obs. 7.

(*m*) J. Voet, Ad Pand., v., 1. 18.

(*n*) J. Voet, Ad Pand., v., 1. 19.

(*o*) J. Voet, Ad Pand., v., 1. 17; Schorer, Notes ad Grot. Introd., i., 5. 23.

and immovable property; and, while she was strictly prohibited from selling the latter, circumstances would allow her to dispose of the former by herself (*p*).

Contracts.—The wife could not, by herself, validly bind her husband or the common property. As a general rule it might be stated that she also could not bind herself, and that contracts entered into by a married woman without her husband's authority, specially in the Provinces of Holland and Zeeland, were *ipso jure* null and void, and founded no right of action against the wife, either *stante matrimonio* or after the dissolution of the marriage (*q*).

The husband's authority or consent might be given expressly or tacitly, or even by way of ratification. In that case the wife was considered to have acted as agent of her husband (*r*).

There have been exceptions, however, in different Provinces and towns as to the wife's incapacity to bind herself (*s*). In all cases where the wife was considered capable of binding herself, she or her heirs might be sued after dissolution of the marriage in respect of contracts entered into by her *stante matrimonio* without the husband's authority (*t*).

In the Province of Friesland a married woman, though she could not bind herself to other persons, could, in the same way as a minor, make other persons bound to her, and she had a claim against the person with whom she contracted, which she could enforce after the dissolution of the marriage (*a*).

If a married woman paid a debt contracted during her marriage without her husband's consent, she could recover the money so

(*p*) Grotius, Introd. i., 5. 23; J. van Sande, Dec. Fris., ii., 4, def. 3; Fock. Andr., Bijdragen, ii., pp. 7, 9, 15, 26, 31, 36—37; Het Oud Ned. B. R., ii., 158—159.

(*q*) Grotius, Introd., i., 5. 23; S. van Leeuwen, R. H. R., i., 6, 7, *in fin.*; ii., 7, 8, par. 2; Cens. For., i., 1, 7. 6; J. Voet, Ad Pand., xxiii., 2. 42; V. d. Keessel, Thes. Sel., Thes. 96; J. v. d. Linden, Koopmansh. p. 27; Fock. Andr., Bijdragen, ii., 31—34; Het Oud Ned. B. R., ii., 159—160.

(*r*) Holl. Cons., iii. b., Cons. 146 (H. Grot.); J. Voet., Ad Pand., xxiii., 2. 42.

(*s*) *E.g.*, in the Provinces of Overyssel and Utrecht and the towns of Zutfen and Groningen; Fock. Andr., Bijdragen, ii., 10, 12, 19, 23—25, 27; Het Oud Ned. B. R., ii., 159; J. Voet, Ad Pand., xxiii., 2. 42.

(*t*) Rodenburg, De Jure Conjug., Prælim., 186, n. 2.

(*a*) J. v. Sande, Dec. Fris., ii., 4. 3; L. Huber, Obs. Rerum Judic., ii., Obs. 130; Fock. Andr., Bijdragen, ii., 8; J. Voet, Ad Pand., xxiii., 2. 43, quotes this provision of Frisian law as an instance of a general rule universally observed, which is incorrect.

paid with a *condictio indebiti*. Even if the contract had been entered into during the marriage and payment were made after its dissolution, she could avail herself of this remedy, if she had paid in ignorance of her legal rights. If she had been aware of her legal rights, and nevertheless after dissolution of her marriage had made the payment, she was considered to have ratified the contract after she had become free from the marital power of her husband.

Just as a married woman could not bind herself by entering into a contract without her husband's authority, so she could not, without such authority, dissolve a contractual obligation, *e.g.*, by accepting payment from a debtor or by granting him relief or otherwise (*b*).

Power to Bind Husband and Community.—A married woman was capable of binding herself, her husband and the community to a limited extent under the following conditions: (a) in the case of household debts (*c*), except where, on the application of the husband, the wife had been forbidden by judicial interdict to incur these on her own account (*d*); (b) if, and in so far as, she—whether of age or still a minor—with her husband's consent publicly carried on a business as merchant, but only with regard to obligations which she had incurred in, for and on behalf of that business (*e*); but the husband could revoke his consent and thus limit his liability as to obligations entered into by his wife after such revocation, provided that he took care that such revocation were known to those who might be likely to enter into contracts with his wife (*f*); (c) if, and in so far as, she or her husband had been enriched by the transaction (*g*); (d) during her husband's absence a married woman might act under a general power of attorney from her husband, or obtain authority from the Court (*h*); (e) if a married woman became

(*b*) J. Voet, Ad Pand., xxiii., 2. 50.

(*c*) Grotius, Introd., i., 5. 23; J. Voet, Ad Pand., xxiii., 2. 46; J. v. Sande, Dec. Fris., ii., 4, def. 3; Fock. Andr., Bijdragen, ii., 10, 19, 25, 31—34; Het Oud Ned. B. R., ii., 159.

(*d*) Voet, *ibid.*

(*e*) Grotius, Introd., i., 5. 23; Schorer, Notes ad Grot. Introd., *loc. cit.*; J. Voet, Ad Pand., xxiii., 2. 44, and authors quoted; Fock. Andr., Het Oud Ned. B. R., ii., 159.

(*f*) J. Voet, Ad Pand., xxiii., 2. 44.

(*g*) J. Voet, Ad Pand., xxiii., 2. 43; v. 1. 19; Grotius, Introd., i., 5. v. 1. 23, *in fin.*; V. d. Linden, Koopmanshandboek, i, 3. 7.

(*h*) J. v. Sande, Dec. Fris., ii., 4, def. 4; J. Voet, Ad Pand., xxiii., 2, 47.

criminally liable to the payment of a fine, neither her husband nor the community were liable for the payment (*i*).

J. Voet (*k*) maintains that the incapacity of the married woman to enter into a valid contract with third persons, without her husband's authority, did not prevent her from entering into contracts with her husband himself, and that the marital power exercised by the husband over his wife did not prevent their contracting with each other, provided that such contract did not amount to a donation.

Voet does not give any authority for his statement, and in so far as he does not distinguish whether the wife was still a minor or of age, and whether the husband and wife had been married in community of property, or had excluded the *communio bonorum*, his statement seems too general. Where the husband and wife had been married with an ante-nuptial contract excluding the community of goods and the wife had obtained the sole administration of her own property, then, if she were of age and would have been able to enter into a valid contract but for the want of her husband's authority, the wife in entering, during marriage, into a contract with her husband would seem tacitly to have obtained the required authority to a contract which could not prejudice the husband, as he was party to it himself (*l*). Such a contract, however, in order to be valid, must not prejudice the rights of third parties. Thus husband and wife were prohibited from making any gifts (*donationes inter viros*) to each other *stante matrimonio*, with a few unimportant exceptions, such as personal ornaments.

Any contract which, though apparently non-gratuitous, originated in the design of conferring, or would have the effect of conferring, some advantage on either of the spouses would, on this account, be null and void (*m*), unless the donation were confirmed by the death of the donor before the donee, without having previously been revoked or there being any other evidence of a change of intention,

(*i*) J. v. Sande, Dec. Fris., ii., 4, def. 4; Schorer, Notes ad Grot., Introd., i., 5, 23; J. Voet, Ad Pand., v., 1. 17.

(*k*) J. Voet, Ad Pand., xxiii., 2. 63; xxiv., 1. 8; Rodenburg, De Jure Conjugum, ii., 4, 21.

(*l*) V. d. Berg, Nederlands Advysboek, iii., Cons. 177; Schorer, Notes ad Grot., Introd., i., 5. 19 and 24.

(*m*) Grotius, Introd., iii., 2. 9; J. Voet, Ad Pand., xxiv., 1. 8; Schorer, Notes ad Grot., Introd., iii., 2. 9; Rodenburg, *loc. cit.*, ii., 4. 19; Regtsgel. Obs., iv., Obs. 39; V. d. Keessel, Thes. Sel., Thes. 486; V. d. Linden, Koopmanshandboek, p. 214.

and provided that the estate was not insolvent (*n*). So, one spouse could not, by act *inter vivos*, renounce a moiety of the *quæstus* of the community in favour of the other, unless it were confirmed by the testament of the renouncing party (*o*), for a donation of this kind lapsed upon the death of the donee before the donor unless it was afterwards ratified by the surviving donor or confirmed in his last will (*p*). Such donations might be revoked at any time by either donor, unless they were reciprocal donations (*q*). Revocation was presumed in case of divorce (*r*).

It might be stated that the prohibition extended to and vitiated every transaction, whatever were its form and character, if it appeared that either party was to derive any advantage from it. It existed, notwithstanding there had been a *separatio bonorum* or *a mensa et toro*. These rules did not refer to remuneratory donations, *donationes mortis causa*, or testamentary bequests.

Exemption from Arrest.—In consequence of her inability to bind herself, a married woman could not be arrested for debt. If she were a public trader she could not be arrested if she were living with her husband, for in that case he was considered to have consented to her incurring liabilities, as a single dissent on his part would be sufficient to stop his wife from trading. But if the husband were absent, the wife, if a public trader, was liable to be arrested, under certain conditions (*s*).

Testamentary Power.—A married woman could make her own will without the assistance of her husband, and she could make any dispositions in it which she liked regarding her own property or her half of the property in community (*t*). This privilege, however, did not extend to *donationes mortis causa*, as they were in the nature of contracts and not of dispositions by will (*a*). The same rule applied with regard to donations in general (*b*).

(*n*) Grotius, Introd., iii., 2. 9 ; J. Voet, Ad Pand., xxiv., 1. 3, 4, 6; Schorer, Notes ad Grot. Introd., iii., 2, 9.

(*o*) J. Voet, Ad Pand., xxiv., 1. 13; Rodenburg, *loc. cit.*, ii., 4. 20.

(*p*) J. Voet, Ad Pand., xxiv., 1. 7.

(*q*) Schorer, Notes ad Grot. Introd., *loc. cit.;* Holl. Cons. ii., Cons. 118; iv., Cons. 349.

(*r*) J. Voet, Ad Pand., xxiv., 1. 6.

(*s*) J. Voet, Ad Pand., ii., 4. 36.

(*t*) Grotius, Introd., i., 5. 25; Schorer, Notes ad Grot. Introd., *loc. cit.* ; J. v. Sande, Dec. Fris., ii., 4, def. 4 ; Groenewegen, Leg. Abr., Cod. v., 12. 25 ; J. Voet, Ad Pand., xxviii., 1, 38.

(*a*) J. v. Sande, Dec. Fris., ii., 4 ; def. 4 *in fin.*

(*b*) Holl. Cons., i., Cons. 129; J. Voet, Ad Pand., xxxix., 5, 9.

Rights of Succession.—Again, the wife could not adiate an inheritance without her husband's authority nor repudiate it (*c*).

Suretyship.—Woman's Incapacity under Senatus Consultum Velleianum.—A woman was, as a rule, incompetent to be a surety (*d*). The *Senatus Consultum Velleianum*, "Ne pro alio feminae intercederent" (*e*), forbade any woman—whether married or unmarried—to become a surety for the debt of another. This principle was extended to make illegal any intervention on a woman's part *alienam obligationem in se suscipere*, viz.: to undertake any obligation which—economically speaking—did not concern her, but a third person (*e.g.*, the liberation of a debtor by stipulating a novation, or giving a pledge, or the undertaking of a loan in the interest of a third party). If, nevertheless, a woman entered into such a contract in contravention of this *Senatus Consultum*, the contract was not absolutely void, but, if she were sued upon it, she could raise an exception. If she paid in error, she could reclaim the sum of money so paid. This made a transaction of suretyship entered into by a woman "relatively" void, that is to say the transaction was void, if the woman relied upon the privilege conferred upon her by the *Senatus Consultum*, and claimed that the transaction should be considered void.

Where Privilege could be Pleaded.—If she were sued upon a contract of suretyship, the *exceptio ex Senatus Consulto Velleiano* which she could resort to at any stage of the proceedings, even when execution was levied, was available not only to her but also to a third person who had become surety at her request or on her behalf. If, in ignorance of this privilege (*beneficium*), a woman had fulfilled the obligation resting upon her, she could reclaim the money with a *condictio* (not a *rei vindicatio*, as the creditor did not obtain ownership). But if she had paid knowingly, she could not do so, because the prohibition against her becoming liable as surety did not include a prohibition against her paying the debt of a third party. The creditor was entitled to an *actio restitoria* or *rescissoria* against the debtor who had been freed from his liability through the woman's intervention, or who had by such intervention been

(*c*) Groenewegen, Leg. Abr., Dig. xxiv., 3. 58; J. Voet, Ad Pand., xxix., 2, 9.

(*d*) Grotius, Introd., iii., 3, 14 and 15.

(*e*) Dig. xvi., 1 Ad Sen. Vell.; Cod. iv., 29, Ad Sen. Vell.

spared from entering into an obligation (in case of a so-called *tacita intercessio*).

Exceptions.—The woman could not avail herself of the privilege in the following cases, viz:—(a) If she had deceived the creditor. "Infirmitas enim feminarum, non calliditas auxilium demeruit" (*f*); (b) If the creditor did not know that she had become a surety, *e.g.*, in case of a *tacita intercessio*, or if the woman acted through a third party as a dummy. "Immo tunc locus est senatus consulto, cum scit creditor eam intercedere" (*g*); (c) If the creditor were a minor and the debtor for whom she became a surety were at the same time a bankrupt, as in that case her interest clashed with that of a minor, and the interest of the latter had the preference (*h*); (d) If the suretyship had been entered into with regard to the gift of a *dos*, for the same reason of conflicting privileged interests as in (c); (e) If the woman had renewed the contract within a period of two years.

Justinian's Legislation.—Justinian confirmed the *beneficium ex Senatus Consulto Velleiano* by two enactments:—(a) It was required that every suretyship entered into by a woman should be entered into by a *documentum publicum* signed by three witnesses (*i*).

The meaning of this—as explained by the Glossator Martinus—was, that, if the *intercessio* had not taken place by such deed, it was *ipso jure* void in any case, but that, if it had taken place by such *documentum publicum*, it was relatively void in general, and binding only in the above-mentioned exceptional cases. To this enactment there was one exception. The form of *intercessio* was of no consequence if the woman had benefited by her becoming a surety. The *intercessio* in that case, in reality, ceased to be a suretyship; it was an undertaking of a direct obligation, and was binding upon her without the observation of any formality (*k*).

(b) It was enacted that a married woman who had signed an acknowledgment of debt by her husband, or bound herself or her property as a surety for her husband's debts, was not bound by it, whether such a contract were entered into by *documentum publicum*

(*f*) Dig. xvi., 1, 2 lex par. 3 (Ulp.).
(*g*) Dig. xvi., 1. 12 (Paulus).
(*h*) Dig. iv., 4. 12.
(*i*) Cod. iv., 29, 23 (2).
(*k*) Cod. iv., 29, 22. Cf. the text of Cod. iv., 29, 22, in Kotzé's translation of Van Leeuwen's R. H. R., ii., p. 38 in notes, and in appendix, on p. 615.

or by private act, and whether it was entered into once or several times (*l*). The transaction was absolutely void in any case, and the exceptions of the *Senatus Consultum Velleianum* were of no avail. This defence was called the *Authentica si qua mulier.*

Practice and theory have extended the *beneficium ex Authentica si qua mulier* to all intercessions of a married woman on behalf or for the benefit of her husband.

Modification of Roman Law in the Middle Ages.—In the Middle Ages, by custom, three modifications were introduced of the above rules, viz.:—(a) A woman carrying on business, a woman-trader, was always bound by becoming surety for a third party, even if such contract were not made by public instrument, and even if she did it for the benefit of her husband; (b) In canon law the *intercessio* of a woman *on oath* was always binding; (c) Women could renounce the benefit of the *Senatus Consultum Velleianum* and of the *Authentica.* This right of renunciation had already been admitted in certain cases during Justinian's time. Subsequently, it obtained general acceptance by custom, provided that the renunciation was made in the same public document which contained the contract of *intercessio.* A renunciation not contained in such public document was invalid.

It also became customary that the judge or notary public who framed the document which was to contain the renunciation should explain to the woman the nature of the privilege before she renounced it.

Roman-Dutch Law.—In the Dutch Provinces these rules were recognised, though not in all provinces in an equal degree. In Holland the principal rules of Justinian's Code were readily adopted, and the exceptions were accepted and even extended (*m*).

The privilege had to be claimed in the pleadings, but if this were omitted it could be raised at any moment, and even opposed to the execution of the judgment (*n*).

Exceptions to Privilege.—In the following cases a woman could not rely on the *beneficium ex Senatus Consulto Velleiano* nor

(*l*) Nov. 134, c. 8.

(*m*) Grotius, Introd., iii., 3. 14; Huber, Hedend. Regtsgel., i., 3. 27, pars. 4—12; Van Leeuwen, R. H. R., iv., 4. 2; J. Voet, Ad. Pand., xvi., 1. 1; V. d. Keessel, Thes. Sel., Thes. 495; V. d. Linden, Koopmanshandb., i., 14, 10, on pp. 135, 136.

(*n*) Holl. Cons., i., Cons. 292; Schorer, Notes ad Grot. Introd., iii., 3. 14.

on that of the *Authentica* (*o*), viz.:—(a) In case of fraud committed by her (*p*); (b) if she had benefited by her actions, to the extent of such benefit (*q*); (c) if she had become surety for a debt owed by a person who was her own creditor (*r*); (d) in the case of a married woman, if she had become surety for her husband's debts in order to obtain his release from prison (*s*): (e) in the case of a woman who was a public trader (*t*); (f) if she had succeeded as heir to the principal debtor, because the debt then became one of her own; (g) if, after a lapse of two years, she had confirmed her suretyship by a renewed promise (*a*); (h) if in her will she expressed the wish that her heirs should pay what she owes. "*Si mulier quod ex causa fidejussionis debet, in testamento heredibus solvendum injungat*" (*b*); (i) if she had renounced the privilege (*c*).

Renunciation of Privilege.—Form.—The renunciation, according to some authorities, had to be made in a public instrument; according to others it could be made in a private document.

Groenewegen (*d*) maintains that, according to the customs of France and of Holland, a public instrument was not required for renunciation, but that it could be made in the woman's own handwriting (*proprio chirographo*) *vel aliunde*.

Schorer, in his notes, quotes this passage without comment (*e*).

Voet (*f*) similarly quotes Groenewegen, but previously mentions that French law did not recognise the *beneficium ex Senatus Consulto Velleiano* at all.

Van der Linden (*g*), in a note to his edition of Pothier, observes:

(*o*) Huber, Hedend. Regtsgel., i., 3, 27, 16; Kersteman, Rechtsgel., Woordenboek, *in voce* "Beneficien"; J. Voet, Ad Pand., xvi., 1, 9—11.

(*p*) Grotius, Introd., iii., 3, 15; Schorer, Notes ad Grot. Introd., iii., 3, 15, Jo. i., 7, 6; J. Voet, Ad Pand., xvi., 1, 11.

(*q*) Grotius, Introd., iii., 3, 16.

(*r*) *Ibid.*

(*s*) Holl. Cons., vol. v., Cons. ult. pag. ult.; J. Voet., xvi., 1, 10; Neostadius, De Pactis Antenuptialibus, Obs., xviii., 6.

(*t*) Groenewegen, Leg. Abr., Cod. iv., 29, pr.

(*a*) Grotius, Introd., iii., 3, 17.

(*b*) V. d. Keessel, Thes. Sel., Thes. 495; U. Huber, Hedend. Regtsgel., i., 3, 27, 17, who adds four more cases taken from the civil law; V. Sande, Decis. Fris., iii., 11, def. 7; Holl. Cons. ii., Cons. 317; V. Sande, Dec. Fris., iii., 11, def. 3.

(*c*) Grotius, Introd., iii., 3, 18; Schorer, Notes ad Grot. Introd., *loc. cit.*; V. d. Keessel, Thes. Sel., Thes. 496; Van Leeuwen, R. H. R., ii., 4, 2; J. Voet, Ad. Pand., xvi., 1, 9 and 10.

(*d*) Leg. Abr., Cod. iv., 29, 23.

(*e*) Notes ad Grot. Introd., iii., 3, 18.

(*f*) Ad Paud., xvi., 1. 9. *in fin.*

(*g*) On Obligations, vol. i., p. 454.

"According to our modern law it is beyond question and generally accepted in practice that a woman may renounce both the privileges of the *Senatus Consultum Velleianum* and the *Authentica si qua mulier*, and this without any distinction whether such renunciation is made in a public or a private instrument."

Van der Keessel (*h*) maintains that a public instrument is necessary, "*nisi forte aliud in Hollandia consuetudine receptum fuisse probetur.*" In his lectures on this thesis he quotes two judgments, one of the Court of Holland, dated 29th May, 1648, and another by the same Court confirmed by the "Hooge Raad" in 1792 (July 27th), both of which upheld the right of renunciation by private document.

On the other hand Van Sande (*i*) maintains that a woman's renunciation in a private document is of no effect unless it is confirmed on oath; in a public document she could renounce without confirmation by oath (*k*).

U. Huber (*l*) deals fully with this question, and holds that a woman could renounce (a) in a public document executed without witnesses; (b) in a private document, if attested by three witnesses: or (c) in a private document executed without witnesses, but confirmed by oath.

G. Noodt (*m*) seems to be in favour of a public document being necessary; "*Jam valere renunciationem, plerique omnes censent: modo mulier ante fit de privilegio suo admonita.*"

S. van Leeuwen (*n*) is of the same opinion, "*Renunciationes non nisi expressum in publico instrumento.*"

The renunciation had to be made in special and not in general words, "*in expressis verbis*" (*o*). The *beneficium ex Authentica si qua mulier* could not be pleaded by a married woman in a case where, and to the extent that she had benefited by a contract made with her husband and to which she was a surety (*p*), as according to Roman-Dutch law husband and wife were married in community of property, and this *beneficium* could only have effect if the marital power had so far been restricted by an ante-nuptial contract that the wife would not be liable for the debts of

(*h*) Thes. Sol., Thes. 496.
(*i*) Dec. Fris., iii., 11, def. 2.
(*k*) *Loc. cit.*, def. 5—6.
(*l*) Hedend. Rechtsgel., i., 3, 27, 19—24.
(*m*) Ad Pand., xvi., 1, *in fin.*
(*n*) Cens. For., i., Bk. iv., 17, 4.
(*o*) Huber, Hedend. Rechtsgel, i., 3, 27, 23.
(*p*) Grotius, Introd., iii., 3, 19.

her husband. Even then, according to Groenewegen, it was necessary that the Roman law should have been specially referred to in order to make the *beneficium ex Authentica* operative (*q*).

The privilege did not operate in the case of a woman who carried on business publicly; nor if she became a party to a bill of exchange or pledged her credit by accepting one (*r*). The wife could renounce the *beneficium ex Authentica* if the renunciation were made in express terms and in a special document. The renunciation of the *Beneficium ex Senatus Consulto Velleiano* did not of itself include a renunciation of the *beneficium ex Authentica qua mulier* (*s*).

II. **Husband's Marital Power: Representation and Administration of Wife's Property.**—The limited capacity of the wife to act was counter-balanced by the authority of her husband (*t*). His authority over his wife manifested itself in two ways.

In the first place the husband represented his wife or assisted her in law and—if necessary—in legal transactions. He appeared for her in Court (*a*).

In the second place he administered her property. If married in community of goods, the husband had the sole and exclusive administration of the common property. If the wife had kept her own property separate and the community of goods had been excluded by ante-nuptial contract, the husband, unless special provision had been made to the contrary, administered his wife's property, and, in doing so, was entitled to alienate her movable property (*b*).

Powers of Administration.—In administering the property the husband was entitled to collect the fruit and income thereof, the rents and profits, and dispose of them at will. If his wife were the proprietor of a *jus patronatus*, the presentation was made by the husband; for the presentation was the *fructus*, and the wife could not make it without his consent (*c*).

(*q*) Groenewegen, Leg. Abr., Cod. iv., 29. 15.

(*r*) Schorer, Notes ad Grot. Introd., iii., 3, 18.

(*s*) Grotius, Introd., iii., 3, 19; J. Voet, Ad Pand., xvi., 1, 10.

(*t*) Groenewegen, Leg. Abr., Dig., xxiv., 3, 58; J. Voet, Ad Pand., xxix., 2, 9.

(*a*) Fock. Andr., Bijdragen, ii., 5, 10, 12, 14, 16, 18, 21, 30.

(*b*) Fock. Andr., Bijdragen, ii., 6, 12, 18, 21, 30, 36; Het Oud Ned. B R., ii., 160.

(*c*) J. v. Sande, Dec. Fris., ii., 4, def. 2; Rodenburg, de Jure Conj., i., 2, de Marit. Potest. in Contr., 4; J. Voet, Ad Pand., xxiii., 2, 59.

The husband's administration of his wife's property did not—in most of the Provinces—involve the right to alienate her immovable property without her consent (*d*). Only, in the Provinces of Holland and Brabant, the husband's power was unlimited in this respect and entitled him to alienate and encumber his wife's estate and charge it with servitudes without her consent (*e*), and even against her will (*f*).

The husband's administration embraced all acts of an obligatory nature. The husband bound the common property and that of his wife by all contracts entered into by him so that not only during marriage the common property or the wife's property could be attached for debts incurred by the husband, but even after the dissolution of the marriage recourse might be had against the wife for half of the debts incurred by her husband, if she had been married in community of property, or for the whole of them, if they had been incurred by the husband on behalf of the wife's estate (*g*). The power also included obligations which the husband incurred as surety, or in his administration as a guardian of minors (*h*).

It also included donations made by the husband *stante matrimonio*, unless it appeared that the gifts had been made for the purpose of defrauding his wife or his or her heirs, or if there were not any cause for such liberality. A fraudulent purpose which would invalidate the husband's gift, was considered to exist if the gift had been made at a time when, judging from the delicate state of the wife's health, her death might be shortly expected (*i*).

Power to Bind Matrimonial Property.—It was not only the husband's acts which were binding upon the matrimonial property.

(*d*) J. v. Sande, Dec. Fris., ii., 4, def. 2; Schorer, Notes ad Grot. Introd., ii., 11, 17; L. Goris., Advers. Tract., i., 5, 6—8; J. Voet, Ad Pand., xxiii., v., 7; Fock. Andr., Bijdragen, ii., 6, 9, 12, 18, 22, 31, 36; Het Oud Ned. B. R., ii., 160.

(*e*) Grotius, Introd., i., 5, 22; Groenewegen, Leg. Abr., Inst., ii., 8, 5; Dig., xxiii., 4, *lex ult.*; Holl. Cons. iii., b, Cons. 213 (313); v., Cons. 132; Grotius, Obs., 1, Obs. 12; Boel-Loenius, Cons. c., 103; Fock. Andr., Bijdragen, ii., 30, 36; V. d. Keessel, Thes. Sel., Thes. 92; J. Voet, Ad Pand., xxiii., 5, 7.

(*f*) Groenewegen, Leg. Abr., Inst., ii., 8, 5.

(*g*) Grotius, Introd., i., 5, 23; Groenewegen, Leg. Abr., Cod. iv., 12, 1; Neostadius, Pact. Anten., Obs. v.; J. Voet, Ad Pand., xxiii., 2, 52; Fock. Andr., Bijdragen, ii., pp. 18, 21.

(*h*) J. Voet, Ad Pand., xxiii., 2, 53; and authors quoted; V. d. Keessel, Thes. Sel., Thes. 93.

(*i*) Someren, de Jure Novercarum, cap. iv.; J. Voet, Ad Pand., xxiii., 2, 54; A. Wesel, de Damni inter Conj. Com. Tr. ii., 3, 48; V. d. Keessel, Thes. Sel., Thes. 93.

The consequences of his omissions had to be borne equally by the common property, and the husband could not be made solely liable for omissions whereby either the community or his wife had been deprived of some profit. As he could use his own discretion in acquiring, so he could use it in not acquiring property. The husband could adiate an inheritance which had devolved upon his wife, even against her will, or he might refuse to adiate, and repudiate a succession to which she had become entitled (*k*).

He could obtain a distribution of the estate to which his wife had succeeded, or effect a compromise, or cause a third person to acquire a title in her estate by *usucapio*, or even forfeit the estate. For none of these acts was the husband accountable or chargeable to his wife or her heirs, unless it could be proved that he had acted fraudulently (*l*).

Wife's Liability for Husband's Torts.—The wife became equally bound for the husband's torts, and after dissolution of the marriage she could be held liable for half the damages for which the husband had become liable on that account (*m*). He could not, however, impose upon his wife any liability for the consequences of any criminal acts committed by him, and any fines which he was condemned to pay, had to be paid out of his share of the common property exclusively (*n*). If the husband's property were confiscated, his wife's pecuniary interests remained altogether unaffected by it (*o*).

Personal Authority.—As regards personal authority, the husband had the right of moderate punishment (*modica castigatio*) over his wife (*p*).

III. **Limitation of the Marital Power.**—The extensive power of the husband regarding the administration of the property which husband and wife had in common, and of the wife's property, might be limited in more than one respect, either before or during the

(*k*) Groenewegen, Leg. Abr., Dig., xxiv., 3, 58; J. Voet, Ad Pand., xxix., 2, 9; xxiii., 2, 57; Holl. Cons. v., Cons. 118.

(*l*) Rodenburg, de Potest. Alien., iii., 2, 8—10 *et seq.*; J. Voet, Ad Pand., xxiii., 2, 55, 57.

(*m*) Groenewegen, Leg. Abr., Cod. iv., 12, 2; J. Voet, Ad Pand., xxiii., 2, 56.

(*n*) Groenewegen, Leg. Abr., Cod. iv., 12, 3; V. d. Keessel, Thes. Sel., Thes. 95.

(*o*) Grotius, Introd., i., 5, 23; Schorer, Notes ad Grot. Introd., i., 5, 23; Groenewegen, Leg. Abr., Cod. iv., 12, 3; V. d. Keessel, Thes. Sel., Thes. 95; J. Voet, Ad Pand., xxiii., 2, 56.

(*p*) Fock. Andr., Bijdragen, ii., 38—40; Het Oud Ned. B. R., ii., 160—164.

marriage, while even after its dissolution the wife had an opportunity to avert any disastrous consequences of maladministration of the community by her husband.

Marital Power Compared with Guardianship.—The possession of this right by a married woman, derived from her peculiar character as the *inferior inter pares*, marks the difference between the marital power and the guardianship of minors already referred to, and which is illustrated by the following examples. Minors and persons under curatorship could not exclude or limit the powers of those who were placed over them, but their protection consisted in the right which they enjoyed of obtaining damages from their guardians, after the guardianship had come to an end, for negligence and maladministration of their property and interests. Minors and persons under curatorship had a tacit legal hypothec on the property of their guardians (*q*). The wife had no such real security against her husband.

Guardians and curators were bound at the end of the guardianship and curatorship to give an account of their administration of the ward's property, and in case of loss through negligence on their part were bound to indemnify the minor or ward against such loss (*r*). Far from being entitled to such an account, and indemnification from her husband, the wife was liable for the husband's obligations and bound by the contracts entered into by him (*s*).

During their guardianship the guardians and curators could not alienate immovable property belonging to their wards without having previously obtained consent from the Court (*t*). They were also precluded from entering into contracts personally with their wards (*t*). On the other hand, the husband could alienate or encumber, at will, movable or immovable property (in the Provinces of Holland and Brabant at least, and in the other Provinces he could alienate and encumber immovables with his wife's consent). If community of property had been excluded by ante-nuptial contract and the wife had reserved to herself the free administration of her own property, the husband and wife

(*q*) J. Voet, Ad Pand., xxiii., 2, 63, and authors quoted.

(*r*) J. Voet, Ad Pand., xxiii., 2, 63; Neostadius, de Pactis Anten., Obs. ix., *in notis in fin.*; V. d. Keessel, Thes. Sel., Thes. 91.

(*s*) J. Voet, Ad Pand., xxiii., 57; J. v. d. Linden, Koopmanshandb., i., 3, 7.

(*t*) Grotius, Introd., i., 8, 6.

could enter into contracts with each other, provided that such contracts did not amount to donations (*a*).

Moreover, the wife—even if she were a minor by age—could not avail herself of the minor's *restitutio in integrum* to obtain relief from a contract entered into by her with her husband's authority, even although she proved that she had suffered loss by entering into the contract, because in such case she was taken to have contracted as her husband's agent (*b*).

Restraint of Marital Power over Property.—Her remedies lay elsewhere. Though she was unable to change her own incapacities, and, in that respect, could not rid herself of the necessity of her husband's authority to render her acts valid, she could limit her husband's powers or exclude them altogether as far as his administration of her property was concerned. She might, before entering upon her marriage, retain for herself the power of administering her own property, or she might, during her marriage, apply to the Court to grant her this power, or to dissolve the community and to confer upon her the administration of her own half of the common property.

This power of the wife to limit the marital power of the husband with regard to the administration of her property is considered subsequently in connection with the contractual *régime* of matrimonial property (*c*).

British Colonies.—Little need be added with regard to the colonies where the Roman-Dutch law prevails and where the above-mentioned rules regarding the consequences of marriage, with the exception of some statutory changes, remain the common law of the land.

South Africa (*d*).—**1. Incapacity of the Wife.**—While the married woman is unable to bind herself or her husband, she can validly act in a fiduciary capacity, *e.g.*, as an executrix of a will, and in that capacity pass transfer of immovable property, though her husband may intervene by application to the Court. For that reason the

(*a*) Schorer, Notes ad Grot. Introd., i., 5, 29; J. Voet, Ad Pand., xxiii., 2, 63; Rodenburg, de Jure Conj., ii., 4, 21.

(*b*) *Ibid.*

(*c*) See Chapter IX.

(*d*) De Bruyn, Opinions of Grotius, No. 8 on pp. 43—45; Nathan, Common Law of South Africa, i., paras. 385—396; Maasdorp, Institutes of Cape Law, i., 2nd ed., 28—34; Roos-Reitz, Principles of Roman-Dutch Law, pp. 14—17; Wessels, History of Roman-Dutch Law, pp. 450—453.

husband must receive notice of his wife's application to the Registrar of Deeds to pass a transfer.

In the case of an action being brought against the wife on a contract entered into by her before her marriage, the writ of summons may be issued against the husband personally, if there be community of property between the spouses, or it may be directed against her "duly assisted" by her husband.

In actions for tort the writ of summons will be issued against the wife "assisted by" her husband, or against the husband "in his capacity of husband and guardian" of his wife.

In the case of an action brought by or on behalf of a married woman, the writ will be issued in the name of the wife "assisted by" her husband, or in the name of the husband in the capacity above mentioned.

Gifts between husband and wife are forbidden except in cases of small importance regarding clothing and jewellery and others, whereby the donee is not made richer, nor the donor rendered poorer. A special exception was introduced by statute in Cape Colony in the case of the assignment of a life policy by a husband to his wife, whether they are married under community of property or not (*e*).

Suretyship.—In modern times the negative character of the intercession has receded to the background. The capacity of a woman—either unmarried or married—to bind herself as a surety, provided that she had solemnly renounced the benefits of the two *Senatus Consulta*, diverted the attention from the fact that the privileges were originally prohibitive in character, which was clearly reflected in the form in which such intercession had to be made, in order to be valid. It became the rule that the intercession should be confirmed on oath or made by a public document, and, in the latter case, the woman must have been previously warned by the Judge or the notary public and have at the same time renounced the benefits of the *Senatus Consultum Velleianum* and of the *Authentica*.

Forms relax in the course of time. In several countries the oath and the previous warning fell into disuse, and at the present time a woman can validly bind herself as surety for a third person or for her husband by private or public document, provided

(*e*) Act No. 13 of 1891, s. 18.

that she renounces the two *Senatus Consulta*, and does so with full knowledge and understanding of what she is doing.

The tendency of not adhering too closely to the strict formalities necessary for the validity of these contracts was already manifest in the Province of Holland. At the end of the eighteenth and the beginning of the nineteenth centuries, J. Van den Linden, who was eminently a practical lawyer, wrote in his Manual (*f*): "It has, however, been accepted as a general rule of practice that women can renounce this privilege"; and in the note to his edition of Pothier (*g*): "Indeed this renunciation has become such a well known and general custom, that we ought to consider whether it would not be less absurd to abolish the *Velleianum* decree altogether, as King Henry IV. has done in France" (*h*).

The same tendency has shown itself in South Africa (*i*). Women can enter into contracts of suretyship, provided they have renounced the benefits of the two *Senatus Consulta*. Women who are public traders, though not entitled to the benefit of the *Senatus Consultum Velleianum* in their trade obligations, are entitled to that of the *Authentica*, if their suretyship in favour of their husbands has no relation to any trade obligations (*k*).

Though, in this respect, the capacity of women has not been extended to mercantile acts so as to make a woman, who is not a public trader, subject to mercantile law or the law of merchants by her signing a bill of exchange, yet the Bills of Exchange Act, No. 9 of 1893 of Cape Colony has abolished the benefits of these *Senatus Consulta* as far as regards promissory notes and bills of exchange drawn or accepted by women.

The renunciation of these benefits may be made personally or by

(*f*) V. d. Linden, Koopmansh, i., 14, 10 on p. 136.

(*g*) On Obligations, vol. i., p. 454.

(*h*) This is what Bugnyon states (cf. van Leeuwen by Kotzé, Appendix to vol. ii., p. 601): "Une femme ne se pourrait aucunement obliger pour le faict d'autrui . . . laquelle solennité ne fut jamais receue ny approuvée en France." In France women were considered capable of looking after themselves. Cf. J. Voet, Ad Pand. xvi., 1, 9. "In Gallia nullus hujus senatusconsulti usus est dum illic sagaciones creditae mulieres, etc."

(*i*) De Bruyn, Opinion of Grotius, pp. 46—50; Kotzé's Translation of van Leeuwen, R. H. R., iv., 4, 2, notes and Appendix; Nathan, Common Law of South Africa, ii., par. 983, jo. 773; Maasdorp, Institutes of Cape Law, iii., ch. 30, pp. 347—355; Morice, English and Roman-Dutch Law, 2nd ed., pp. 13, 14; Auret *v.* Hind, 4 E. D. C. 283.

(*k*) McAlister *v.* Raw & Co. (1885), 6 N. L. R., N. S. 10.

proxy, provided that the woman who so renounces, understands what she is doing (*l*), and that the document constituting the proxy contains an explicit authority for such renunciation (*m*).

The renunciation need not necessarily be made in a notarial document, and is considered as valid if contained in a written document of any kind. A woman can become a surety for a third person by any document whatsoever, provided that she renounces in that same document the benefits of the *Senatus Consultum Velleianum* or of the *Authentica*, or of both, as the case may be, and does so in express words (*n*).

The privilege should be pleaded, but it has been held in Cape Colony that—even if not pleaded—the Court ought to take judicial notice of it (*o*).

2. **Limitation of Husband's Marital Power.**—In South Africa it is a favoured expression that a woman can, before marriage, by ante-nuptial contract "exclude" the marital power of her husband. This expression—though incorrect, because the married woman remains in the position of a minor even after having reserved the widest powers to herself by ante-nuptial contract as far as her property and its management is concerned (*p*)—shows that the marital power has now ceased to have much significance beyond the administration of the marriage property and the rights attached thereto.

Ceylon.—Ordinance No. 15 of 1876, amended by Ordinance No. 2 of 1889, regulates the matrimonial rights of married persons with regard to property. Although this Ordinance leaves the personal incapacity of the married woman and the husband's marital power untouched, it removes the disability of husband and wife, whether married before or after the proclamation of the Ordinance (*q*), and notwithstanding the existence of any community of goods between

(*l*) Heydenrych *v.* Frame, 15 C. T. R. 99.

(*m*) Mackellar *v.* Bond (1884), 9 A. C. 715; Natal Bank *v.* Bond (1884), 53 L. J. P. C. 97.

(*n*) Whitnall *v.* Goldschmidt, 3 E. D. C. 314; Oak *v.* Lumsden, 3 S. C. R. 144; Stride *v.* Wepener (1903), T. H. 383; S. A. L. J., xxi. (1904). 61.

(*o*) Makadi *v.* de Kock, Griq., 1 Lawr. Rep. 344.

(*p*) Morice, English and Roman-Dutch Law, p. 11. Even in Natal, where by Law No. 22 of 1863 (amended by Laws 17 of 1871 and 14 of 1882), the exclusion of community of property has become the statutory rule, unless expressly upheld by ante-nuptial contract.

(*q*) June 29th, 1877.

them, to grant to each other donations during the existence of the marriage, whether by way of voluntary gift or by way of settlement, subject to the rights of creditors of either of them (*r*).

At the same time it provides that any married woman, independent of the date of her marriage, shall be able to effect a policy of insurance upon her own life or the life of her husband for her separate use (*s*), and that the husband shall be able to insure his own life for the benefit of his wife, or his wife and children, or any of them (*t*).

A married woman remains incapable of binding herself or of validly disposing of, or dealing with, her own property without the consent of her husband, but it is specially provided that in case she requires to deal with any property of her own, and if—(a) the wife shall be deserted by her husband; (b) the wife shall be separated from her husband by mutual consent; (c) the husband shall have lain in prison under the sentence or order of any competent Court for a period not exceeding two years; (d) the husband shall be a lunatic or idiot; (e) the husband's place of abode shall be unknown; (f) the husband's consent is unreasonably withheld; (g) the interest of the wife or children of the marriage require that the husband's consent be dispensed with—it shall be lawful for the wife to apply to the Court of the District in which she resides or the property is situate, for an order enabling her to dispense with her husband's consent for such disposing of, or dealing with her own property (*u*). Such consent for dealing with, or disposing of, her property shall not be required in case husband and wife are separated *a mensa et toro* by a decree of a competent Court (*u*).

The Ordinance also provides that in case any questions or disputes arise between husband and wife relative to any separate property of the wife, the District Court shall be the proper Court to settle such dispute; and that either party shall be able—unassisted by the other—to apply by summons to such Court for settlement of the dispute (*v*).

British Guiana.—In British Guiana, until the year 1904, the above-mentioned rules applied to all marriages. By Ordinance 12 of 1904 (May 21st, 1904), amended by Ordinance 2 of 1905, the matrimonial rights of persons married after the commencement of

(*r*) Art. 13.
(*s*) Art. 17.
(*t*) Art. 18.
(*u*) Art. 12.
(*v*) Art. 16.

the Ordinance, with regard to property, were regulated on the basis, that in future marriages no community of goods should exist between husband and wife. At the same time all restrictions on a married woman's capacity were removed, and the husband's marital power entirely abolished. The married woman is by that Ordinance placed on the same footing as if she were a *femme sole*.

Though the Ordinance provides that the respective matrimonial rights of any husband and wife with regard to property arising under and by virtue of any marriage solemnised before the commencement of the Ordinance shall be regulated by the law which would have been applicable if the Ordinance had not passed (*x*), yet the removal of the married woman's incapacity by the Ordinance must be considered to apply to all married women independent of the date of their marriage, in so far as this does not come into conflict with the marriage *régime* which prevailed at the time of the marriage, and this is especially so where persons, married before the commencement of the Ordinance, excluded the community of property between them by ante-nuptial contract.

In some instances the Ordinance removes all restrictions specifically. Thus it provides that the *Senatus Consultum Velleianum* and the privilege of the *Authentica si qua mulier* shall no longer apply or have any effect in the Colony (*y*).

It may thus be said that the Roman-Dutch common law rules continue to apply to all marriages solemnised before the commencement of Ordinance No. 12 of 1904, in so far as they have not been expressly or impliedly repealed by that Ordinance.

SECTION II.

Laws of France, Quebec, St. Lucia, Mauritius and Seychelles, the Channel Islands, and the Codes of Belgium, Italy, Spain, Germany and Switzerland.

As the law which prevails in Quebec and St. Lucia is derived from the *coutume* of Paris but is now codified (*z*) and that in Mauritius and Seychelles is the Code Civil, it will be useful to consider them together with the law of France.

(*x*) Art. 3.

(*y*) Art. 25.

(*z*) Civil Code of Lower Canada, arts. 173—184, correspond to Civil Code, St. Lucia, arts. 143—154, and both these reproduce with differences of detail arts. 212—226 of the present French Code Civil.

I. Limitation of Wife's Capacity—Authorisation Necessary.—Law of France (*a*).—By the *coutume* of Paris, independently of the interest which the husband acquired in the wife's property and of his right to the exclusive administration of it, as well as of that which was in community, the wife became by her marriage completely dependent on him. The maxim of the *coutume* of Arras (*aa*), *feme mariée n'a vouloir, ni nouloir*, prevailed in that of Paris. The wife's civil incapacity was absolute except so far as it was removed by the authority which her husband might confer on her.

The principal distinction between the *coutume* of Paris and the Civil Codes of Lower Canada and St. Lucia and the Code Civil on the one hand, and the common law of England on the other, consists in the nature of that authority and the manner in which it must be granted in order to render her acts valid.

The incapacity of the wife to deal with property or to bind herself or her husband by any contract, or to sue or be sued unless she had obtained his authority, and the species of authority which is required, will be found in the following articles of the Coutume.

Coutume of Paris.—"La femme mariée ne peut vendre, aliener, ni hypothequer ses heritages, sans l'authorité et consentement exprès de son mary. Et si elle fait aucun contract, sans l'authorité et consentement de son dit mary, tel contract est nul, tant pour le regard d'elle, que son dit mary ; et n'en peut être poursuivie, ny ses heritiers, après le décès de son dit mary" (*b*).

"Femme ne peut ester en jugement sans le consentement de son mari, si elle n'est authorisée ou separée par justice, et la dite séparation executée" (*c*).

"Une femme mariée ne se peut obliger sans le consentement de son mari, si elle n'est separée, par effet, ou marchande publique ; auquel cas étant marchande publique, elle s'oblige et son mary touchant le fait et dépendances de la dite marchandise publique" (*d*).

(*a*) Burge, 1st ed., i., 212.

(*aa*) Art. x.

(*b*) Art. ccxxiii. ; Dupless., tit. x., liv. 1, c. iv. In the *pays du droit écrit* the married woman preserved, as regards her paraphernal property, the independence secured to her by the civil law. As to the history of the *puissance maritale* in France, see Baudry-Lacan., ii., p. 69, s. 1410, and p. 670, s. 2175.

(*c*) Dupless., tit. x., liv. 1, c. 4, art. ccxxiv.

(*d*) Dupless., tit. x., liv. 1, c. 4, art. ccxxxiv.

Not only was the wife incapable of selling, alienating, or hypothecating her real estate, of contracting any obligation, or of suing or being sued without the authority of her husband, but under an Ordinance of 1731 she could not, without his authority, take a gift from any person (*e*).

Law of Quebec.—The Code of Lower Canada provides: "A wife, even when not common as to property, cannot give nor accept, alienate nor dispose of property, *inter vivos*, nor otherwise enter into contracts or obligations, unless her husband becomes a party to the deed or gives his consent in writing" (*f*).

A wife may be separate as to property, and that either in consequence of a clause in the ante-nuptial marriage contract, or by a judgment of the Court during the marriage. The result is the same.

"She may do and make alone all acts and contracts connected with the administration of her property" (*g*).

The language of this last provision (art. 1318) as to the effect of a judicial separation seems, at first sight, wider than the one already cited (art. 177).

But it has been held that the wife's freedom, even when separated by judgment, does not extend beyond acts of administration (*h*).

Code Civil.—Under the Civil Code (*i*) a married woman, even if she is not under the *régime* of community, or if she is separated in goods, cannot grant, alienate, hypothecate, or acquire, by gratuitous or onerous title, unless her husband either concurs in the act or consents to it in writing (*k*). This enumeration of disqualifications is not exhaustive. Incapacity is the rule (*l*), and it extends, speaking generally, to all juridical acts of whatever character and however advantageous to the married woman they may appear to be (*m*).

(*e*) Ord. 1731, art. 9; Code Civil, art. 934.

(*f*) C. C. of L.C., art. 177. The article adds "saving the provisions contained in the Act 25 Vict. c. 66." This refers merely to a power given to married women to make deposits in a savings bank.

(*g*) C. C. of L.C., arts. 177, 210, 1318.

(*h*) Lamontagne *v.* Lamontagne (1890), M. L. R. 7 S. C. 162. Cf. Baudry-Lacantinerie, Courtois et Surville, Contrat de Mariage, 2nd ed., v. 3, n. 1498.

(*i*) See arts. 217—224; and cf. art. 1124.

(*k*) Art. 217.

(*l*) Art. 1124.

(*m*) Aubry et Rau, v., p. 141, n. 17, p. 142, n. 18; Baudry-Lacant., ii., 685, s. 2203, pp. 686—688, ss. 2204—2207.

Similarly under the law of Quebec, the incapacity of a wife applies not merely to contracts, but to any other acts by which she might incur obligations or liabilities. She cannot, therefore, accept a succession or act as agent, or in any other situation which would subject her to personal liability, unless she has obtained his authority (*n*).

Suretyship.—The obligation of suretyship under the *Senatus Consultum Velleianum* and the *Authentica si qua mulier* was at first also excluded from a wife's capacity; but the *Senatus Consultum Velleianum* was abolished by the edict of Henry IV., of 1606. But in Normandy, until its *coutume* was abrogated by the Code Civil, not only did it prevail in full force, but it could not be renounced (*o*).

Under the Code Civil it has not been recognised, and art. 1431 assumes that the wife may be bound as a security for her husband It provides that the wife who becomes bound jointly and severally with her husband in respect of affairs in the community, or of her husband, is not deemed bound with regard to the latter, except as security; she may be indemnified against the obligation which she has contracted.

There are similar provisions in the Code of Belgium (*p*).

Acts without Authorisation Null.—The acts of the wife, without the *autorisation maritale*, are not merely voidable, but absolutely null and void; and consequently no proceeding is required to set them aside(*q*).

By the law of Quebec "the want of authorisation of the husband, where it is necessary, constitutes a cause of nullity which nothing can cover, and which may be taken advantage of by all those who have an existing and actual interest in doing so" (*r*).

"**Ester en Jugement.**"—**Law of Quebec.**—"A wife cannot appear in judicial proceedings without her husband or his authorisation, even if she be a public trader or not common as to property; nor can she, when separate as to property, except in matters of simple administration." If the husband be interdicted or absent or refuse

(*n*) Pothier, Traité de la Puis. du Mari, s. 33; C. C. of L.C., arts. 643, 1708.

(*o*) Burge, 1st ed., i., 235, citing Arrêt, October 25th, 1766; Merlin, Rép. tit. Senatusconsulte Velléien., ss. 1, 8; Merville, Cout. Normand. 505, 513; 2 Basnage, art. cccxci.

(*p*) Art. 1431.

(*q*) C. C. of L.C., art. 183; Merlin. Rép. Autoris. Marit. sect. 3, s. 1.

(*r*) C. C. of L.C., art. 183.

his authorisation the judge may give the necessary authorisation, and it may be given at any time before judgment (*s*).

Code Civil.—The language of art. 215 of the Code Civil is almost identical. "The wife cannot *ester en jugement* without the authorisation of her husband, even when she is a *marchande publique* or not under the *régime* of community or separated in goods" (*t*). This authorisation is needed whatever be the jurisdiction before which the proceedings are to come (*u*) (except where the wife is prosecuted in a criminal or police case) (*x*), whatever be the capacity in which she appears (*y*), and even if her husband is the adverse party (*a*), and the proceedings are an action for nullity (*a*).

But the wife has no need of the husband's authorisation for the initial procedure in *séparation de corps* or divorce, though she requires that of the Court before being able to continue it (*b*).

It is a rule of public policy that the husband must be joined in any action against the wife. Consequently when a judgment has been obtained against her without so joining him in a foreign country the French Courts will not grant *exequatur* of such judgment (*c*).

In the case of foreigners the general opinion seems to be that the rule as to the marital authorisation and as to joining the husband should be governed by the national law, so that an English married woman might sue or be sued alone in France, but the point does not appear to have yet been determined by the highest Court (*d*).

The authorisation of the husband to plead is not subject to any particular form, and may be express or tacit (*e*).

(*s*) C. C. of L.C., art. 176, 178, 180; Englar *v.* Rosenbloom, 1909, R. J. 2; 35 S. C. 428.

(*t*) Since the law of February 6th, 1893, a woman, who is judicially separated, resumes the full exercise of her civil capacity.

(*u*) Aubry et Rau, ii., p. 139, n. 6; Demolombe, iv., pp. 149, 150, ss. 128, 130.

(*x*) Art. 216. It has been held in Mauritius that the husband, by virtue of his *puissance maritale*, can prosecute for all offences committed to the prejudice of his wife: Anicet *v.* Boudon (1903), Dec. S. C. 1903.

(*y*) Aubry et Rau, v., 139; Laurent, D. C. F., iii., 136, s. 102.

(*a*) Baudry-Lacant., ii., 677, ss. 2186, 2187, and authorities collected in nn. (1), (2), (3).

(*b*) Code Proc. Civ., art. 875.

(*c*) Barnes c. de Montmort, 1902, J., p. 116.

(*d*) See 1882, J., p. 619; 1880, J., 151, 187—191; and 1885, p. 386, article by M. Feraud-Giraud, a councillor of the Court of Cassation; 1888, J., p. 138; Vincent and Penaud, Dict. de Droit Int. Privé, pp. 769 *et seq.*

(*e*) Pandectes Françaises, Mariage, p. 197.

Certain conservatory acts do not require to be authorised, and a married woman may cause a valid notice, protest, attachment, or act to interrupt prescription to be served in her own name. So also she may put in "opposition" to a default judgment, or apply *en référé* (before a Judge in Chambers) (*f*). Similarly, notices and acts importing conservatory measures may be served on the wife without joining the husband (*g*).

Where Married Woman is Bound without Authorisation.—The married woman is, however, bound, without any authorisation by her husband, by obligations arising by operation of law independent of her personal capacity (*h*). Thus, she is bound by all the duties incidental to a guardianship which has devolved upon her (*i*); she is subject to the rule *nul ne doit s'enrichir au détriment d'autrui* (*k*); the *negotiorum gestor* has a claim upon her (*l*); she is responsible for her delicts or *quasi*-delicts (*m*); she has the right, without authorisation, to see to the inscription of her legal hypothec (*n*), to exercise all her rights in regard to her children (*o*), to revoke donations *inter viros* made by her husband during the marriage (*p*), and to make her will (*q*).

She may recognise a natural child born before marriage (*a*), apply for a patent, and acquire property by accretion (*b*), by occupation (*c*), and by prescription (*d*).

Ante-Nuptial Obligations, under the Coutumes.—In order to prevent the wife from evading the law by dating an obligation as of a period anterior to her marriage, although executed by her after her marriage, her obligation, *sous seing-privé*, is not sufficient to charge the husband or his heirs, unless besides the date there are other

(*f*) Code of Civil Proc., art. 809.

(*g*) Pandectes Françaises, Mariage, pp. 195, 203.

(*h*) Pothier, Puiss. du Mari, s. 50; Aubry et Rau, v., 142, s. 472, n. 20; Laurent, D. C. F., iii., 133, s. 100.

(*i*) Demolombe, iv., 210, s. 176.

(*k*) Aubry et Rau, *ad loc. cit.*, p. 143, n. 23; Demolombe, iv., 211, s. 177.

(*l*) Laurent, iii., 134, s. 101.

(*m*) Pothier, *ad loc. cit.*, s. 52; Aubry et Rau, *ad loc. cit.*, p. 143, n. 24; Société Générale *v.* Lasserre (1885), Dalloz, 1886, i., 147.

(*n*) Code Civil, art. 2194.

(*o*) See arts. 148, 337, 346, 377.

(*p*) Art. 1096.

(*q*) Arts. 226, 905. The powers, above enumerated, have been extended by special legislation, *e.g.*, a law of July 20th, 1895, art. 16, entitles a married woman to invest money in the savings banks (*caisse d'épargne*) without her husband's authorisation.

(*a*) Code Civil, art. 337.

(*b*) Art. 546.

(*c*) Arts. 712 *et seq.*

(*d*) Art. 2219.

circumstances which furnish proof of its having been really given before the marriage (*e*).

Under the Code Civil and Law of Quebec.—The Code Civil and the Civil Code of Lower Canada ordain that the estate in community shall not be charged with personal debts contracted by the wife before marriage, except so far as they result from an authentic act anterior to marriage, or as they have received before that event a certain date, either by registration or by the decease of one or more of those who signed the said act (*f*).

The Province of Quebec allows " other sufficient proof " of the date of the wife's debt, and in commercial matters it may be by parole (*g*).

The creditor of the wife cannot, by virtue of an act which has not received a certain date before the marriage, sue for payment of his debt against her, except with respect to her reversionary interest, *la nue propriété*, in her personal immovables (*h*). This right to sue against the *nue propriété* does not exist in Quebec (*i*).

The husband who alleges that he has paid for his wife a debt of this nature cannot demand compensation therefor, either from his wife or from her heirs (*h*).

Collateral Security for Wife's Obligation.—The Province of Quebec retains the old French law, under which not only is the obligation of the wife without the previous authority of the husband void, but any collateral security given by a third person for its performance is also void (*k*). The French Code is different. It provides that the nullity founded upon the want of the husband's authority can be pleaded only by the wife and the husband, or by their heirs (*l*).

(*e*) Burge, 1st ed., i., 213, citing Lebrun, de la Comm., liv. ii., c. 1, s. 5, n. 16; Pothier, Traité de la Comm., ss. 259, 260; Merlin, Rép., tit. Autoris. Marit., s. 4; Toullier, xii., p. 332.

(*f*) Code Civil, art. 1410; and see art. 1328.

(*g*) C. C. of L.C., art. 1281.

(*h*) C. C., art. 1410; C. C. of L.C., art. 1281.

(*i*) Comm. Rep., ii., 209.

(*k*) Burge, 1st ed., i., 214, citing Voet, lib. xlvi., tit. 1, de Fide jussoribus, n. 10; A. Wesel, de Connub. Societ. Tr., ii., c. 1, n. 120; Lebrun, de la Comm., liv. ii., c. 1, s. 5, n. 16; Pothier, Traité des Oblig., s. 395; Domat, liv. iii., iv., tit. des Cautions, s. i., n. 4; Bouhier, c. xix., n. 35. See C. C. of L.C., arts. 183, 1932; Pothier, Introd. au Coutume d'Orleans, tit. 20, n. 25; Nouv. Denisart, vol. Hypothèque, pp. 745—748, 774. See Venner *v.* Lortie (1876), 1 Q. L. R. 234; Lamontagne *v.* Lamontagne (1890), M. L. R. 7 S. C. 162.

(*l*) Art. 225.

But if the security, instead of being given simply for the performance of the obligation, contains an engagement on the part of the surety that he would indemnify the obligee, in case it were disputed, it would be valid and might been forced (*m*). And the same rule applies when the surety is bound jointly and severally (*n*).

The principle is that security can only exist in a valid obligation. A party may, nevertheless, guarantee an obligation, although it may be annulled by an exception purely personal to the party bound; for example, in the case of minority (*o*).

Position of Surety.—The surety may oppose to the creditor all the objections which appertain to the principal debtor, and which are inherent in the debt. But he cannot oppose objections which are purely personal to the debtor (*p*).

Husband's Power of Authorisation.—Minority of Husband.—In Quebec, as by the old French law, so completely is the authority attached to the relation of husband, that it may be granted by him, notwithstanding he is a minor. Being emancipated by marriage, he can authorise his wife, though a minor, not only *pour les actes de simple administration*, but even to make alienations (*q*). If, however, the husband sustained any prejudice from those alienations, he would be entitled to the relief which is afforded to unmarried minors in similar cases (*r*).

So notwithstanding his minority he may give her authority *pour ester en jugement* (*s*).

In St. Lucia a husband, although a minor, may in all cases authorise his wife who is of age; if the wife be a minor, the authorisation of her husband, whether he is of age or a minor, is sufficient for those cases only in which an emancipated minor might act alone (*t*).

But by the Code Civil, if the husband be a minor, an authority

(*m*) Burge, 1st ed., i., 214, citing authorities in note (*k*), and Merlin, Rép., tit. Autoris. Marit., sect. 4, s. 3.

(*n*) Pothier, Obligations, n. 395; Planiol, Traité Elémentaire de Droit Civil, 2nd ed., ii., nn. 2331, 2352; Baudry-Lacantinerie et Wahl, Contrats Aléatoires, &c., nn. 919, 920; Norris *v.* Condon (1888), 14 Q. L. R. 184.

(*o*) Code Civil, art. 2012; C. C. of L.C., art. 1932.

(*p*) Code Civil, art. 2036; C. C. of L.C., art. 1958.

(*q*) C. C. of L.C., art. 182.

(*r*) Burge, 1st ed., i., 215, citing Merlin, Autoris. Marit., sect. 5, s. 1; Pothier, Introd. au tit. 10 de la Comm., n. 151; and see Pothier, Puissance du Mari, n. 30.

(*s*) *Ibid.*; C. C. of L.C., art. 182.

(*t*) Art. 152, C. C. St. Lucia.

from the Court is in all cases necessary to enable the wife either to bring or defend suits or to make binding contracts (*u*).

Minority of Wife.—By the law of the Province of Quebec, if the wife be a minor as well as the husband, the latter can invest her with authority only for such acts as an emancipated minor can perform alone (*x*). It would be necessary to procure the appointment of a curator in respect of acts which related to property in immovable or real estate. If the husband had attained his majority he would himself sustain the character and office of her curator (*y*).

Form of Authorisation.—The term "*autoriser*" or authorise, was, under the old law, considered the proper expression to be used in the grant of the authority, and the term "*habiliter*" was not equivalent to it (*z*).

Neither the presence of the husband when the act was done, nor his signing it, was a sufficient authorisation under the *coutume* of Paris (*a*).

By the law of Quebec the use of the word "authorise" is not essential. In contracts it is sufficient that the husband becomes a party to the deed or gives his consent in writing (*b*). In judicial proceedings the article says: "A wife cannot appear without her husband or his authorisation" (*c*). There must either be a written authorisation produced by the wife, or else the husband must be made a party to the cause. If the wife is the defendant the plaintiff must serve a separate writ of summons upon the husband.

It is not sufficient that the husband is physically present at the trial, or that he gives instructions to the wife's attorney. His written authorisation must be produced or he must be a party to the cause. For otherwise he escapes from the jurisdiction of the Court (*d*).

General or Express Authorisation.—Even when the husband is a party to the act and takes a benefit under it, and therefore may be presumed to give the authority essential to its validity, it has been

(*u*) Art. 224.

(*x*) C. C. of L.C., art. 182.

(*y*) Burge, 1st ed., i., 215; Pothier, Introd. au tit. 7 de la Comm., n. 152.

(*z*) Burge, 1st ed., i., 215, citing Pothier, Introd. au tit. 10, n. 145; Ricard, Traité du Don Mutuel, c. iii., n. 60; Lebrun, de la Comm., liv. ii., c. 1, s. 3; Bourjon, Droit Comm. de la France, liv. ii., c. 1, s. 3, n. 31.

(*a*) *Ibid.*

(*b*) C. C. of L.C., art. 177; Kearney v. Gervais (1893), R. J. Q. 3 S. C. 496.

(*c*) C. C. of L.C., art. 176.

(*d*) Thibaudeau v. Désilets (1901), R. J. Q. 10 K. B. 183.

decided that his express authority for the specific act cannot be dispensed with (*e*).

Coutume of Paris.—It has been considered that the *coutume* of Paris requires that the wife should have an express special authority from her husband for the particular act if it relates to the alienation by sale, hypothecation, &c. of immovable property and that a general authority to make alienations, &c., is insufficient (*f*).

Code Civil.—The Code Civil and the Civil Code of Lower Canada do not in this respect adopt the strictness of the *coutume* of Paris (*g*). The concurrence of the husband in the transaction, or his consent in writing, is sufficient to give it validity (*h*). The wife, even though she be not under community of goods or even though she enjoy separate property, whether by stipulation in the marriage contract or by reason of a subsequent judicial separation in goods, is not competent to give, alienate, or mortgage, or acquire property, either by gift or purchase, without the actual concurrence of her husband in the transaction or without his consent in writing (*i*).

The Code of Lower Canada is somewhat fuller. It expressly declares that the wife cannot enter into contracts or obligations unless the husband becomes a party to the deed or gives his consent in writing (*k*). And it goes on to say, "If, however, she be separate as to property, she may do and make alone all acts and contracts connected with the administration of her property."

But there is no difference in either respect between the law of France and that of Quebec. The difference is merely in expression (*l*).

A general authority by the husband to the wife *à administrer ses biens* will enable her to do those acts which are within the limits of that authority, but will give her no power to make any disposition

(*e*) Burge, 1st ed., i., 216, citing Merlin, Rép., tit. Autoris. Marit., sect. 6, s. 2.

(*f*) Burge, 1st ed., i., 215, citing Pothier, Introd. au tit. 10 de la Comm., s. 146; Merlin, Rép., tit. Autoris. Marit., sect. 6, s. 2, art. 1.

(*g*) See all the recent authorities on this point collected and discussed in Baudry-Lacant., ii., 697, s. 2228.

(*h*) Thomas *v.* Ancouturier (1893), Sirey, 1893, i., 183. Special facilities for the giving of marital authorisation by soldiers and sailors in time of war are created by a law of June 8th, 1893.

(*i*) Code Civil, art. 217; C. C. of L.C., art. 177. See, further, as to the old law, Baudry-Lacant., ii., 710, 711, s. 2243; Pivert *v.* Layet et Turc (1898), Sirey, 1898, i., 400; Clauzonnier *v.* Borello (1902), Sirey, 1903, i., 88.

(*k*) C. C. of L. C., art. 177. The words 'saving the provisions contained in the Act 25 Vict. c. 66," refer merely to power to make deposits in a savings bank.

(*l*) See Planiol, Traité Elémentaire de Droit Civil, iii., 4th, nn. 953, 1445 and cf. Code Civil, arts. 1449, 1536.

by sale, pledge, or other alienation of immovables (*m*). Neither will any general power of disposition contained in the settlement made on her marriage be sufficient (*n*).

By the Code Civil, also, a general authority granted by a husband to his wife to sue or to contract, even though stipulated by marriage contract, is valid so far only as it may affect the administration of the wife's property (*o*). This is also the law of St. Lucia (*p*).

It is not essential that the authority required by the *coutume* of Paris and Codes of France and Lower Canada should be given *in ipso negotio*. It may be given previously, but the *feme* should recite the authority in the act, and express therein that she acts by virtue of that authority (*q*).

Authorisation by Ratification.—Where the previous or cotemporaneous authority of the husband has been wanting the act will derive no validity from his authority given subsequently or from a ratification by the wife after she has become a widow (*r*).

The Code Civil, by reserving only to the wife, the husband, and their respective heirs the power of pleading the invalidity of any transaction, on the ground of the authority required by law being wanted, gives effect to a subsequent ratification (*s*).

But the ratification must be by the husband and wife together. If it is by the wife only, it is no better than the original act. If it is by the wife authorised by the Judge, the husband's right of challenge remains. If it is by the husband, the wife or her heirs have still the right of challenge.

(*m*) Pothier, Traité de la Puissance du Mari, ss. 67, 68; Lamontagne *v.* Lamontagne (1890), M. L. R. 7 S. C. 162.

(*n*) C. C. of L.C., art. 181; Pothier, *ibid.*, s. 67; Merlin, Rép. Autoris. Marit., sect. 6, s. 2.

(*o*) Code Civil, art. 223. And see art. 1538.

(*p*) C. C., art. 151.

(*q*) Burge, 1st ed., i., 217, citing Pothier, Introd. au tit. 10 de la Comm., s. 147; Merlin, Rép., tit. Autoris. Marit., sect. 6, arts. 2, 3. As to the degree of particularity required, see Aubry et Rau, v., pp. 153 *et seq.*; Demolombe, iv., pp. 237 *et seq.*, ss. 207 *et seq.*; Laurent, iii., 146, s. 113; Baudry-Lacant., ii., pp. 712 *et seq.*, ss. 2245 *et seq.*

(*r*) Burge, 1st ed., i., 217; Merlin, Rép., tit. Autoris. Marit., sect. 6, s. 2, art. 3; Lebrun, liv. ii., c. 2, s. 5; Code Civil, art. 217; Lamontagne *v.* Lamontagne (1890), M. L. R. 7 S. C. 162; Peloquin *v.* Cardinal (1893), R. J. Q. 3 Q. B. 10; Mignault, Droit Civil Canadien, i., 548.

(*s*) Art. 225. As to whether creditors or assigns have the right to plead nullity on the ground of want of authorisation, see Baudry-Lacan., ii., 786, s. 2348; and authorities collected in n. (2).

The last proposition is not admitted by all writers (*t*).

A ratification by the wife, after she has become sole, will give validity to an act originally void from the want of the husband's authority (*u*).

But in Quebec the act is an absolute nullity. *C'est le néant, et on ne ratifie pas le néant* (*x*).

Judicial Authorisation.—If the husband be absent from the country, or if the wife has no certain knowledge of his being alive, or if he be interdicted, the authority which she requires for all those acts which are not *actes de simple administration* must be supplied by the judicial tribunal of the husband's domicil. Amongst acts of this description may be enumerated the employment, dismissal, and payment of servants, the expenses of housekeeping, the receipt of rents, the making necessary and useful repairs, &c. (*y*).

Revocation of Authorisation.—The husband may revoke his authorisation (*z*), and, *semble*, even the authorisation of justice when it proceeded on the ground of his absence or incapacity, after his return, or recovery of capacity (*a*). He cannot, however, set aside a judicial authorisation granted in consequence of the refusal of his own (*b*).

II. **Husband's Marital Power: Limitations.**—The necessity for the husband's authority to render the wife's acts valid is founded on the marital power, and not on the interest which he acquires in the property which is under his administration. This authority is required, although they should not be subject to the community, and if there be a separation of their respective estates, it is still necessary for the wife to obtain the husband's authority for all acts, except those which are of mere administration and management (*c*).

Effect of Séparation de Biens and Séparation de Corps.—The exception in the *coutume* of Paris, *si elle n'est séparée par effet*,

(*t*) Larombière, Obligations, sur l'art. 1338, n. 18; Baudry-Lacantinerie, Précis de Droit Civil, 6th ed., i., n. 652; Planiol, Traité Elémentaire de Droit Civil, iii., n. 324.

(*u*) Burge, 1st ed., i., 217, citing Merlin, Rép., tit. Autoris. Marit., sect. 9.

(*x*) Lamontagne *v.* Lamontagne, *ubi supra*; C. C. of L.C., art. 183.

(*y*) Burge, 1st ed., i., 217, citing Pothier, Traité de la Puis. du Mari, s. 50; Merlin, Rép., tit. Autoris. Marit., sect. 7; Code Civil, art. 222; C. C. of L.C., art. 180.

(*z*) Demolombe, iv., 417, ss. 322, 324; Baudry-Lacant., ii., 780, s. 2337; Lisbonne *v.* Daubèze (1873), C. Bordeaux, Sirey, 1874, ii., 193.

(*a*) Aubry et Rau, v., 158, n. 88; Demolombe, iv., 419, s. 325.

(*b*) Aubry et Rau, v., 159, n. 89.

(*c*) Pothier, Traité de la Puis. du Mari, s. 15.

does not give to the wife the power of alienating immovable property, even if she has been separated from her husband, *par séparation de biens*, or *de corps*, but enables her to act without his authority in matters which involve the mere ordinary administration or management of her estate; and the sentence of separation will be ineffectual, even for the latter purpose, if it has not been executed; or, in the language of the article, *si elle n'est séparée par effet*. The wife enjoys only this limited capacity, notwithstanding the separation imports a *séparation de corps* (*d*).

In St. Lucia separation from bed and board renders the wife capable of suing and being sued, and of contracting alone for all that relates to the administration of her property, but for all acts and suits tending to alienate her immovable property she requires the authorisation of the Judge (*e*).

By the Code Civil and by the Code of Lower Canada the wife separated, either in body and goods, or in goods only, regains the uncontrolled government thereof. She may dispose of her movables and alienate them. The wife, separated in goods, cannot alienate her immovables without the consent of her husband or without being thereto authorised by the Court on his refusal (*f*).

But in saying she may dispose of her moveables it is not meant that she may dispose of the capital. It is only as to acts of administration that she has unlimited power (*g*). A judgment of separation has no effect until it has been carried into execution (*h*).

Scope of Wife's Implied Authority.—General Authority to Alienate Immovables Null.—In no case, nor by virtue of any stipulation, can the wife alienate her immovables without the special consent of her husband, or upon his refusal, without being authorised by the Court. Every general authority granted to the wife of alienating immovables, either by the marriage contract, or subsequently, is null (*i*).

(*d*) See p. 301. Merlin, Rép., tit. Autoris. Marit., sect. 7.

(*e*) Code of St. Lucia, art. 178.

(*f*) Art. 1449. Under the law of February 6th, 1893, which replaces the former art. 311 of the Civil Code, the wife, when *separée de corps*, resumes the full exercise of her civil liberty; C. C. of L.C., arts. 1318, 210.

(*g*) Guillouard, Contrat de Mariage, 3rd ed., iii., n. 1193; Baudry-Lacantinerie, Courtois et Surville, Contrat de Mariage, 2nd ed., iii., n. 1498; Lamontagne *v.* Lamontagne (1890), M. L. R. 7 S. C. 162; Mignault, vol. 6, p. 395. See pp. 309, 310, *supra*.

(*h*) Code Civil, art. 1444; Civil Code, L.C., art. 1312.

(*i*) Art. 1538; C. C. of L.C., arts. 181, 1318.

The Code of St. Lucia (dealing with the clause of separation of property in marriage covenants) makes a similar provision (*k*).

Marchande Publique.—The *coutume* of Paris enables the wife who is a *marchande publique* to make a binding contract *touchant le fait et dépendance de la dite marchandise.*

"La femme marchande publique se peut obliger sans son mari, touchant le fait et dépendance de la dite marchandise" (*l*).

The Civil Code of Lower Canada retains the old law, and provides, "A wife who is a public trader may, without the authorisation of her husband, obligate herself for all that relates to her commerce, and in such case she also binds her husband if there be community between them. She cannot become a public trader without such authorisation express or implied" (*m*).

The Code of St. Lucia, by an identical provision, allows a public trader to obligate herself (*n*).

Definition of "Marchande Publique."—The following article of the Coutume contains the definition of a *marchande publique*, who may avail herself of the preceding article of the Coutume:

"La femme n'est reputée marchande publique pour débiter la marchandise, dont son mari se mêle; mais est reputée marchande publique, quand elle fait marchandise séparée, et autre que celle de son mari" (*o*).

The trade must be carried on by herself, on her own separate account, and the husband must have no participation in it.

In Quebec, if she is separate as to property she must, before entering into business, be placed upon a register (*p*).

This registration removes to a great extent the difficulty which existed in the old law, and still exists in France, of determining in some cases whether the business is truly that of the wife and not that of the husband (*q*).

Her capacity to contract without the intervention of the husband is expressly limited by these provisions to transactions exclusively relating to the particular trade in which she is engaged.

(*k*) Art. 1337.

(*l*) Burge, 1st ed., i., 219, citing Dupless., tit. x., liv. 1, c. 4, art. ccxxxvi.

(*m*) C. C. of L. C., art. 179.

(*n*) Art. 149.

(*o*) Dupless., tit. x., liv. 1, c. 4, art. ccxxxv.

(*p*) R. S. Q. 5502 a; 60 Vict. c. 49, s. 13 (Queb.).

(*q*) Baudry-Lacantinerie et Hougues-Fourcade, Personnes, 2nd ed., ii., n. 225.

The Code Civil has provided for the case of a married woman, being a trader, by the following article:

"If the wife be a public trader, she shall be competent to contract in matters relating to her trade, without being authorised by her husband, and in such case she also binds her husband, provided there exist community of goods between them.

"She shall not be reputed a public trader if she only retail, in the course of business, articles of merchandise belonging to her husband, without carrying on a separate trade on her own account" (*r*).

The capacity which the wife derives from this cause is founded on the presumption that she could not carry on trade publicly without the knowledge and permission of her husband, and this permission is equivalent to an authority from him (*s*).

Having invested her with authority for carrying on the trade, he is presumed to have given her authority to do all those acts, and contract those engagements which are requisite for that purpose (*t*).

Wife's Domestic Agency.—Coutume of Paris.—The *coutume* of Paris and the law of Quebec do not prevent the wife from contracting for the necessaries required for the domestic establishment of her husband's family. The husband, by committing to her the superintendence of their domestic concerns, gives her an implied authority, and constitutes her his agent to contract for such necessaries as are suited to their station. On such occasions she incurs no personal liability, because she is acting as the agent of her husband (*a*).

It is the duty of the husband, if the wife, acting under this implied authority, exceeds the expenditure which he is disposed to sanction, to give notice to the tradesmen not to give her further credit (*b*).

(*r*) Code Civil, art. 220; Code de Comm., art. 4. See on this subject, Aubry et Rau, v., pp. 155 *et seq.*; Demolombe, iv., pp. 232 *et seq.*, ss. 199 *et seq.*; Laurent, iii., pp. 151 *et seq.*, ss. 116 *et seq.*; Baudry-Lacant., ii., pp. 720 *et seq.*, ss. 2255 *et seq.* The acts of a married woman, being a *marchande publique*, are presumed to be *actes de commerce*. Cf. Code de Comm., art. 638; and see Baudry-Lacant., ii., 736, s. 2276. But the presumption may be rebutted: Demolombe, v., s. 302.

(*s*) The question whether authority has been given is one for the appreciation of the legal tribunals: Laporte *v.* Cotel (1897), Sirey, 1897, i., 352.

(*t*) Pothier, Puissance du Mari, nn. 21, 22; Baudry-Lacantinerie et Hougues-Fourcade, Personnes, 2nd ed., ii., n. 2255.

(*a*) Merlin, Rép., tit. Autoris. Marit., sect. 7, s. 7; Lebrun, de la Comm., liv. ii., c. 2, sect. 2, s. 6; Brown *v.* Guy (1881), 5 L. N. 111; Piché *v.* Morse (1898), 15 R. J. S. C. 306.

(*b*) Merlin, *ubi cit. sup.*; Aubry et Rau, Cours de Droit Civil, 4th ed., v., 341, s. 509; Guillouard, Contrat de Mariage, 3rd ed., ii., n. 866.

If the wife has exceeded her authority she is liable in respect of the effects she has received; and even the husband will be liable if he has had the benefit of them. So, although the wife has no authority to receive payment of a debt, yet if she has delivered it to the husband, or, if it has been applied to the benefit of the community, the payment is valid, and the debtor is discharged (*c*).

The wife may be constituted the agent of the husband by an express mandate or she may be competent to charge him, by means of that implied authority which she derives from his having been accustomed to pay similar debts previously contracted by her, or to give receipts for sums paid to the wife (*d*).

Code Civil.—In the matter of domestic administration the wife under the Code Civil is considered to have a tacit authorisation from the husband to purchase such provisions and goods as may be necessary for the household wants. But it is as his agent that she is presumed to contract. Generally speaking, the husband is bound personally to pay for dress, ornaments, and luxuries suitable to the social and pecuniary position of the family (*e*). But he will not be bound to pay for excessive supplies or purely sumptuary expenditure (*f*), or where the tradesman has accepted the wife as sole debtor (*g*). Whether the orders given by the wife are exaggerated or not is a question of fact to be decided by the Judge on the circumstances of each case. The husband may revoke the tacit mandate which the wife is supposed to possess for the purchase of necessaries in several ways. He may give individual notice to tradesmen not to accept the wife's orders, or he may cause an advertisement to be published in the press, though it will be for the Court to judge whether such advertisement has come to the knowledge of the tradesman (*h*). Where the wife is residing in France and her husband is domiciled abroad, she may validly be sued for the price of goods purchased by her (*i*). And where the wife is living apart and the husband makes

(*c*) Burge, 1st ed., i., 220, citing Lebrun, de la Comm., liv. iii., c. 1; Merlin, Rép., tit. Autoris. Marit., sect. 7; C. C. of L.C., art. 1011.

(*d*) Burge, 1st ed., i., 220, citing Merlin, Rép., tit. Autoris. Marit., sect. 7; C. C. of L.C., art. 1291.

(*e*) Cass., July 16th, 1889, s. 90, i., 115; Pandectes Françaises, tit. Mariage, pp. 536 *et seq.*

(*f*) *Ibid.*, p. 538.

(*g*) Gaz. Pal., 93, i., 164.

(*h*) Pandectes Françaises, Mariage, p. 538; Poitiers, December 23rd, 1889, D. 90, 2, 359, and D. 1902, 2, 133.

(*i*) Vincent *v.* Trousseau, Gaz. Pal., 88, i., 707.

her an allowance for her needs, no action will lie against him, for it is for the tradesmen to inquire what is the wife's situation (*k*), nor will the husband be responsible for debts incurred by the wife who has left the conjugal domicil against his will, such conduct implying a revocation of his tacit mandate (*l*). But, so far as the husband would have been liable for aliment, he may be bound towards a tradesman in good faith who was not aware of the circumstances (*m*). The wife will remain personally liable, to the extent to which the husband is exonerated, for goods ordered by her if she has realised any advantage from them (*n*). Neither the husband nor the community will be liable for the wife's *quasi*-contracts or for her torts (delicts or *quasi*-delicts) unless in so far as the husband may have participated or authorised or ratified the acts in question (*o*). The only remedy is against any separate estate she may possess. In the case of a married woman being a foreigner the liability of the husband or wife will be measured by the national law of the parties (*p*). The Court of Cassation has, however, laid it down that when transactions take place in France between a Frenchman and foreigner the Frenchman may be excused from making strict inquiry into the capacity of the former. It suffices in such cases that the Frenchman should have acted not inconsiderately, without imprudence and in good faith" (*q*).

The wife cannot bind herself, nor engage the property of the community, even to free her husband from prison, or for the establishment of their children, in case of her husband's absence, until she shall have been thereto authorised by law (*r*).

The Code Civil and the Civil Code of Lower Canada and the Civil Code of St. Lucia provide that when minors, interdicted persons, or married women, are admitted in such capacities to obtain relief against their engagements, the reimbursement of what, in consequence of such engagements, shall have been paid during minority, interdiction, or marriage, cannot be exacted from them, unless it be proved that what has been paid has turned to their advantage (*s*).

(*k*) Sirey, 74, ii., 169; Dall., 75, ii., 41.

(*l*) Pandectes Françaises, tit. Mariage, p. 540.

(*m*) *Ibid.*, p. 540.

(*n*) *Ibid.*, p. 540.

(*o*) *Ibid.*, p. 542.

(*p*) Redfern *v.* Digley, Court of Appeal of Paris, 1900, J. p. 139.

(*q*) S. 61, i., 305.

(*r*) Code Civil, art. 1427; C. C. of L.C., art. 1297; St. Lucia Code, art. 1215.

(*s*) Code Civil, art. 1312; C. C. of

Payment made to the creditor is not valid if he were incapable of receiving it, unless the debtor can prove that the thing paid has turned to the benefit of the creditor (*t*).

Whether Wife, or Marchande Publique, could Sue or be Sued.—In the old law, jurists have considered that the wife, as incident to the implied authority she derives from being *une marchande publique*, might sue and be sued as a *feme sole* (*a*), but the contrary opinion is now laid down by the Code of Lower Canada and is in conformity with the Code Civil (*b*).

But, in Quebec, when the married woman trader is separate as to property it has been held that she may sue and be sued without authorisation so far as the act upon which the suit is founded was an act of administration relating to her business (*c*).

As the wife has not, under the *coutume* of Paris, the Code Civil, and the Civil Code of Lower Canada, a *persona standi in judicio* without the authority of her husband, a suit, which had been instituted by or against her before her marriage, cannot be afterwards prosecuted without that authority (*d*). But his authority is inferred if he join with her in the suit (*e*).

When the authority of the husband, for the purpose of enabling the wife to execute acts which regard her interests, unconnected with any suit (*actes extrajudiciares*) or acts connected with the prosecution or defence of any suit (*actes judiciares*), cannot be obtained, in consequence of his absence, mental incapacity, or refusal, the *coutume* of Paris (*f*) enabled the Judge to grant the requisite authority. The *coutume* did not limit the authority merely

L.C., art. 1011; C. C. of St. Lucia, art. 943.

(*t*) Code Civil, art. 1241; C. C. of L.C., art. 1146.

(*a*) Burge, 1st ed., i., 221, citing Chassenæus, ad Consuet. Burgund., Rub. iv., s. 1; Boerius, Coutumes de Berry, tit. 1, art. iv.; Choppin, de Moribus Paris, lib. ii., tit. 1, n. 6; Mevius, ad Jus. Lub., lib. i., tit. 7, art. 9; Peckius, de Jure sistendi, c. 5, n. 14.

(*b*) C. C. of L. C., art. 176; Code Civil, art. 215. See Burge, 1st ed., i., 221, citing Rodenburg, de Jure Conjug., tit. iii., c. 1, n. xviii.; Voet, ad Pand., lib. v., tit. i., n. 15; Merlin, Rép. tit., Autoris. Marit., sect. 7.

(*c*) Methot *v.* Dunn (1884), M. L. R. 1 S. C. 224; 12 R. L. 634; Guy *v.* Dagenais (1896), R. J. Q. 9 S. C. 44. But see Young *v.* Feehan (1813), 2 R. de L. 437.

(*d*) Code of Civ. Proc., Prov. of Quebec, arts. 266—270.

(*e*) Burge, 1st ed., i., 222, citing Arrêts, Parl., Paris, Juin, 1603; 13 Mai, 1702; 28 Juin, 1711; Arrêt, Parl. de Flandre, 22 Nov., 1696; Pothier, Traité de la Puiss. du Mari, s. 56; Baudry-Lacant., ii., 709, s. 2242; but see Code Civ. Proc., Quebec, art. 270.

(*f*) Art. 218; Burge, 1st ed., i., 222.

to *actes judiciares*. The husband might grant it for any contract or alienation (*g*).

The Code Civil and the Civil Code of Lower Canada adopt the principle of this article and the construction which it had received (*h*).

As regards the wife, authorisation, whether granted by her husband or by the Court, renders her as capable as if she had not been married (*i*).

Effect of Authority of Court.—The authority conferred by the Court has not the effect of depriving the wife of the right of rescinding contracts on the same grounds which would have been competent to her in any other case of *lesion* (*k*).

The authority derived from the Court, as well as from the husband, is limited to the special act for which it was granted. But an authority, *pour plaider*, extends to the execution of the judgment, and even to *actes extrajudiciares*, as division, &c. (*l*).

If the suit be against the wife and she will not herself apply to the Court for an authority to enable her to defend, the adverse party may obtain it, and unless he does obtain it the judgment is void (*m*).

The effect of an authority granted by the husband is different from that of an authority granted by the Court. When it is granted by the former, and the spouses are under the *régime* of community (*n*), the community is chargeable with the consequences of the act (*o*).

(*g*) Burge, 1st ed., i., 222, citing Arrêt, April 28th, 1722; Bouhier, c. xvii.

(*h*) Arts. 218 (refusal of authorisation *ester en jugement*), 219 (refusal of authorisation to do an act), 221 (conviction involving *peine afflictive ou infamante*), 222 (interdiction or absence), 224 (minority). As to procedure, see Code Procéd. Civ., arts. 861—864. As to whether the detention of the husband in an asylum under the law of June 30th, 1838, is a ground for an application for judicial authorisation, there is some controversy: see Demolombe, iv., 267, s. 225; Aubry et Rau, v., 147, n. 40; Baudry-Lacant., ii., 744, s. 2284.

(*i*) Pothier, Tr. de Mar., s. 76; Aubry et Rau, v., 159, n. 91; Laurent, iii., 178, s. 142; Baudry-Lacant., ii., 766, s. 2310.

(*k*) Merlin, Rép., tit. Autoris. Marit., sect. 8, s. 4.

(*l*) Burge, 1st ed., i., 222, citing Arrêt, April 26th, 1722; Merlin, *ibid.*

(*m*) Merlin, *ibid.*

(*n*) In the absence of such matrimonial convention, the husband is not bound as a result of his authorisation: Baudry-Lacant., ii., 777, s. 2328.

(*o*) Code Civil, arts. 220 (a particular application of this rule to the case where the wife is a *marchande publique*), 1409 (2), 1419. For Quebec, C. C. of L.C., arts. 1280, 1290; Augé *v.* Daoust (1893), R. J. Q. 4 S. C. 113; Mignault, Droit Civ. Canad., i., 547.

When it is granted by the latter, it produces no effects as against the husband (*p*).

Termination of Marital Power.—The marital power, like every other civil right, ceases when the husband has forfeited his civil status. The wife is then capable of acting in every respect as a *feme sole*, and does not require the authority of the Judge (*q*).

When the husband shall be affected by a judicial sentence subjecting him to any punishment by law declared infamous, even though it be a sentence by contumacy only, the wife, although of full age, cannot, during the period prescribed for such punishment, either bring or defend suits or make contracts, unless she shall have sued out an authority for that purpose from the Judge, who in such case shall have power to grant the authority without hearing or summoning the husband (*r*).

This provision does not exist in the law of Lower Canada; but by the Act 6 Edw. VII. c. 38, a husband condemned to death or to perpetual personal punishment is in a state of interdiction.

Personal Rights and Duties of Spouses.—By the Codes of France, Lower Canada, and St. Lucia it is provided that the husband and wife owe each other fidelity, succour and assistance. The husband has a duty to protect the wife, and the wife to obey the husband. The wife is bound to live with the husband and follow him wherever he chooses to reside, and the husband is bound to receive her according to his means and condition (*s*).

In France the husband and wife cannot prosecute each other for theft or embezzlement of one another's property. By art. 380, Code Pénal, theft between husband and wife can only give rise to civil reparation. The Code only speaks of "*soustraction*," but this is extended to all kinds of frauds relating to the mutual property rights of husband and wife (*a*).

Coutume of Normandy.—Law of Channel Islands.—The custom of Normandy is in force in Jersey (*b*) and in the main in Guernsey (*c*) also.

(*p*) Art. 1426. Unless the wife is a *marchande publique* and acts in that capacity, in which case the community is charged: *ibid.*

(*q*) Pothier, la Puis. du Mari, n. 24.

(*r*) Code Civil, art. 221.

(*s*) Code Civil, art. 212—214; C. C. of L.C. arts. 173—175; C. C. of St. Lucia, arts. 143—145.

(*a*) Dall. Rép., tit. Vol.

(*b*) See Table de décisions de la Cour Royale de Jersey, 3 vols. (1889—1907). An Act of February 8th, 1878, prescribes the procedure for obtaining *séparation de biens*.

(*c*) For a summary of the law

There is no material difference between the *coutumes* of Paris and Normandy in any of the particulars which have been stated in this section (*d*).

Under the law of Jersey a married woman, *non séparée de biens*, is, generally speaking, incapable of contracting without the consent of her husband (*e*). She cannot *ester en justice* except for the purpose of claiming *séparation de biens* (*f*), or possess movable property (*g*), or be sued for a movable debt (*h*).

III. **Agreements in Derogation of Conjugal Rights and Duties.**—The same doctrine as has been indicated above, viz., that no agreements between the spouses can derogate from the legal relations attaching by law to the status of husband and wife was adopted by the law of France and the derivative systems of law.

"Le principe, que les contrâts de mariage sont susceptibles de toutes sortes de conventions, a ses exceptions. Celles, qui blesseraient la bienséance publique, quoique faites par contrât de mariage, ne seraient pas valables. Par exemple, il n'est pas douteux que s'il était dit, par un contrat de mariage, que la femme serait le chef de la communauté de biens qui aurait lieu entre les conjoints, une telle convention ne serait pas valable, étant contre la bienséance publique, que l'homme, que Dieu a fait pour être le chef de la femme, *vir est caput mulieris*, ne soit pas le chef de leur communauté de biens, et qu'au contraire cette communauté ait la femme pour chef.

"Les conventions, qui paraissent tendre à soustraire la femme à la puissance que notre droit municipal a accordée au mari sur elle, sont aussi regardées comme étant, dans nos mœurs, contraires à la bienséance publique, et en conséquence nulles" (*i*).

The Code Civil contains the following article:—

Code Civil.—"Married persons cannot derogate from the rights

of Guernsey, see Carey, Institutions de Guernesey, ed. 1889, pp. 118 *et seq.*

(*d*) Burge, 1st ed., i., 223, citing 2 Basnage, arts. 538, 539; Merville, 504.

(*e*) Lambert *v.* Bouteloup (1889), Table de Déc., 1889—93, p. 63; Yvon *v.* Veulle (1890), *ibid.*; Le Gros *v.* Le Gros (1892), *ibid.*

(*f*) Ex parte Le Boutillier (1900), Table de Déc., 1894—1900, p. 77. But a wife, *sui juris* by the law of her own domicil, may *ester en justice* in Jersey: Brissonnière *v.* Brissonnière (1901), Table de Déc., 1901—07, p. 90; De Osko *v.* Jugla (1903), *ibid.*; McGrath *v.* McCann (1904), *ibid.*; Hall *v.* Maire (1905), *ibid.*

(*g*) In re Davis (1895), *ibid.*, 77.

(*h*) Trésorier des Etats *v.* Quenault (1898), *ibid.*, 77.

(*i*) Burge, 1st ed., i., 237, citing

resulting from the power of the husband over the persons of his wife and of his children, or which belong to the husband as head, nor from the rights conferred on the survivor of the married parties by the title '*Of the Paternal Power*,' and by the title '*Of Minority, Guardianship, and Emancipation*,' nor from the prohibitory regulations of the present Code" (*j*).

Other Systems.—There are similar provisions in the Codes of Belgium (*a*), Italy (*b*), Spain (*c*), and Portugal (*d*), and the Swiss cantons of Ticino (*e*), Neuchâtel (*f*), Fribourg (*g*), Valais (*h*), and Vaud (*i*).

Agreements for Separation.—A separation of the husband and wife, by their own act, was not admitted, either by the law of France before the promulgation of the Code Civil, or of Holland, or Spain; but such separation must have been decreed by a judicial sentence (*k*).

Code Civil.—The Code Civil formerly allowed a separation by mutual consent to be, in certain cases, a foundation for a divorce (*l*). This now falls within the province of the law of divorce.

Other Continental Codes.—The provisions of the modern Continental Codes on the foregoing points may be briefly noticed.

Capacity of Wife and Marital Power of Husband.—Belgian Law.—This with very few exceptions is similar to the French Code Civil.

Italian Law.—Under the Italian law the wife, unless generally or specially authorised by the husband, cannot make donations, alienate or mortgage real property, contract loans, transfer or get in capital sums, or enter into compromises or sue in regard to such acts (*m*). This applies to dispositions of the wife's separate property. The husband's authorisation is not necessary (a) when he is a minor, interdicted, absent, or undergoing a sentence of more than a year's imprisonment; (b) when the wife is judicially separated on the ground of the husband's fault; (c) when the wife is a trader (*n*). The authorisation of the civil Court is necessary when

Pothier, Traité de la Com., tom. 6, ss. 4, 5; Denisart, tit. Convent. Matrim., s. 2.

(*j*) Code Civil, art. 1388.

(*a*) Art. 1388.

(*b*) Art. 1379.

(*c*) Art. 1316.

(*d*) Arts. 1103, 1104.

(*e*) Art. 632.

(*f*) Art. 1139.

(*g*) Art. 106.

(*h*) Art. 1270.

(*i*) Art. 1043.

(*k*) Burge, 1st ed., i., 239, citing Pothier, Traité du Mariage, ss. 466, 506, and c. 3, n. 506; Voet, xxiv., 2, n. 8, de Divortiis; 1 Febrero, p. 19; Voet, xxiii., 4, n. 16.

(*l*) Arts. 275 *et seq.*

(*m*) Art. 134.

(*n*) Art. 135.

the husband refuses authorisation to his wife, or when there is conflict of interest between them as to the act in question, or when they are judicially separated either by reason of the wife's fault or their joint fault or by mutual consent (*o*).

A plea of nullity arising from absence of authorisation can only be set up by the husband, the wife, or her heirs and assigns (*p*).

Spanish Law. — Under the law of Spain the husband is the administrator of the conjugal community, save stipulations to the contrary and the provisions of art. 1384 as to paraphernal property (*q*). If he is under eighteen years of age, however, he can only act, borrow, charge, or alienate his immovable property with the consent of his father, mother, or guardian according to circumstances, and cannot appear as a litigant without the assistance of these persons (*r*); he cannot without their assent take money on loan, nor charge or alienate the realty. The husband is the representative of his wife. The latter cannot without his authorisation appear as a litigant either in person or by procurator, except to defend herself on a criminal charge, or to sue or defend in proceedings against her husband, or when she has obtained judicial authority (*s*). Neither can the wife without her husband's authorisation or a power from him acquire property subject to obligation (*oneroso*) or on lucrative conditions, nor alienate her property, nor bind herself, except in the cases and within the limits prescribed by law (*t*). Acts done by the wife in contravention of these provisions are null, except as regards things which by their nature are destined for the ordinary consumption of the family, purchases of which by the wife are valid (*u*). Purchases of jewels and articles of value by the wife without the authorisation of her husband are only valid if the latter has consented to the wife's use and enjoyment of such things (*a*). A wife may without her husband's permission make a will, and exercise the rights and discharge the duties belonging to her relating to children, legitimate or acknowledged, which she may have borne to others, and the property of the same (*b*). She enjoys his honours, except those strictly personal, and retains them until

(*o*) Art. 136.
(*p*) Art. 137.
(*q*) See p. 586, *post*.
(*r*) Art. 59.
(*s*) Art. 60.
(*t*) Art. 61 ; and see art. 63, *infra*.
(*u*) Cf. as to French law, Dalloz, Rép., *s.v.* Contrat de Mariage, n. 1012.
(*a*) Art. 62.
(*b*) Art. 63.

she again marries (*c*). Only the husband or his heirs can plead the nullity of acts done by the wife without an authorisation or regular permission (*d*).

A wife cannot, without her husband's authorisation, be surety, under the Codes of Italy (*e*), Spain (*f*), and Portugal (*g*).

German Law.—By German law the status of a married woman does not create any incapacity. All the restrictions on her powers of disposition arise under the marital *régime*, which may put all the wife's property into a common fund or under her husband's management. But if she enters into any contract for personal services the husband may terminate such contract without previous notice if authorised to do so by the Guardianship Court, and the Court must grant that authority if it is satisfied that the performance of the contract on the wife's part would be detrimental to the interests of the conjugal life. The right to terminate the contract is excluded if the husband has assented to the contract, or if the Guardianship Court on the application of the wife has given its consent in his place. The husband cannot terminate the contract while he and his wife are living apart from one another (*h*). In all matters relating to household management the wife is authorised as a general rule to act on the husband's behalf. The husband may restrict or exclude the wife's implied agency, but the Guardianship Court has power to set aside such restriction or exclusion on the wife's application if it can be proved that it was brought about by an abuse of the husband's privilege. Against third parties who have had no notice of such restriction or exclusion, it has no effect unless duly entered in the marriage property register (*i*).

Swiss Law.—Under the present law of Switzerland the capacity of a married woman is determined by cantonal law (*k*). Unless she is married under the *régime* of separate property, a married woman is under the guardianship of her husband, and, in general, loses the capacity of independent legal action, and consequently of binding herself by contract, unless certain special legal forms are

(*c*) Art. 64.
(*d*) Art. 65.
(*e*) Art. 134.
(*f*) Art. 61.
(*g*) Art. 1193.
(*h*) C. C., s. 1358.
(*i*) S. 1357.
(*k*) Federal Law of Personal Capacity, 1881, s. 7. This law is repealed by the Federal Civil Code (Final title, art. 62), as from the time when the Code comes into force.

observed (*l*); but if she has reserved property (*Sondergut*) it remains subject to her own management and disposition (*m*). Under the *régime* of separate property a married woman is in principle free to dispose of that which belongs to her, but the husband has the administration and usufruct of such of her property as constitutes the *dos* (*n*). A married woman who carries on a trade or profession with the express or tacit consent of her husband is liable upon obligations arising from such transactions as fall within the ordinary scope of such profession or trade to the whole extent of her property, notwithstanding any rights of usufruct or administration which her husband may have. If her property by cantonal law is transferred to her husband he is likewise liable; and in cases where there is a community of property the common property also is liable (*o*).

A wife has full power under all the cantonal systems to provide for the daily necessities of the household, and within the scope of such authority can bind not only herself but also her husband, or the community, if there be one (*p*). This power may, however, in some cases be withdrawn by means of a public notification (*q*).

The rules of the Federal Civil Code, which is to come into force in 1912, are more elaborate. They provide in addition that the husband shall be the head of the conjugal community (*r*), and that he may be bound by his wife's acts outside the limits of the daily needs of the household, if he has expressly or tacitly empowered her

(*l*) Huber, Schweizerisches Privatrecht, i. 273—282. Several cantons prohibit married women from entering into particular transactions. Thus the Canton de Vaud does not permit married women to buy land: Civil Code, art. 1049.

(*m*) Huber, i. 293—295.

(*n*) Huber, i. 262—266. But neither the French Civil Code nor that of Ticino leave a wife married under the *régime* of separate property wholly free from her husband's control and administration.

(*o*) Federal Code of Obligations, arts. 34, 35. So Federal Civil Code, art. 167. In case of the husband's refusal the wife may, under the Code, be empowered to carry on a trade or profession by the Court, if she can prove that it is to the interest of the conjugal community or of the family. The liability of the spouses will, under the Code, depend upon the property *régime* adopted by them: arts. 206—208, 219—221, 243.

(*p*) Huber, i. 283—285. So, too, Federal Civil Code, art. 163.

(*q*) So under the Federal Civil Code, art. 164. Such restriction or withdrawal may, in a proper case, be revoked by the Court: art. 165.

(*r*) Art. 160.

so to bind him (*s*). They also provide for the protection of the conjugal community by the Court (*t*). If the health, reputation, or economic position of one of the spouses is seriously endangered by the common life, that spouse may break up the household (*u*). A married woman has full capacity to bring actions, but if legal questions arise relating to property contributed by her, her husband alone can sue or be sued (*a*).

Personal Rights and Duties of Spouses.—In the **Italian** and **Spanish** Codes there are similar provisions to those of the French Code Civil (*b*).

German Law.—The German Civil Code has the following provisions on the subject: (a) The spouses are bound to live together as husband and wife, but if the insistence of one of the spouses on this right amounts to an abuse of the right, the other spouse is not bound to observe his or her corresponding duty; the same rule applies in all cases in which the other spouse would be entitled to claim a divorce (*c*); (b) the husband decides in all questions relating to the conjugal life, and more particularly as regards the choice of a domicil and of a residence; but even in this case the wife is not obliged to obey if the husband's requirements constitute an abuse of his right (*d*); (c) the wife has the right and duty to manage the household affairs; she must do personal work in the house or in her husband's business if such work is usually done by persons in her condition of life (*e*).

The spouses, in the fulfilment of the obligations resulting from their conjugal relations, are only bound to exhibit the care that they are in the habit of displaying in their own private affairs (*f*). It is presumed in favour of the husband's creditors that movable property found in the possession of one of the spouses belongs to the husband. This rule applies particularly to negotiable instruments. With regard to things destined exclusively for the use of the wife, such as clothes, jewels, and especially instruments of work, a contrary rule prevails both as between the spouses and as regards third parties (*g*).

(*s*) Art. 166.
(*t*) Art. 169.
(*u*) Art. 170.
(*a*) Art. 168.
(*b*) Spanish, arts. 56—58; Italian, arts. 131—133.
(*c*) S. 1353.
(*d*) S. 1354.
(*e*) S. 1356.
(*f*) S. 1359.
(*g*) S. 1362.

A wife is entitled to refuse to give evidence in civil or criminal proceedings in which her husband is a party (*h*).

The provisions of the **Austrian** Code on this subject are similar to those of the German Code (*i*).

Swiss Law.—A married woman takes her husband's name and acquires his right of citizenship (*k*). The husband has, by the laws of the cantons, the right to determine the conjugal domicil, and the wife is bound to obey him in this respect (*l*); though she cannot be compelled to do so, an obstinate refusal will constitute a ground of divorce (*m*). The laws of the cantons also in general require of the spouses conjugal faithfulness and community of life (*a*), a rule which seems to have no actual legal effect except in fixing the responsibility in cases of divorce.

Under the Federal Civil Code, spouses may contract with each other, but contracts which relate to the wife's contributed property (*Eingebrachtes Gut, apports, beni apportati*) or to the property of the community are not valid without the consent of the guardianship authority; and the same rule applies to obligations entered into by the wife in favour of third parties for the benefit of the husband (*b*). If a husband neglects to provide for his wife and children, the Court may order his debtors to pay sums due from them to the wife wholly or in part. Execution for debt between spouses is limited to the cases specially provided for by the law (*c*).

SECTION III.

British Dominions and the United States.

Law of England.—Common Law.—By the common law of England the husband and wife are one person, that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband.

With some few exceptions, *e.g.*, when her husband was convicted

(*h*) Code of Civil Procedure, art. 383; Criminal Procedure, art. 51.

(*i*) Arts. 90—92.

(*k*) Federal Constitution, art. 54; Law of Civil Status and Marriage, 1874, art. 25; Huber, i. 233; Federal Civil Code, art. 161.

(*l*) This rule is preserved by the Federal Civil Code, art. 160.

(*m*) Law of Civil Status and Marriage, 1874, s. 46; Huber, i. 234.

(*a*) So the Federal Civil Code, art. 159.

(*b*) Art. 177.

(*c*) Arts. 171, 173—176.

of a felony or was civilly dead (*d*), or when she traded as a *feme sole* in the City of London (*e*), the married woman was incapable of contracting or acting as a *feme sole*, or of suing or being sued as such (*f*).

She could not, therefore, be joined in any action as a defendant in respect of a contract subsequent to her marriage (*g*), because the contract as against her was void. If a contract, made by her before her marriage, were put in suit against her, and she was sued jointly with her husband (*h*), a promise by her could not be alleged (*i*).

The deeds or other instruments under seal of a married woman were void (*k*).

It was not an exception to the rule which incapacitated her from binding herself by her contracts that the husband had become discharged by her conduct from that liability, which it will be seen he incurred, as incident to his relation of husband. As a consequence of the wife's incapacity to make a contract binding on her at law, the rule prevailed, notwithstanding she might have separate property (*l*). But in a Court of Equity in England, according to its doctrines, the contracts of the wife might be enforced under certain circumstances hereafter stated against her separate property.

The wife was incapable of making any personal contract or obligation, or of incurring any debt or engagement, to bind her husband, without his concurrence or authority, express or implied (*m*).

(*d*) Sparrow *v.* Carruthers, cited in Lean *v.* Schutz (1778), 2 W. Black. 1195.

(*e*) Ex parte Carrington (1739), 1 Atk. 206. And see further, as to the position of a *feme sole* trader under the custom of the City of London: Caudell *v.* Shaw (1791), 4 T. R. 361; Clayton *v.* Adams (1796), 6 T. R. 605.

(*f*) Com. Dig., Baron and Feme, Q. 241; James *v.* Fowkes (1697), 12 Mod. 101.

(*g*) 4 Vin. Abr. 93, pl. 5.

(*h*) Mitchinson *v.* Hewson (1797), 7 T. R. 348; Richardson *v.* Hall (1819), 1 Brod. & Bing. 50.

(*i*) Morris *v.* Norfolk (1808), 1 Taunt. 212; Pittam *v.* Foster (1823), 1 B. & C. 248.

(*k*) Read *v.* Jewson, cited (1773), 4 T. R. 362; Perk. s. 6.

(*l*) Marshall *v.* Rutton (1800), 8 T. R. 547; Gilchrist *v.* Brown (1792), 4 T. R. 766; Waters *v.* Smith (1795), 6 T. R. 451; Wardell *v.* Gooch (1806), 7 East, 582; Pritchett *v.* Cross (1792), 2 H. Black. Rep. 17; Pitt *v.* Thompson (1800), 1 East, 16; Crookes *v.* Fry (1817), 1 B. & Ald. 165.

(*m*) The Earl of Derby's Case (19 Eliz.), 4 Leon. 42; Smith *v.* Plomer (1812), 15 East, 607.

Upon this principle she was not permitted to assume the office and responsibility of an executrix without her husband's concurrence (*n*).

This disability extended to any contract which in its consequences might personally affect him. If, therefore, she purchased an estate without his knowledge, and he afterwards disagreed to it, he might recover the purchase-money from the vendor (*o*); but his assent to the transaction would confirm it so far as he was interested; yet after his death, if the wife survived him, or if she made no election and died before him, her heirs might disaffirm the purchase. The wife, it should be observed, was a person by law enabled either to purchase or to accept an estate; therefore, subject to the approval or disagreement of her husband, it vested in her in the meantime (*p*).

If the wife, after her husband's death, entered upon the estate made over to her during the marriage and took the profits, that would be an assent and confirmation (*q*).

She was incapable of receiving or disposing of money without his concurrence. Therefore payment of a legacy bequeathed to her generally, and not given to her separate use, would be a void payment as to her husband (*r*), and the law was the same with regard to rent, money, &c. (*s*). But the wife might act as her husband's agent or attorney. If, therefore, he authorised her to receive and pay money, or if she were accustomed so to do with his permission, which is an implied authority, he would be bound by such her acts (*t*).

So, also, if the husband desired money to be *lent* to his wife, payment of it to her would bind him; and he would be liable to make satisfaction to the creditor (*u*), because this amounted to an express contract by the husband to pay the money and an assent that the wife should receive it.

(*n*) Burge, 1st ed., i., 304, citing Godolph, part 2, c. 10, ss. 2, 3; Wentw. Off. Ex. 377, 14th ed.; Thrustout *v.* Coppin (12 Geo. III.), 2 Bl. Rep. 801.

(*o*) Granby *v.* Allen (9 Will. III.), 1 Lord Raym. Rep. 224; S. C., *sub nom.* Garbrand *v.* Allen (1697), Comberb. 450.

(*p*) Co. Litt. 3.

(*q*) Butler and Baker's Case (1591), 3 Rep. 25 a, 26 a.

(*r*) Palmer *v.* Trevor (1684), 1 Vern. 261, and note.

(*s*) Roberts *v.* Pierson (1753), 2 Wils. 3; Tracy *v.* Dutton (19 Jac. I.), Palm. 206.

(*t*) Palm. 206; Seaborne *v.* Blackston (1663), Freem. Ch. 178.

(*u*) Stephenson *v.* Hardy (1773), 3 Wils. 388.

She was also incapable, without his concurrence or authority, of suspending, altering, or releasing any debt made payable to herself generally, or of giving, indorsing, or accepting a promissory note or other security (*v*).

In England (*w*) and Scotland (*x*) the common law, instead of adopting the *Senatus Consultum Velleianum*, rendered the married woman incapable of binding herself.

Equity.—Modern Legislation.—Partly by the action of the Courts of Equity, but mainly by the Married Women's Property Acts, 1870 (*y*), 1874 (*z*), 1882 (*a*), and 1893 (*b*), the position of married women under the law has been profoundly affected, with the result that, as regards their proprietary interests, husband and wife have practically become distinct legal entities, both between themselves (*c*) and as regards third persons, alike in contract and in tort.

The modern law as to all questions of the proprietary rights of married women, and of their contracts with reference to their separate estate (the liability incurred by a married woman on her contracts is a proprietary and not a personal one) (*d*), and of the effects of the Married Women's Property Acts, will be examined in a subsequent chapter (*e*). Here we shall deal merely with the effect of marriage on her personal capacity and status in certain respects apart from these statutes.

Contracts.—A Married Woman as Agent for her Husband.—And first, as to a married woman's contracts as agent for her husband. Such agency may be express, implied or ostensible.

Express Agency.—Where a husband expressly authorises his wife to act as his agent he is of course bound by what she does within the scope of her authority (*f*).

(*v*) Rawlinson *v.* Stone (1746), 3 Wils. Rep. 1, at p. 5; Brown *v.* Benson (1803), 3 East, 331.

(*w*) See p. 327, *ante*. As to modern legislation, see Chapter XIII., *post*.

(*x*) Stair, 1, 4, n. 16; and see p. 338, *post*; and as to modern legislation, see Chapter XII., *post*.

(*y*) 33 & 34 Vict. c. 93.

(*z*) 37 & 38 Vict. c. 50.

(*a*) 45 & 46 Vict. c. 75.

(*b*) 56 & 57 Vict. c. 63.

(*c*) Since the Married Women's Property Act, 1882, husband and wife can contract together, and there is nothing to prevent a wife from standing in the position of landlord to her husband, and if there is a real agreement between them, the husband is, by virtue of such tenancy, entitled to be registered as a voter under s. 3 of the Representation of the People Act, 1867 (30 & 31 Vict. c. 102), s. 3: Pearce *v.* Merriman, [1904] 1 K. B. 80.

(*d*) See Scott *v.* Morley (1887), 20 Q. B. D. 120.

(*e*) See Chapter XIII., *post*.

(*f*) See Lord *v.* Hall (1849), 8 C. B.

Implied Agency.—During Cohabitation.—While the mere fact of marriage implies no such authority, if the wife, during their cohabitation, orders necessaries the husband's authority is presumed, unless the contrary appear (*g*), as for instance, if the husband has warned the plaintiff not to give her credit (*h*), or has made his wife an adequate allowance for necessaries, and has forbidden her to pledge his credit, in which case notice to the plaintiff of the allowance or the prohibition is unnecessary (*i*). The term "necessaries" means goods suitable to the husband's state or degree or to the position which he allows his wife to assume (*j*). But the real question in cases under this head is the question of authority (*k*); and evidence that the wife was at the time of purchase already supplied with similar "necessaries" is admissible only to negative such authority (*l*). During cohabitation a wife has no implied authority to borrow, even for the purpose of purchasing "necessaries." Cohabitation of a husband and wife, each having property, and the fact that household necessaries are, upon the orders of the wife, supplied to and consumed at the common home, affords no evidence of a joint liability on the part of the husband and wife for the price of such necessaries (*m*). Such facts give rise to a presumption that the wife has actual authority to pledge her husband's authority for the household necessaries, but the presumption is one not of law but of fact only, and may be rebutted, as by proving that the husband has

627; Marshall *v.* Rutton (1800), 8 T. R. 545.

(*g*) Etherington *v.* Parrot (1704), 1 Salk. 118; Jolly *v.* Rees (1864), 15 C. B. (N. S.) 628; Debenham *v.* Mellon (1880), 6 A. C. 24. Remmington *v.* Broadwood (1902), 18 T. L. R. 270; Slater *v.* Parker (1908), 24 T. L. R. 621.

(*h*) Etherington *v.* Parrot, *ubi supra*.

(*i*) Jolly *v.* Rees, *ubi supra*; Debenham *v.* Mellon, *ubi supra*.

(*j*) Jolly *v.* Rees, *ubi supra*; Hunt *v.* De Blaquiere (1829), 5 Bing. 550; 30 R. R. 737; Emmett *v.* Norton (1838), 8 C. & P. 506; and cf. the definition "necessaries" in the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 2. The same reason applies to render a man liable for the debts of a woman (a) with whom he cohabits, holding her out to the world as his wife: Watson *v.* Threlkeld (1794), 2 Esp. 637; or (b) whom he makes his domestic manager.

(*k*) Reid *v.* Teakle (1853), 13 C. B. 627; Debenham *v.* Mellon, *ubi supra*.

(*l*) Reneaux *v.* Teakle (1853), 8 Exch. 680. It is immaterial whether the plaintiff did or did not know of the supply of the articles in question. Cf. Barnes *v.* Toye (1884), 13 Q. B. D. 410; Johnstone *v.* Marks (1887), 19 Q. B. D. 509.

(*m*) Morel Brothers & Co. *v.* Westmoreland (Earl of) (1902), 72 L. J. K. B. 66.

provided a sufficient allowance for household necessaries, and has forbidden the wife to incur household expenses beyond such allowance (*n*). It is a good defence by the husband, in an action against husband and wife for the price of household necessaries supplied, upon the order of the wife, at the residence where they cohabited, that the plaintiff has previously obtained judgment against the wife as principal, even if the judgment was only an interlocutory one under Order XIV. of the Rules of the Supreme Court (*n*).

While Living Apart.—When the husband and wife are *living apart* (*o*), the presumption is that the wife has no authority to pledge her husband's credit. If a tradesman brings an action against a husband for goods supplied to the wife while living apart from her husband, it is for him to show that, under the circumstances of the separation, the wife had authority to bind her husband (*p*). Separation involves a revocation of the wife's agency, and the fact that the plaintiff had no notice of the separation will not better his position, unless he has been previously dealing with the wife as her husband's agent with the latter's permission (*q*). But if the plaintiff can show that the parties are living separate, either on account of the husband's misconduct or cruelty, the wife being left without adequate means, or by mutual consent, and that the husband has failed to pay her a reasonable or agreed allowance, she becomes her husband's agent of necessity, and is entitled to pledge his credit for suitable necessaries (*r*).

(*n*) See note (*m*), p. 330.

(*o*) A woman divorced from her husband is restored to the position of a *feme sole*. So also is a woman judicially separated, but only as regards such property as she may acquire or as may come to or devolve upon her after the decree: Waite *v.* Morland (1888), 38 Ch. D. 135; cf. Hill *v.* Cooper, [1893] 2 Q. B. 85.

(*p*) Mainwaring *v.* Leslie (1826), Moody & M. 18; 31 R. R. 691.

(*q*) Cf. Wallis *v.* Biddick (1873), 22 W. R. 76; Clifford *v.* Laton (1827), 3 C. & P. 15.

(*r*) Montague *v.* Benedict (1825), 3 B. & C. 631; 27 R. R. 444; Seaton *v.* Benedict (1828), 5 Bing. 28; Read *v.* Legard (1851), 6 Exch. 642; Emmett *v.* Norton, *ubi supra;* Bazeley *v.* Forder (1868), L. R. 3 Q. B. 559; Wilson *v.* Ford (1868), L. R. 3 Ex. 63. As to the effect of the husband's misconduct or cruelty, see Aldis *v.* Chapman, Selw. N. P. 232; Hodges *v.* Hodges (1796), 1 Esp. 441; 4 R. R. 889; Houliston *v.* Smyth (1825), 3 Bing. 127. As to separation by mutual consent, without an adequate allowance to the wife, see Eastland *v.* Burchell (1878), 3 Q. B. D. 432. If the separation is due to the fault of the wife, and without the husband's consent, she cannot pledge his credit, even for necessaries: Etherington *v.*

Ostensible Agency.—If the husband "holds out" his wife as his agent, *e.g.*, by standing by while she orders goods (*s*), or by having paid on previous occasions for similar goods which she had ordered (*t*), he will be liable on her contracts to anyone who has given her credit in the belief that she possesses such authority. If he revokes such authority, either expressly or by separating from his wife, he must give notice to the tradesman with whom she dealt, otherwise the wife's ostensible agency will continue, even if the husband has died (*u*), or become insane (*x*).

Torts.—A husband is liable to be sued jointly with his wife and to satisfy judgment obtained against her for her fraud, as well as for other torts committed by her (*y*) during her coverture, unless the fraud or tort is directly connected with a contract by her, is the means of effecting or inducing it, and is part of the same transaction. That liability which existed before the Married Women's Property Act, 1882 (*z*), is not affected by that Act, nor is the remedy of the party injured limited by the Act to the wife's separate estate, if any (*a*). If the husband dies, or the wife is judicially separated from him *pendente lite*, the action abates against him (*b*).

Evidence.—Under the Criminal Evidence Act, 1898 (*c*), the wife or husband of a person charged with an offence is now a competent witness for the defence at every stage of the proceedings (*d*). No

Parrot, *ubi supra;* Hindley *v.* Westmeath (1827), 6 B. & C. 200; 30 R. R. 290; and unchastity on the part of the wife will terminate the husband's duty to maintain her, and, consequently, her right to pledge his credit: Harris *v.* Morris (1801), 4 Esp. 41; Wilson *v.* Glossop (1888), 20 Q. B. D. 354; Collins *v.* Cory (1901), 17 T. L. R. 242.

(*s*) Jetley *v.* Hill (1884), 1 C. & E. 239.

(*t*) Debenham *v.* Mellon, *ubi supra.*

(*u*) Smout *v.* Ilbery (1842), 10 M. & W. 1; 62 R. R. 510.

(*x*) Drew *v.* Nunn (1879), 4 Q. B. D. 661.

(*y*) As regards torts between spouses see p. 716, *post.*

(*z*) 45 & 46 Vict. c. 75.

(*a*) Earle *v.* Kingscote, [1900] 2 Ch. 585. The husband was not, at common law, strictly speaking, liable for the wife's torts at all. He was liable to be sued jointly with her because of her inability to be sued alone; and unless judgment was obtained against them both during the coverture, his liability was at an end: Lush, Husband and Wife, 3rd ed., p. 328; and cf. Capel *v.* Powell (1864), 17 C. B. (N. S.) 743; Cuenod *v.* Leslie (1909), 25 T. L. R. 374, at p. 375; [1909] 1 K. B. 880.

(*b*) Cuenod *v.* Leslie, *ubi supra*, reversing Ridley, J., in S. C. (1908), 25 T. L. R. 2.

(*c*) 61 & 62 Vict. c. 36.

(*d*) S. 1.

comment is to be made, however, on the failure of a husband or wife to give evidence (*e*); neither is to be called except on the application of the person charged (*f*); neither is to be compellable to disclose any communication made to each other during marriage (*g*). The wife or the husband may be called for the prosecution, without the consent of the person charged, in case of certain offences enumerated in the Schedule to the Act, where such evidence is admissible at common law (*h*).

Coercion.—Where a wife commits a felony under the compulsion of her husband she will be treated as his innocent instrument and excused. The mere fact that the parties are married has never constituted a presumption of compulsion (*i*). Questions have arisen from time to time how far the mere presence of the husband should furnish a presumption of marital control, and the decisions on the subject have not been entirely uniform (*k*). The rule may, in any case, be rebutted by evidence of independent action or active participation by the wife (*l*). It has been held (*m*) that the doctrine of presumed coercion does not apply to murder; and there is some controversy as to whether, and under what limitations, it applies to misdemeanour (*n*).

Acknowledgment of Deeds.—In the case of a woman married before 1883, all deeds purporting to deal with land (unless she was entitled to it for her separate use) and of her reversionary interests in personal property must be executed by her and her husband, and acknowledged by her (*o*) in accordance with the provisions of the Fines and Recoveries Act, 1833 (*p*), and s. 7 of the Conveyancing

(*e*) S. 1 (b).

(*f*) S. 1 (c).

(*g*) S. 1 (d).

(*h*) S. 4.

(*i*) Brown *v.* Att.-Gen. for New Zealand, [1898] A. C., at p. 237.

(*k*) Encyclo. Laws Eng., 2nd ed., iii. 130, tit. Coercion; and see Brown *v.* Att.-Gen. for New Zealand, *ubi supra;* Reg. *v.* Torpey (1871), 12 Cox, C. C. 45; Reg. *v.* Baines (1900), 19 Cox, C. C. 524.

(*l*) Reg. *v.* Torpey, *ubi supra;* Reg. *v.* Cohen (1868), 11 Cox, C. C. 99; Reg. *v.* John (1875), 13 Cox, C. C. 100; Reg. *v.* Dykes (1885), 15 Cox, C. C. 771.

(*m*) Reg. *v.* Manning (1849), 2 C. & K. 903.

(*n*) See Reg. *v.* Cruse (1838), 8 C. & P. 541; and cf. R. *v.* Conolly (1829), 2 Lew. 229; R. *v.* Price (1837), 8 C. & P. 20.

(*o*) Encyclo. Laws Eng., 2nd ed., i. 125, tit. Acknowledgment of Deeds.

(*p*) 3 & 4 Will. IV. c. 74. In Johnson *v.* Clark (1907), 24 T. L. R. 156, an alleged custom of burgage tenure in Kendal for a married woman to dispose of her real estate by deed with her husband's concurrence, but without a separate examination, was

Act, 1882 (*q*). Malins' Act, 1857 (*r*), enabled a married woman to dispose of reversionary interests in personal estate (with certain exceptions, notably personal estate to which she is entitled under her marriage settlement) and provided that every deed thereunder should be acknowledged in the manner prescribed by the Fines and Recoveries Act, 1833 (*s*).

Juridical Position.—Under the Married Women's Property Act, 1882 (*t*), a married woman is now capable of suing and being sued either in contract or 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 against her (*u*). A judgment against a married woman imposes a liability on her property only, and not upon her person (*v*), and therefore she cannot be imprisoned upon a debtor's summons (*x*), nor can a bankruptcy notice issue against her (*y*).

Insurance.—A married woman has an insurable interest in the life of her husband (*z*), and may now by statute (*a*) insure her own, or her husband's, life for her separate use, by virtue of the power to contract which modern legislation has conferred upon her, and the policy and all the benefit thereof will enure accordingly. Moreover, a policy of insurance effected by a man on his own life, and expressed to be for the benefit of his wife and children, creates a trust in favour of the latter, and does not, so long as any object

held by Parker, J., to be bad in law.

(*q*) 45 & 46 Vict. c. 39.

(*r*) 20 & 21 Vict. c. 56. See also as to acknowledgments under the Land Transfer Act, 1875 (38 & 39 Vict. c. 87), s. 87, and Rules of 1903, rr. 338—340.

(*s*) See note (*p*), p. 333.

(*t*) 45 & 46 Vict. c. 75.

(*u*) S. 1 (2).

(*v*) See Scott *v.* Morley (1887), 20 Q. B. D. 120; Softlaw *v.* Welch, [1899] 2 Q. B. 419.

(*x*) Draycott *v.* Harrison (1886), 17 Q. B. D. 304.

(*y*) In re Lynes, [1893] 2 Q. B. 113; and cf. Turnbull *v.* Nicholas, [1900] 1 Ch. 180. As to the giving of security for costs by married women, see In re Isaac (1885), 30 Ch. D. 418; Whittaker *v.* Kershaw (1890), 44 Ch. D. 296; Pike *v.* Cave (1893), 62 L. J. Ch. 937. The question of the remedies, civil and criminal, of married women in relation to their separate property is referred to below, p. 716, *post*.

(*z*) Evans *v.* Bignold (1869), L. R. 4 Q. B. 622. So has the husband in the life of the wife: Griffiths *v.* Fleming, [1909] 1 K. B. 805.

(*a*) Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 11; and see Married Women's Property Act, 1870 (33 & 34 Vict. c. 93), s. 10. See also New York Cons. Laws (1909), c. 14, s. 52.

of the trust remains unperformed, form part of the estate of the insured, nor is it subject to his debts (*b*), provided that if the policy was effected, and the premiums paid, with intent to defraud the creditors of the insured, the latter are entitled to receive out of the monies paid under the policy a sum equal to the premiums so paid (*b*). The executors of a person who has effected an insurance on his life for the benefit of his wife can maintain an action on the policy, notwithstanding that his death was caused by a felonious act by his wife (*c*). In such a case, the trust created by the policy having been defeated by reason of her crime, the insurance money becomes part of the property of the assured, and as between his legal representatives and the insurers, no question of public policy arises to afford a defence to the action (*c*).

Office.—A married woman may now accept the office of trustee, executrix, or administratrix, without her husband's consent in virtue of her power to contract as a *feme sole* (*d*); and it is not necessary that her husband should join in the administration bond (*e*). A married woman is still incapable of acting as a next friend or a guardian *ad litem* (*f*).

Agreement in Derogation of Marital Relations.—By the common law of England persons by their private agreement could not alter the character and condition which by law resulted from the state of marriage while it subsisted, and from thence acquire rights of action and legal responsibilities and consequences following from such alteration of character and condition (*g*).

(*b*) The same rule applies to a policy by a woman on her own life for the benefit of her husband and children: Act of 1882, s. 11.

(*c*) Cleaver *v.* Mutual Reserve Fund Life Association, [1892] 1 Q. B. 147. See also, as to the construction of s. 11, Browne *v.* Browne, [1903] 1 Ch. 188; In re Griffiths' Policy, [1903] 1 Ch. 739.

(*d*) See Married Women's Property Acts, 1882 (45 & 46 Vict. c. 75), ss. 18, 24; and 1907 (7 Edw. VII. c. 18), s. 1.

(*e*) In the goods of Ayres (1883), 8 P. D. 168. The Married Women's Property Act, 1882, does not enable a woman married since the commencement of the Act, being a trustee of real estate, to convey to a purchaser except with the concurrence of her husband and by deed acknowledged by her: In re Harkness and Allsopp's Contract, [1896] 2 Ch. 358. It has been held that this rule does not apply to a married woman who is a mortgagee: In re Brooke and Fremlin's Contract, [1898] 1 Ch. 647. This power has now been given to her by an Act of 1907 (c. 18).

(*f*) In re Somerset (Duke of) (1887), 34 Ch. D. 465.

(*g*) Marshall *v.* Rutton (1800), 8 T. R., p. 547; Bateman *v.* Ross (1813), 1 Dow,

Agreement for Separation.—The law of England does not give effect to deeds by which the parties contemplate their future separation (*h*). But agreements for the immediate separation of husband and wife may be upheld and enforced (*i*), even if there are no circumstances which would justify divorce or judicial separation (*k*). Where the agreement is only executory, a valuable consideration is necessary to its being supported (*l*)—*e.g.*, a covenant by the trustees to indemnify the husband against the debts of his wife (*m*); or against his own debts (*n*); or a withdrawal by the wife of pending (*o*) or threatened (*p*) proceeding for nullity of marriage or restitution of conjugal rights. Where, in pursuance of a separation deed, husband and wife live apart, there is valuable consideration for the deed (*q*). An agreement for separation need not be in writing (*r*), and it may be made between husband and wife directly, without the intervention of a trustee (*s*). Where a deed of separation does not contain a provision (*dum casta vixerit* clause) limiting the annuity payable under it during the chastity of the wife, the mere fact of her subsequent adultery does not deprive her of the annuity granted by it (*a*). The agreement will be ended if the parties subsequently become reconciled and resume cohabitation (*b*); but mere casual acts of intercourse submitted to by the wife, not with any intention of being reconciled to her husband, but in consequence of statements made by him as to his health, the husband having continued to pay the allowance under the deed after such acts of intercourse, have been held not to

235; Jee *v.* Thurlow (1824), 2 B. & C. 547; 26 R. R. 453; Innell *v.* Newman (1821), 4 B. & Ald. 419. But see below.

(*h*) Durant *v.* Titley (1819), 7 Price, 577; 21 R. R. 773; 12 Rul. Cas. 811; Westmeath *v.* Westmeath (1821), Jac. 126; Cocksedge *v.* Cocksedge (1844), 14 Sim. 244; Cartwright *v.* Cartwright (1853), 3 De G. M. & G. 982.

(*i*) Wilson *v.* Wilson (1848), 1 H. L. C. 538; Besant *v.* Wood (1879), 12 Ch. D. 605, where the old law is reviewed.

(*k*) Hart *v.* Hart (1881), 18 Ch. D. 670.

(*l*) Walrond *v.* Walrond (1858), John. 18.

(*m*) Wellesley *v.* Wellesley (1839), 10 Sim. 256.

(*n*) Wilson *v.* Wilson, *ubi supra*.

(*o*) Wilson *v.* Wilson, *ubi supra*; McGregor *v.* McGregor (1888), 21 Q. B. D. 424.

(*p*) Besant *v.* Wood, *ubi supra*.

(*q*) In re Weston, Davies *v.* Tagart, [1900] 2 Ch. 164.

(*r*) McGregor *v.* McGregor *ubi supra*.

(*s*) Sweet *v.* Sweet, [1895] 1 Q. B. 12, 14.

(*a*) Wasteneys *v.* Wasteneys, [1900] A. C. 446.

(*b*) Bateman *v.* Ross (1813), 1 Dow, 235; 14 R. R. 55.

bring a deed of separation to an end (*c*). Acts of cruelty subsequent to the deed may revive previous acts of cruelty so as to entitle a wife to sue for judicial separation, notwithstanding a clause in the deed of separation that she should not take proceedings of any sort against her husband in respect of anything done up to the date of its execution (*d*). Such a deed does not, however, place the wife with respect to the child in the same position as the father would have been in if he had not executed it (*e*). It does not amount to a delegation by the husband to the wife of his rights and powers in respect of the child (*e*), and accordingly, children have been ordered to be delivered up by their mother to the father on *habeas corpus*, notwithstanding provisions contained in deeds of separation to the contrary (*f*): for example, on the ground of the mother's inebriety (*g*), or of her refusal of all religious education to the child, the father being a clergyman of the Church of England—and the publication by her of a book, "calculated to deprave public morals" (*h*). On the other hand, notwithstanding the rule of law that a covenant by a father to abstain from seeing or exercising any control over his children is void, as being opposed to the welfare of the child, if the Court finds that, by reason of the conduct of the father, his control is injurious to the child, such a covenant will be enforced (*i*).

Scots Law.—In the absence of any agreement by which the *jus mariti* is excluded, and in so far as it is not affected by common law exceptions (*k*), or has not been excluded by statute (*l*), the husband, according to the law of Scotland, acquires by the marriage a power both over the person and estate of the wife. Her person is in some sort sunk by the marriage, so that she cannot act by or for herself (*m*).

(*c*) Rowell *v.* Rowell, [1900] 1 Q. B. 9. See further as to breaches of the covenant, Macan *v.* Macan (1900), 70 L. J. K. B. 90; Hunt *v.* Hunt, [1897] 2 Q. B. 547.

(*d*) Kunski *v.* Kunski (1907), 23 T. L. R. 615.

(*e*) In re Besant (1879), 11 Ch. D. 508.

(*f* In re Westmeath's Children (1819), Jac. 251, n.

(*g*) Carnegie's case, not reported, cited by Jessel, M.R., in In re Besant, *ubi supra*, at p. 512.

(*h*) In re Besant, *ubi supra*.

(*i*) Swift *v.* Swift (1865), 34 L. J. Ch. 209; affd. on appeal, *ad loc. cit.*, p. 394. And cf. Hamilton *v.* Hector (1872), L. R. 13 Eq. 511; Hope *v.* Hope (1857), 26 L. J. Ch. 417.

(*k*) Burge, 1st ed., i., 227. See p. 339, *infra*.

(*l*) See the Married Women's Property (Scotland) Act, 1881 (44 & 45 Vict. c. 21); the Conjugal Rights Amendment Act, 1861 (24 & 25 Vict. c. 86); and pp. 340, 341, *infra*.

(*m*) Ersk. Inst., 1. 6, s. 19; Stair's Inst., b. 1, tit. iv., s. 13; Fraser. Husband and Wife, i., 507.

Husband's Curatorial Power.—The *potestas maritalis* constitutes him the curator to his wife. And as a consequence of this curatorial power, all deeds done or granted by a wife without his consent are in themselves void, unless they should relate to her separate property, from which the husband's *jus mariti* and right of administration are excluded, or are in his own favour (*n*). Even when in security for his debts, or in favour of his relations, the wife's deeds require the husband's consent (*o*).

Wife's Obligations ex delicto.—There are some obligations granted by the wife during marriage which require the husband's consent; others are valid without it; and, again, there are others which are null, though his consent be given. Obligations arise either from delict or from contract. Obligations formed by the wife's delict stand good against herself (*p*) because marriage affords no indemnity to delinquents; but they have no operation against the husband (*q*) unless he be convicted of accession to the crime or delict which produces the obligation; for delicts being personal ought to draw no punishment on the innocent; *culpa teneat suos auctores*. The effect of such obligations is, in several respects limited even as to the wife; for where the punishment consists of a pecuniary fine, her person cannot be attached for the payment of it during the marriage, if she has no separate estate exempt from the *jus mariti* (*r*). Diligence must, therefore, be suspended until the dissolution of the marriage (*s*).

Wife's Personal Obligations.—Personal obligations granted by the wife whilst she is *sub curâ mariti*, although with the husband's consent, are *ipso jure* void; *e.g.*, bonds, bills, promissory notes, obligatory receipts, contracts, &c., for whatever cause they may have been granted, whether for borrowed money, the price of goods, or as a cautioner for others (*t*). Such obligations cannot even be

(*n*) Ersk. Inst., 1, 6, s. 22; Stair, b. 1, tit. iv., s. 16; Rennie *v.* Ritchie (1845), 4 Bell, App. 221; Dickson *v.* Blair (1871), 10 Macph. 41.

(*o*) Bell, Princ. 1610; Rennie *v.* Ritchie, *supra*.

(*p*) See Fraser, Husband and Wife, i., 545, 557.

(*q*) Thus a husband is not responsible civilly for his wife's slander: Barr *v.* Neilsons (1868), 6 Macph. 651; Milne *v.* Smiths (1892), 20 Rettie, 95.

(*r*) Chalmers *v.* Baillie (1790), Mor. Dict., 6083.

(*s*) Murray *v.* Graham (1724), Mor. Dict., 6079; Fiscal of Lanarkshire *v.* McLuckie (1796), Hume, 204. But see Fraser, Husband and Wife, i., 560; Stair's Inst., b. 1, tit. iv., s. 16, note.

(*t*) Bell's Princ., 1611; Fraser, Husband and Wife, i., p. 519, 523

the foundation of diligence against the wife's separate estate (*u*). They do not acquire force even by her judicial ratification of them (*v*); for deeds in themselves null cannot be rendered effectual by any ratification, though they may be, by acts of homologation performed by the grantor after becoming *sui juris* (*w*).

Common Law Exceptions.—This rule admits of several exceptions at common law.

1. **Rule of In rem versum.** — Where the wife has a separate *peculium*, or stock, derived either from her father or a stranger, for the maintenance of herself and children, which is by the grant exempted from the *jus mariti*, she can lawfully charge or burden such stock and bind herself for sums of money to the extent of such stock (*x*). But the only way in which the wife's personal obligation can be made good is by showing that the money has been *in rem versum* of the wife, which case will be the basis of diligence against her property, *stante matrimonio*, and even against her person after the dissolution of the marriage (*y*).

Debts incurred in the management, recovery, and exoneration of the separate property of a married woman are *in rem versum* of her (*z*); so are bills and promissory notes (*a*) granted by her in a trade which she carries on with her husband's consent, with separate property, excluded from his *jus mariti* (*b*), and her separate property is chargeable in her hands, and in those of her husband, to whatever extent he has benefited by it, with her ante-nuptial debts (*c*).

2. **Separation.** — Where there is a legal, or even voluntary separation of the husband and wife, under circumstances which do not entitle the wife to pledge her husband's credit—*e.g.*, if she has

et seq. And see Jackson *v.* McDiarmid (1892), 19 Rettie, 528, as to cash credit bonds.

(*u*) *Ibid.* But see p. 341, *infra*, for cases where diligence can be founded against the wife's personal estate.

(*v*) Birch *v.* Douglas (1663), Mor. Dict., 5961.

(*w*) Ersk. Inst., 3, 3, s. 47.

(*x*) Neilson *v.* Arthur (1672), Mor. Dict., 5984; Galbaith *v.* Provident Bank (1900), 2 Fraser, 1148.

(*y*) Stair's Inst., 1, 4, s. 16, note; Harvey and Fawel *v.* Chenel's Trustees (1791), Mor. Dict., p. 5980.

(*z*) Fraser, Husband and Wife, i., 537. Such obligations are binding if contracted with the intention of benefiting the wife's separate estate, whether they do so in fact or not: Henderson *v.* Dawson (1895), 22 Rettie, 895.

(*a*) But not as cautioner: Harvey, *ubi cit. supra*, note (*y*).

(*b*) Biggart *v.* City of Glasgow Bank (1879), 6 Rettie, 470.

(*c*) Married Women's Property Act, 1877, s. 4.

deserted him, or the husband has settled an adequate sum for the wife's separate maintenance, her personal obligations during their separation are effectual against her; and if the husband is abroad and the wife engaged in trade, diligence can proceed on obligations, contracted in such trade, against her person (*d*).

The obligations contracted by the wife after separation cannot affect the husband; for by his securing a yearly annuity for her maintenance he fulfils the natural obligation which the marriage imposed on him to provide for her; and therefore the creditors who continue to deal with her, contract upon her credit alone (*e*).

Where a married woman's heritable property is excluded from her husband's *jus mariti* and right of administration she can deal with it just as if she were an unmarried woman (*f*) and (*g*) she is in the same position if she has obtained a protection order, or is judicially separated from her husband. Moreover, under the Married Women's Property (Scotland) Act, 1881 (*h*), the income of heritable property in Scotland belonging to a woman, married after the passing of the Act, is no longer subject either to the *jus mariti*, or to the right of administration, of her husband, and her receipt for the rents of such property would now probably be sufficient (*i*). Property acquired by a married woman after the passing of the Act is in the same position as property belonging to her when the Act was passed, unless the husband "have, before the passing thereof, by irrevocable deed or deeds, made a reasonable provision for his wife in the event of her surviving him" (*k*). In so far as the *corpus* of a married woman's heritage is concerned, where the provisions of the Act of 1881 apply, she is still in the same position as she occupied at common law, and cannot, therefore, without her husband's consent burden or dispose of it (*l*). The same observation holds good with regard to both the income and the *corpus* of heritage from which the husband's *jus mariti* and right of administration have not been excluded (*m*).

(*d*) Ersk. Inst., 1, 6, s. 25; Churnside *v.* Currie (1789), Mor. Dict., p. 6082; followed in Orme *v.* Diffors (1833), 12 Shaw, 149; Biggart *v.* City of Glasgow Bank (1879), 6 Rettie, 470.

(*e*) Ersk. Inst., 1, 6, s. 25.

(*f*) Annand *v.* Scott (1775), 2 Paton, 369; Standard Property Investment Co. *v.* Cowe, &c. (1877), 4 Rettie, at p. 704.

(*g*) See p. 341, *post*.

(*h*) 44 & 45 Vict. c. 26.

(*i*) S. 2.

(*k*) S. 3.

(*l*) Ersk. Inst., 1, 6, s. 27.

(*m*) Ersk. Inst., *ad loc. cit.*

3. **Obligations which can only be validly fulfilled by the Wife.**—Notwithstanding the husband's *jus mariti* "execution may be used against a wife's person to compel her to the performance of acts which are in her own power, and cannot be validly performed but by herself" (*a*). If the obligation is one involving only some act by the married woman, such as the fulfilment of an engagement to sing at a concert or act in a play, damages alone, and not specific performance, can be obtained by the creditor: in other cases specific performance may be enforced by imprisonment (*b*).

4. **Husband's Imprisonment.**—The wife's disability ceases during her husband's imprisonment for a long term (*c*).

5. **Wife holding herself out as Unmarried.**—According to Lord Fraser, "if a married woman assert herself to be unmarried, and so induce any person to enter into a contract with her, the other party may insist on the contract being implemented, and may use diligence on the wife's obligation" (*d*). Mr. Walton (*e*), however, suggests that this rule ought not to be carried further than this: that a married woman cannot, under the circumstances supposed, at once repudiate, and take the benefit, of the contract.

6. **Statutory Exceptions.**—(1) Under the Conjugal Rights Amendment Act, 1861 (*f*), when a married woman has obtained a protection order under the statute, property earned by her own industry, or acquired by her by succession or otherwise thereafter, is excluded not only from the *jus mariti*, which makes the husband, in virtue of his *potestas maritalis*, owner of his wife's movables, but from the right of administration, which he possesses as his wife's curator; and after such protection order, or decree of judicial separation, the wife has the same capacity, and is liable to the same diligence, as regards both her person and her estate, as an unmarried woman (*g*).

(2) The Married Women's Policies of Assurance (Scotland) Act, 1880 (*h*), excludes from the husband's *jus mariti* and right of administration policies of insurance effected by a married woman on her own life or the life of her husband for her separate use, and

(*a*) Ersk. Inst., 1, 6, s. 19.

(*b*) Fraser, Husband and Wife, 1, 555.

(*c*) *Ibid.*, 1, 547; Walton, Husband and Wife, 168.

(*d*) *Ad loc. cit.* 1, 544. As to French law on this point, see Lasnier *v.* Fillatreau (1902), Sirey, 1902, i., 485.

(*e*) *Ad loc. cit.* 171.

(*f*) 24 & 25 Vict. c. 86.

(*g*) Ss. 5, 6.

(*h*) 43 & 44 Vict. c. 26, s. 1.

makes such policies assignable by her, either *inter vivos* or *mortis causâ*, without her husband's consent.

(3) The Married Women's Property (Scotland) Act, 1877 (*i*). excludes equally from the *jus mariti* and right of administration of the husband a married woman's wages or earnings, by literary, artistic, or scientific skill, and all investments of these species of property. The Married Women's Property (Scotland) Act, 1881 (*k*), excludes both the *jus mariti* and the right of administration from the income of the wife's heritable estate (*l*), and the *jus mariti*, but not the right of administration, from the whole of her movable estate (*m*).

The Wife's Præpositura.—Where the wife is *præposita negotiis* by the husband—intrusted with the management, either of a particular branch of business, or of his whole affairs—all the contracts which she makes in the exercise of her *præpositura*, and even the debts due by her for the price of goods, though they should not be constituted by writing, but arise merely *ex re*, from furnishings made to her, are effectual; but such obligations do not affect herself, because she acts not in her own name, but on behalf of her husband, who gave her powers to act, and who must on that account be bound by her deeds (*n*).

How Constituted.—A *præpositura* may be constituted either by a written commission, or factory, or tacitly, when the wife has been accustomed for a long time previously without a formal mandate to act for her husband, while he either approves of her management by discharging her engagements, or at least acquiesces in it (*o*).

Scope of Authority.—With regard to disbursements necessary for a family, the rule is that the wife is presumed, while she remains in family with her husband, to be *præposita negotiis domesticis*. In this character she has power to purchase whatever is proper for the family; and the husband is liable for the price, even though what was purchased may have been applied to other uses, or though he may have given the wife a sum of money *aliunde*, sufficient for the family expense (*p*).

(*i*) 40 & 41 Vict. c. 29, s. 1.
(*k*) 44 & 45 Vict. c. 21.
(*l*) S. 2.
(*m*) S. 1.
(*n*) Ersk. Inst., 1, 6, s. 26; Stair's Inst., 1, 4, s. 10.
(*o*) Wilson *v.* Deans (1695), Mor. Dict., p. 6021.
(*p*) Dalling *v.* McKenzie (1675), Mor. Dict., p. 6005; Alston *v.* Philip and Sir James Stanfilds (1682), Mor. Dict., p. 6007; Bell, Prin., 1566.

Termination of Præpositura.—This *præpositura* ceases, (1) by the wife's delict; for if she should abandon her husband's family, and take up her residence elsewhere, she can be no longer looked upon either as manager of the family, or as being under the husband's protection; and therefore she has no longer authority to oblige him to the payment of any of her debts, except those which she may have contracted for her necessary subsistence (*q*); (2) by the husband depriving the wife of the management of his family. This is effected by inhibition; which is a remedy competent to every husband, whose wife discovers an inclination to live beyond his fortune (*r*).

Inhibition.—As the wife's right of managing her husband's family is founded entirely on the presumption that he placed her in the position, and as every one may remove his managers at pleasure, without assigning any reason for it, inhibition may pass against the wife, *etiam causâ non cognitâ*, though the husband should not offer to justify that measure, by any actual proof of her want of economy (*s*).

The inhibition is a notice prohibiting the lieges from dealing with the wife without the husband's special authority. It is published by registration in the General Register of Inhibitions (*t*), and by service of a copy on the wife or at her place of residence; and it is effectual against tradesmen dealing with the wife even although they prove that they never heard of it (*u*). But the husband may estop himself from relying on it by having expressly or impliedly allowed his wife to pledge his credit after its publication (*x*).

The husband may also terminate his wife's *præpositura* by private notices to the tradesmen dealing with her. These are only effectual, however, in so far as she is provided for *aliunde* (*y*).

Though a wife may buy on her husband's credit, she is not, generally speaking, entitled to borrow money; that not being supposed to fall within the sphere of her agency. But if the

(*q*) Allan *v.* Earl and Countess of Southesk (1677), Mor. Dict., p. 6005.

(*r*) Stair's Inst., 1, 4, s. 17 and note; Ersk. Inst. 1, 6, 26.

(*s*) Carse *v.* Burton (1747), Mor. Dict., 6024; Countess of Caithness *v.* The Earl (1747), Mor. Dict., 6025; Stair's Inst., 1, 4, s. 10, and s. 17.

(*t*) 31 & 32 Vict. c. 64, s. 16.

(*u*) Fraser, Husband and Wife, i., 633.

(*x*) Ker *v.* Gibson (1709), Mor. Dict., 6023.

(*y*) Ersk. Inst., 1, 6, s. 26; Auchinleck *v.* Earl of Monteith (1675), Mor. Dict., 5879.

money were borrowed with his consent, declared, or necessarily implied, or has been *bonâ fide* consumed in his own family, he will of course be liable (*z*). Neither is a wife entitled to pledge furniture or the like (*a*).

Juridical Capacity.—Pursuer.—Defender.—At common law a married woman could not by herself raise or defend any action, even as regards her separate property, from which the *jus mariti* and right of administration were not excluded (*b*). The rule did not, however, apply when the wife was living separate from her husband, and he refused to lend his concurrence (*c*), or when his interests were adverse (*d*), or he had gone abroad and had not been heard of for years (*e*). Since the Married Women's Property (Scotland) Act, 1881 (*f*), a married woman may appear in actions relating to the income of her personal estate or the rents and profits of her heritage, without the husband's consent or concurrence.

Trade Partnership.—A married woman cannot engage in trade without her husband's consent (*g*), and at common law (*h*), and possibly (*i*) still, in spite of the Act of 1881, the marriage of a female partner dissolves the firm.

Married Woman as Witness.—Under the Criminal Evidence Act, 1898 (*j*), the wife or husband of the person charged with an offence is a competent witness for the defence at every stage of the proceedings under the same conditions as in England (*k*).

Office.—In Scotland a woman cannot be a tutor or curator.

Agreement in Derogation of Marital Power.—In Scotland an agreement ante-nuptial, or post-nuptial, by which the husband renounces the *jus mariti* or power of administration, is sustained (*l*).

Agreements for Separation.—In Scotland, voluntary contracts for separation between husband and wife, by which the husband settles on

(*z*) Thomson *v.* Home (1827), 6 Shaw, 204; Grant *v.* Baillie (1830), 8 Shaw, 606.

(*a*) See Tweddel *v.* Duncan (1841), 3 Dunlop, 998.

(*b*) Mackay Manual of Practice, 144.

(*c*) See Ewing *v.* Cullen (1833), 6 Wils. & Shaw, 566.

(*d*) Encyclo. Scots Law, Married Woman, viii., at p. 299.

(*e*) McQuillan *v.* Smith (1892), 91 Rettie, 375.

(*f*) 44 & 45 Vict. c. 26.

(*g*) Ferguson's Trustees *v.* Willis, Nelson & Co. (1883), 11 Rettie, at p. 268.

(*h*) Russell *v.* Russell (1874), 2 Rettie, 94.

(*i*) See Encyclo. Scots Law, *ad loc. cit.*

(*j*) 61 & 62 Vict. c. 36.

(*k*) Ss. 1, 4. And see p. 332, *ante*.

(*l*) Stair's Inst., i., 4, s. 9.

her a fixed annuity for her maintenance, were formerly deemed void, *ab initio*, as being contrary to one of the essential duties of marriage —viz., the adherence of the married pair to one another (*m*). But by later decisions they are effectual during the whole period of the separation, as being granted by the husband, in consequence of his natural obligation to maintain the wife. But they are revocable, and accounted actually revoked, so soon as he shall offer to receive her again into his family (*n*); and if the deed contain *in gremio* an admission of adultery or cruelty, the offender may still raise an action of adherence, and will succeed unless the respondent prove the adultery or cruelty (*o*).

So little effect is given to their voluntary separation, that, if no separate alimony has been agreed on by the parties, the Court will not supply the deficiency. Accordingly, where a wife pursued her husband for an aliment, during their voluntary separation, to be modified by the Court, action was refused as incompetent because the husband might put an end to it immediately, by ordering his wife to live with him. It was laid down that this legal rule, as to the power of revocation in either party, rested on the reason, that separation was contrary to the duties of the married state, of which the object was, that the parties should live together: that for the attainment of this object the law allowed either party to revoke expressly, and even held the contract of separation voided, *ipso facto*, if they actually came together again. But it was observed by the Court, in deciding the case referred to, that this rule of law could not apply, where the reason of it was inapplicable, where the parties would not or could not live together: that supposing, for instance, one party revoked, but yet refused adherence, such a revocation seemed to receive no support from the law; and there appeared to be just as little reason for giving effect to a revocation made after one of the parties was dead, when all adherence was out of the question, when the effect of the contract in separating the parties had had its full completion and was exhausted. Upon these principles it was decided that a voluntary contract of separation was not revocable by the wife after the death of her husband; and

(*m*) —— *v.* Drummond (1634), Mor. Dict., p. 6152.

(*n*) —— *v.* Livingston (1666), Mor. Dict., p. 6153.

(*o*) A. B. *v.* C. D. (1853), 15 Dunlop, 372; A. B. *v.* C. D. (1853), 16 Dunlop, iii.; —— *v.* Lawson (1797), Mor. Dict., 6157.

that as little so was an exclusion therein contained of the wife's legal provisions in the event of the dissolution of the marriage, though these were more valuable than the provisions of the contract, the difference, however, not being so great as to render the contract grossly unequal (*a*).

Law of Ireland.—The legal position of a married woman is substantially the same in Ireland as in England. This proposition applies, *e.g.*, to the acknowledgment of deeds (*b*), suing and defending in civil cases (*c*), contractual capacity, and liability in tort (*d*).

Isle of Man.—Under the ancient jurisprudence of the Isle of Man, the personal capacities of husband and wife were generally similar to those existing under English common law (*e*).

The Married Women's Real Property Act, 1908 (*f*), enables a married woman, during and notwithstanding her coverture, by will executed on or after January 1st, 1908, to devise her real property as if she were a *feme sole* subject to any estate or interest of her husband therein by curtesy or otherwise. The rights of husbands and wives in each other's estate on death are determined by Acts of 1777 and 1852.

An inquest of 1504 (*g*), contains the following findings : " If any forfeit his Goodes to the Lord by Felony, his Wife shall not forfeit her Part of Goods because the Woman is but subject and obedient to the Man. But . . . if the Woman forfeit in felony her Husband may forsake her and her Deeds ; and if he do not but conceale her Deedes, he to stand as deep in the Law as the Woman."

The Conveyancing Act, 1908 (*h*), provides that, 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, with her consent, bind her interest in any property (*i*). This provision applies only to judgments or orders made after the commencement of the Act (*k*).

(*a*) Burge, 1st ed., i., 240, citing Bell *v.* Bell, February 22nd, 1812, Fac. Coll. ; Palmer *v.* Bonar, January 25th, 1810, Fac. Coll. ; Ersk. Inst., i., 6, n. 30, 31, note ; Stair, i., 4, n. 22, note.

(*b*) Fines and Recoveries (Ireland) Act, 1834 (4 & 5 Will. IV. c. 92); R. S. C. (Ireland), 1905, Ord. 83.

(*c*) R. S. C. (Ireland), 1905, Ord. 16, r. 15.

(*d*) Wylie's Judicature Acts, pp. 307 *et seq.*

(*e*) Burge, 1st ed., i., p. 211 ; Johnson, Jurisprudence of the Isle of Man, p. 96.

(*f*) 8 Edw. VII.

(*g*) Mill's Statutes, pp. 32, 33.

(*h*) 8 Edw. VII.

(*i*) S. 21 (1).

(*k*) S. 21 (2)—*i.e.*, July 6th, 1908.

Laws of the Colonies.—The foregoing provisions of the law of England are, generally speaking, reproduced in the other British Dominions not already referred to. A brief summary of their legislation on the foregoing points will be sufficient.

In **Gibraltar** (*l*), the law of England, as it existed on December 31st, 1883, is in force "in the city, garrison, and territory so far as it may be applicable to the circumstances thereof" (*m*). The Fines and Recoveries Act, 1833 (*n*), put in force by an Ordinance of March 14th, 1835, has been repealed (*o*) to the same extent as in England by the Statute Law Revision Acts, 1874 (*p*) and 1875 (*q*), and the Supreme Court of Judicature (Officers) Act, 1879 (*r*). None of these repeals affect the substantive provisions of the Act of 1833 as to the necessity of acknowledgments. But the ordinance of March 14th, 1835, is repealed by Ordinance 1 of 1889 (*s*).

In **Malta** (*t*) the position of the wife is similar to that of a married woman under the Italian Civil Code (*u*). She cannot appear in Court, nor perform any legal act, without her husband's consent or the authority of the Court (*x*). She may, however, make a will (*y*).

Australia.—By the Constitution (*z*), the Federal Parliament has power, but not exclusive power (*a*), to make laws with respect to marriage. There has, as yet, been no such legislation on any matter falling within the scope of the present chapter.

New South Wales.—The law of England as at July 25th, 1828, is in force, generally speaking, in the Colony (*b*). Act 7 Vict. No. 16 (*c*) made provision for the acknowledgment of deeds by married women. 39 Vict. No. 25 (1876) followed Malins' Act, 1857 (*d*). Act 12 of 1903 provided that, whenever, after the passing

(*l*) Burge, 2nd ed., vol. i., p. 144.

(*m*) O. in C. of December 2nd, 1884, Stat. R. & O. Rev., 1904, vi., Gibraltar, p. 5.

(*n*) 3 & 4 Will. IV. c. 74.

(*o*) Sched. to O. in C. of December 2nd, 1884.

(*p*) 37 & 38 Vict. c. 35.

(*q*) 38 & 39 Vict. c. 66.

(*r*) 42 & 43 Vict. c. 78.

(*s*) See further, registration of titles to land, Consolidation O. in C., 1888, and Amendment Ordinance, 1896 (No. 5 of 1896).

(*t*) Ord. 1 of 1873.

(*u*) See pp. 321, 325, *ante*.

(*x*) Ord. 1 of 1873, s. 6.

(*y*) S. 12.

(*z*) 63 & 64 Vict. c. 12, s. 51 (xxi.).

(*a*) S. 52.

(*b*) Burge, 2nd ed., vol. i., p. 289.

(*c*) Ss. 16 *et seq.*, and see 13 Vict. No. 45, s. 8. See also Registration of Deeds Act, 1897 (Act 22 of 1897), and the Real Property Act, 1900 (Act 25 of 1900), s. 109.

(*d*) 20 & 21 Vict. c. 56.

of the Act, at the time any person makes or gives a bill of sale, such person is married and living with his or her wife or husband, and such bill comprises household furniture, such bill of sale is not to be enforced by seizure or sale of any such furniture as is then actually in use by the person making or giving the bill of sale or his or her wife or husband, as the case may be, unless, at the time of its execution, the consent of the wife or husband is endorsed on it in a prescribed statutory form. This provision is to be of no effect after the death of the wife or husband, or if, after the making or giving of the bill, such husband or wife live apart pursuant to a decree, order, or deed of separation, or if a decree for dissolution or nullity of the marriage is made.

Queensland.—The law in Queensland is the law of New South Wales at the date of the erection of Queensland into a separate colony (*e*). The Acts, above noted, 7 Vict. No. 16 and 13 Vict. c. 45, therefore, applied to Queensland. The Queensland Real Property Acts, 1861 (*f*) and 1877 (*g*) so far as unrepealed on September 4th, 1888, were adopted in **Papua** (*h*) by Ordinance 11 of 1889 (*i*).

South Australia.—The common law of England, as on December 28th, 1836 (*k*), is the common law of the Colony. The acknowledgment by married women of dealings with land is dealt with in ss. 255, 257 of the Real Property Act, 1886 (*l*).

Victoria.—The law in force on July 1st, 1851, in New South Wales was continued on the separation of Victoria from that Colony (*m*). The law as to the acknowledgment of deeds by married women is similar to that of England (*n*).

Western Australia.—The common law of England was introduced on the foundation of the Colony in 1829 (*o*). The acknowledgment of deeds of married women is dealt with by 35 Vict. No. 3 (1871).

(*e*) See Burge, 2nd ed., vol. i., p. 291. Deeds under the Land Act, 1897 (61 Vict. No. 25), or any amending Act, do not require registration under 7 Vict. No. 16. See Registration of Deeds Act, 1899 (63 Vict. No. 6), repealing 13 Vict. c. 45.

(*f*) 25 Vict. No. 14.

(*g*) 41 Vict. No. 18.

(*h*) See generally, as to Papua, Burge, 2nd ed., vol. i., p. 297.

(*i*) And see Ord. 5 of 1903.

(*k*) Burge, 2nd ed., vol. i., p. 292.

(*l*) No. 380 of 1886.

(*m*) Burge, 2nd ed., vol. i., p. 294.

(*n*) Real Property Act, 1890 (No. 1136 of 1890), ss. 52—61; Transfer of Land Act, 1890 (No. 1149 of 1890), s. 92; Statutes (1890), iv. 3019, and v. 3323.

(*o*) Burge, 2nd ed., vol. i., p. 296.

Tasmania.—The law of England, as on July 25th, 1828, applies (*p*), and provision is made on the lines of English legislation for the acknowledgment of deeds by married women (*q*).

New Zealand (*r*).—The Property Law Act, 1905 (*s*), provides that a married woman may assign by deed any reversionary or other interest in personal property as validly and effectually as she may dispose of the like interest in money to arise from the sale of land (*t*). Acknowledgment by a married woman, whether married before or after the commencement of the Act (January 1st, 1906), is no longer necessary to the validity of any deed or instrument executed by her (*u*). The husband's concurrence is not necessary to the validity of any disposition of property by his wife, as trustee, executrix, or administratrix (*x*). Property may be conveyed by a husband to his wife, or by a wife to her husband, either alone or together with any other person (*y*).

Other Colonies.—The laws of most of the other Colonies contain provisions analogous to those of English law as to acknowledgment of deeds by married women—*e.g.*, Bahama Islands (*z*); Bermuda (*a*); Grenada (*b*); Jamaica (*c*); Trinidad and Tobago (*d*); Hong-Kong (*e*); Straits Settlements (*f*).

In **Barbados**, a married woman may, with her husband's consent and concurrence, dispose of lands and money subject to be

(*p*) Burge, 2nd ed., vol. i., p. 294.

(*q*) 4 Will. IV. No. 13 (1833); 5 Vict. No. 11 (1841); 21 Vict. No. 42 (1858); 32 Vict. No. 12 (1868); Conveyances and Law of Property Act, 1884 (47 Vict. No. 19), ss. 43, 44.

(*r*) As to law in force, see Burge, 2nd ed., vol. i., p. 300.

(*s*) 5 Edw. VII. No. 36

(*t*) S. 21.

(*u*) S. 22.

(*x*) S. 23.

(*y*) S. 17.

(*z*) 51 Geo. III. c. 15 (1810); 17 Vict. c. 11 (1854); acknowledging deeds and renunciations of dower (36 Vict. c. 9 (1873); 56 Vict. c. 15 (1893); 61 Vict. c. 7 (1898)).

(*a*) Conveyances of real estate and acknowledgments by married women (Nos. 6 of 1779, 1 of 1803, 7 of 1834, 15 of 1883). No. 18 of 1898, an amending Act, requires the registration of deeds by married women (s. 2). There is a saving for deeds by married women under the Aliens Act, 1897 (No. 7 of 1897), or conveying or releasing the right to dower only (s. 3).

(*b*) No. 7 of 1884, ss. 36—50.

(*c*) 27 Vict. c. 17, s. 6; and see No. 3 of 1886.

(*d*) Laws of Trin., ii., 467, No. 98 (revising and consolidating Nos. 21 of 1855, 7 of 1865, 3 of 1879).

(*e*) No. 5 of 1885.

(*f*) Nos. VI. of 1886, ss. 49—52. 7 of 1904, s. 3 (insurances).

invested in the purchase of lands and of an estate therein, and release and extinguish powers as a *feme sole* (*g*). Acknowledgment of such deeds (*h*) and of assignments of legacies, &c., by a married woman is necessary (*i*). A married woman may, with her husband's concurrence, dispose by deed duly acknowledged of her reversionary interest in personal estate, and release her right to a settlement out of such estate in possession. This power does not extend to marriage settlements (*k*). The Court of Chancery may, with a married woman's consent, where it appears to be for her benefit, bind her interest in any property notwithstanding a restraint on anticipation (*l*). In **British Honduras**, the husband's concurrence and the wife's acknowledgment are required in case of applications for the registration of title to land (*m*).

In the **Falkland Islands**, the acknowledgment of deeds by married women was formerly governed by Ord. 3 of 1853. But that ordinance was repealed by No. 6 of 1904, which simplifies conveyance, providing statutory forms of conveyance. In **Fiji**, the Court may appoint some person to act as next friend of a married woman, for the purpose of applications for registration of title to land (*n*). In **Sierra Leone**, Ord. 10 of 1883 (*o*), dealt with acknowledgments by married women. But the whole of that ordinance has now been repealed by No. 23 of 1906, which lays down (*p*) general rules as to the acknowledgment of instruments relating to land for the purpose of registration of title. Similar provision has been made for the acknowledgment of deeds affecting land in **Gambia** (*q*) and **Gold Coast Colony** (*r*).

United States.—The common law of England, in relation to the powers and capacities of married persons, has been abrogated in nearly all of the States. In eleven jurisdictions, including New York and Ohio, married women have been given absolute control over their property, as if unmarried (*s*). In eleven others, including Massachusetts and Pennsylvania, the general principles of

(*g*) No. 25 of 1891, s. 40.
(*h*) S. 40.
(*i*) S. 41. As to how acknowledgments are taken, see ss. 44—51.
(*k*) S. 42.
(*l*) No. 22 of 1899, s. 3.
(*m*) Cons. Laws, Pt. xxxiv., c. 106, s. 37; c. 107, s. 5; No. 30 of 1892, s. 2.
(*n*) No. 7 of 1876, s. 110.
(*o*) S. 11.
(*p*) S. 14.
(*q*) No. 5 of 1880, s. 8.
(*r*) No. 1 of 1895, ss. 7 *et seq.*
(*s*) 21 Cyc. of Law and Procedure, 1144, 1145

equity relating to the separate estate of married women have been incorporated into statutes (*t*).

Acknowledgment of Deeds.—Provisions for the acknowledgment of conveyances, as in England, by married women, exist in many States (*u*)—*e.g.*, Alabama, Alaska, Arizona, Arkansas, Connecticut, Delaware, Florida, Kentucky, Maine, Missouri, New Jersey, North Carolina, Oregon, Tennessee, and Washington. A married woman, abandoned by her husband, can generally convey her real estate as if single—*e.g.*, in Delaware, Kentucky, New Hampshire, and Alabama. In an increasing number of States, however, the acknowledgment of a conveyance by a married woman, if of full age, may be made and certified as if she were a *feme sole*—*e.g.*, Illinois, Indiana, Iowa, Massachusetts, Nebraska, New York, and Pennsylvania. For the conveyance of the homestead of a married person, execution and acknowledgment by both husband and wife are sometimes required—*e.g.*, in North and South Dakota, and in Utah.

General Legal Position of Married Women.—In many States certain limitations are imposed on a wife's capacity. In Alabama, Connecticut (probably), Georgia, Michigan, New Hampshire and Vermont, a wife cannot become a surety for her husband. In Illinois, Kentucky, New York, and Texas, on the other hand, the law expressly permits such suretyship. In Indiana the wife cannot enter into any contract of suretyship, whether as indorser, guarantor, or in any other manner, and in Delaware, if over twenty-one she can give a bond with or without warrant of attorney as if unmarried. In Indiana, New Jersey and Pennsylvania she cannot be an accommodation indorser, guarantor, or surety. In Illinois she cannot be a partner without her husband's consent; in Wyoming she cannot be an administratrix or trustee after marriage; while in New York and Montana a wife can be an executrix, administratrix, and guardian (as also in Colorado), and a trustee in Montana, as if single, and her contracts bind her separate estate. In most of the States a married woman may now sue and be sued as if she were a *feme sole*. This is so in Colorado, Kansas, Missouri, Montana, New York, Ohio, Oregon (where neither spouse is answerable for the debts or liabilities of

(*t*) 21 Cyc. of Law and Procedure, 1144, 1145.

(*u*) Hubbell's Legal Directory, 1908.

the other), Pennsylvania, South Carolina, South Dakota, Virginia, Wyoming. In Wisconsin she can sue in her own name for injury to person or character, and can recover damages for diversion of her husband's affections and loss of his society, and she can insure his life on any conditions. The wife's capacity to insure her husband's life is expressly dealt with in Illinois, New Jersey, and Tennessee. In Nebraska, Tennessee, Wisconsin, and the District of Columbia the wife's powers and liabilities are, as in England, mainly defined with reference to her separate estate. In Texas she can trade; in West Virginia if living separate from her husband she can trade; in North Carolina she can trade with his consent on attaining twenty-one years of age, by ante-nuptial contract or by written declaration. In Florida, Idaho, Montana, and Nevada a married woman may become a sole trader by the authority of a judicial decree. In Louisiana a married woman cannot bind herself by contract without her husband's authority unless she is a public merchant; and even with her husband's authority she cannot bind herself or her property for her husband's debts. She may, however, lawfully contract without authority for necessaries for herself and her family if her husband fail to provide for her.

Marital Compulsion.—The doctrine of marital compulsion in regard to criminal charges has been generally recognised in the United States (*a*).

SECTION IV.

Laws of India, Burmah, China, Japan and Siam.

India.—Hindu Law.—On marriage, the husband is entitled to the society of his wife (*b*), even though she be under age (*c*), but intercourse with her, with or without her consent, before she attains twelve years of age, is punishable as rape (*d*). A chaste wife is entitled to live with her husband (*e*), and to be maintained by him (*f*).

(*a*) Bishop, Crim. Law, i., ss. 358 *et seq.*

(*b*) Binda *v.* Kaunsilia (1890), I. L. R. 13 All. 126; Tekait Mon Mohini Jemadai *v.* Basanta Kumar Singh (1901), I. L. R. 28 Calc. at p. 760.

(*c*) Surjyamoni Dasi *v.* Kali Kanta Das (1900), I. L. R. 28 Calc. at p. 44.

(*d*) Indian Act XLV. of 1860, s. 375.

(*e*) Gatha Ram Mistree *v.* Moohita Kochin Atteah Domoonee (1875), 14 Ben. L. R. at p. 300; Binda *v.* Kaunsilia, *ubi cit. supra*, at pp. 132, 133.

(*f*) See Burge, 2nd ed., vol. ii., p. 586.

These rights may be enforced by a suit for the restitution of conjugal rights (*g*).

Circumstances which under Hindu law justify desertion are an answer to such suit. These would include cruelty, whether physical or moral, to a degree rendering it unsafe for the wife to return to the power of her husband (*h*); the fact that the petitioner is suffering from a loathsome disease (*i*), or adultery by the wife if a suit is brought by her (*k*). Past adultery by the husband would not by itself be an answer to a suit (*l*), but where the husband is actually living in adultery (*m*), or his conduct has been such as to prevent his wife from returning to him without loss of caste or injury to her self-respect and religious feeling (*n*), the Court might refuse a decree.

Having regard to the custom of the country that women—at any rate, in the higher positions of life—are secluded in the zenana, a Hindu husband would apparently be entitled to exercise, within reasonable limits, a certain amount of restraint upon his wife, even if she be an adult, so as to keep her at home (*o*).

In Hindu law a wife can sue, or be sued, in her own name (*p*).

The Hindu law does not permit the parties to a marriage to vary by arrangement the rights, duties, and other incidents which the law attaches to the marriage state. Thus an ante-nuptial agreement by which the husband undertook never to remove his wife from the parental abode (*q*), or that on his taking another wife the first marriage should be void (*r*), is not binding on him. A post-nuptial agreement for a separation is not valid unless

(*g*) Tekait Mon Mohini Jemadai *v.* Basanta Kumar Singh (1901), I. L. R. 28 Calc. 751.

(*h*) Dular Koer *v.* Dwarkanath Misser (1905), I. L. R. 34 Calc. 971.

(*i*) Bai Premkuvar *v.* Bhika Kallianji (1868), 5 Bom. H. C. A. C. 209.

(*k*) Colebrooke's Digest, vol. ii., p. 415.

(*l*) Binda *v.* Kaunsilia (1890), I. L. R. 13 All., at p. 164.

(*m*) Paigi *v.* Sheonarain (1885), I. L. R. 8 All., at p. 81.

(*n*) Lala Gabind Prasad *v.* Doulat Batti (1870), 6 Ben. L. R. App. 85.

(*o*) See Matangini Dasi *v.* Jogendra Chunder Mullick (1891), I. L. R. 19 Calc., at pp. 90, 91.

(*p*) Boyrubchunder Doos *v.* Madhubchunder Paramanie (1863), 1 Hyde, 281.

(*q*) Tekait Mon Mohini Jemadai *v.* Basanta Kumar Singh (1901), I. L. R. 28 Calc. 751.

(*r*) Sitaram *v.* Mussamut Aheeree Heerahnee (1873), 11 Beng. L. R. 129; 20 Calc. W. R. C. R. 49.

it indicates a state of circumstances which would be an answer to a suit for restitution of conjugal rights (*s*).

Deeds of separation sometimes contain a covenant on the part of the husband to resign the children of the marriage, or some of them, to the care of the wife. The legality of such a covenant has been questioned. It has been provided by the Legislature (*t*), that no agreement contained in any separation deed made between the father and mother of an infant shall be invalid by reason only of its stipulating that the father shall give up the custody or control (*a*) of such infant to the mother; but "no Court shall enforce any such agreement if the Court shall be of opinion that it will not be for the benefit of the infant" to give effect thereto (*b*).

Muhammadan Law.—Under Muhammadan law the reciprocal duties of husband and wife are as follows (*c*), each being entitled to enforce their right to the society of the other (*d*). (A) As regards the wife: (a) to live in her husband's house (*e*); (b) to submit to marital intercourse, whenever required, within proper limits of health and decency (*f*); (c) to obey all reasonable commands; and (d) to observe strict conjugal fidelity and propriety of conduct (*g*). (B) As regards the husband: (a) to maintain his wife in a manner suitable to her husband's wealth, or at least the mean between his wealth and hers, if she be the poorer (*h*); (b) to provide her, where he has more wives than one, with separate sleeping accommodation, and, in any case, with an apartment of her own (*i*); (c) to allow her to visit, and be visited by, her parents, or children by a former husband, with reasonable frequency, and to visit, and be visited by, her own blood relations (within the prohibited degrees) at least once a year; but he is under no obligation to allow her to visit or be

(*s*) Sm. Rajlukhy Dabee *v.* Bhootnath Mookerjee (1900), 4 Calc. W. N. 488.

(*t*) 36 & 37 Vict. c. 12, s. 2.

(*a*) Including the right of directing the religious education: Condon *v.* Vollum (1887), 57 L. T. 154.

(*b*) As to the construction of this proviso, see In re Besant (1879), 11 Ch. D., at p. 511.

(*c*) On the whole subject, see Wilson, Digest, ss. 49 *et seq.*

(*d*) Moonshee Buzloor Ruheem *v.* Shumsoonnissa Begum (1867), 11 Moo. I. A. 551.

(*e*) Any special stipulation to the contrary, embodied in any contract of marriage, would be void: Wilson, Digest, s. 56. As to the position of wives under the age of puberty, see pp. 145, *ante*, 355, 898, *post*.

(*f*) Baillie, i. 438.

(*g*) Wilson, Digest, ss. 49, 53; Baillie, 442—450.

(*h*) Wilson, Digest, s. 53.

(*i*) Baillie's Digest, i., 448, 449.

visited by strangers, or to go out to marriage-feasts, public baths, or the like (*k*). The wife may, however, refuse to fulfil the duties above mentioned, without forfeiting her right to maintenance (*l*) or of succession to her husband for non-payment of dower (*m*); and in case of "cruelty" on the part of her husband, she may refuse to live with him without rendering herself liable to a suit for restitution of conjugal rights; she may also, under the same circumstances, obtain a maintenance order for a sum not exceeding 50 rupees a month (*n*). Under Muhammadan law (*o*), the husband has the right to inflict moderate chastisement on his wife, but it seems doubtful whether that right could be legally exercised in British India (*p*). The husband may, however, divorce a disobedient wife (*q*), or withhold maintenance from her (*a*), or sue her for restitution of conjugal rights; the sanctions of attachment of her property, and imprisonment, being available for the enforcement of the decree (*b*). Under the joint effect of s. 375 of the Indian Penal Code (*c*), and s. 1 of Act X. of 1891, a man who has sexual intercourse with his wife, being a girl under the age of twelve years, may be convicted of rape. Under the Muhammadan law, fornication by a married person is punishable with death, and by an unmarried person of either sex, with scourging (*d*). In British India, however, a wife who commits adultery incurs no other penalty than forfeiture of any maintenance which has been allowed to her; while a husband incurs no liability at all, unless his conduct could be regarded as amounting to "cruelty," in which case his wife would have the right to refuse to live with him, without forfeiting her claim to maintenance (*e*).

The Muhammadan law is less strict than the Hindu law as to conditions which are derogatory to the ordinary incidents of marriage. Mr. Ameer Ali (*f*) enumerates the following as being

(*k*) Wilson, *ubi cit. supra*, s. 53.

(*l*) As to which, see Burge, vol. i., pp. 587, 588.

(*m*) See p. 757, *post*.

(*n*) Code of Criminal Procedure, 1898 (Act V. of 1898), s. 488.

(*o*) Koran, iv., v., 40.

(*p*) See ss. 79, 319 of the Indian Penal Code (Act XLV. of 1860); and note 2 to s. 51 in Wilson, Digest.

(*q*) See pp. 897 *et seq*.

(*a*) Baillie, i., 438.

(*b*) Code of Civil Procedure (Act V. of 1908), Ch. I. O. 21, r. 32; Moonshee Buzloor Ruheem *v.* Shumsoonnissa Begum (1867), 11 Moo. Ind. App. 551.

(*c*) Act XLV. of 1860.

(*d*) Wilson, Digest, note to s. 52.

(*e*) *Ibid*.

(*f*) Mahomedan Law, vol. ii. (2nd ed.), p. 312.

valid ante-nuptial conditions: "(a) That the husband shall not contract a second marriage during the existence or continuance of the first. (b) That the husband shall not remove the wife from the conjugal domicil without her consent. (c) That the husband shall not absent himself from the conjugal domicil beyond a certain specified time. (d) That the husband and the wife shall live in a specified place. (e) That a certain portion of the dowry shall be paid down at once or within a stated period, and the remainder on the dissolution of the contract by death or divorce. (f) That the husband shall pay the wife a fixed maintenance. (g) That he shall maintain the children of the wife by a former husband. (h) That he shall not prevent her from receiving the visits of her relations whenever she likes."

In the cases of Hindus and Muhammadans, as in the case of other persons residing in India, a wife would, in the absence of a prohibition by law, be entitled to pledge her husband's credit for necessaries supplied for her support or for that of the family (*g*).

The laws of Burmah, China, Japan and Siam may be briefly referred to in connection with this subject.

Law of Burmah (*h*).—By operation of law, certain legal incidents follow on the creation of the status of husband and wife. The control of the household, the children, and family property is vested in the husband, but he cannot exercise such power in an arbitrary manner and without due regard to the opinions of his wife. In the family interests the wife, if not regarded as an equal partner, certainly does not occupy the unimportant position that women have in most Oriental countries. If she be the bread-winner of the family, as frequently happens, her wishes will be by no means subservient to those of her husband. The husband is bound to maintain his wife and children, and the assistance of the law can be obtained to compel the observance of his duties. As under English law, he is liable also for necessaries supplied to his wife. A wife, however, commits a fault if she lives apart from her husband for no sufficient ground, and in such an event she can claim no maintenance. Neither can she claim it if she have means of her own. The other rights and duties which the husband and wife have are common to all civilised systems of law.

(*g*) See Pusi *v.* Mahadeo Prasad (1889), 3 All. 122; Virasvami Chetti *v.* Appasvami Chetti (1863), 1 Mad. H. C., at p. 379.

(*h*) This account is contributed by Moung Tun Luin, K.S.M., Rangoon.

Law of China (*a*).—The effect of marriage is to bring the wife into the *manus* of the husband, as at Rome, and to make her a member of his family. Chinese women live in such seclusion that the question of the liability of a husband on a wife's contracts cannot often arise. When it does the Court would be guided very much by the circumstances of each case. The husband is not liable for debts contracted by his wife before marriage, unless she was *sui juris* and had no family when he married her.

Law of Japan.—Under the Civil Code, as regards the effects of marriage, the wife by marriage enters the husband's family. A wife is bound to live with her husband, and a husband must cause his wife to live with him. Each is bound to support the other. If the wife is a minor, her husband, if major, exercises the duties of guardian over her. A contract made between spouses may be cancelled by either party at any time during the marriage, but the rights of third parties must not be prejudiced (*aa*).

As regards third parties, the wife requires the authorisation of her husband in order to (1) receive or employ capital; (2) contract debts or guarantee other persons' debts; (3) perform acts involving the acquisition or loss of rights with regard to immovables or valuable movables; (4) institute legal proceedings; (5) enter into contracts with regard to donations, amicable arrangements, or arbitration, or contracts subjecting her to personal restraint; (6) accept or refuse accessions, donations, or bequests. If she is allowed to engage in business she has the capacity of an independent person with regard to it. A husband can cancel or restrict such an authorisation, but such act of his cannot be set up against a third party who has acted in good faith. The wife does not require his authorisation where it is uncertain whether he is alive or dead, or when he has deserted her, or has been interdicted from managing her or his own property, or is under restraint as a lunatic, or is undergoing a term of imprisonment for a year or longer, or where his and her interests are in conflict. If he is a minor he cannot authorise his wife's acts, except according to article 4, *i.e.*, with the consent of his legal representative. Provision is also made for the ratification of

(*a*) This account is contributed by Mr. J. Bromley Eames, Barrister-at-law.

(*aa*) C. C., arts. 788—792; Gubbins' Civil Code of Japan (1899), Part II., 26, 27. For rights as to property, see arts. 798—807.

acts which are capable of being cancelled if the right is not exercised within a certain time; if a person without legal capacity uses fraud for the purpose of inducing belief in his legal capacity, he cannot cancel an act so performed (*b*).

Law of Siam (*bb*).—The wife is bound to submit to the husband, though it is doubtful if he can compel her to live with him against her will. He is bound to support her in the position which his wife ought to occupy, and failure to do so is a ground for divorce (*c*).

The husband is liable, generally speaking, for all the contracts and torts of his principal wife (*d*); but the modern tendency of the Courts is to restrict the right of the wife to enter into contracts without her husband's consent, unless they are for the purposes of their joint living, thus importing rules of partnership law into the relationship. As far as minor wives are concerned, their contracts require ratification in order to make the husband liable, and he is not fully responsible for torts committed by them (*e*).

The preceding observations are intended to apply to those civil capacities and incapacities of married persons which are strictly personal, and relate to personal contracts, and not to those which regard the administration, sale, hypothecation, or other disposition of their property, or the liabilities of the husband and wife, and the property of either, in respect of debts contracted by them before their marriage, or during the coverture. It is conceived more proper, that the latter species of capacities and liabilities should be considered in connection with the rights of the husband and wife in the property of each other. It will be found that the selection of the law to which the decision of those capacities, liabilities, and rights should be referred will be greatly influenced by their relation to property, real or personal.

(*b*) C. C., arts. 12—20; Gubbins, *ubi cit.*, Part I., 4—8.

(*bb*) This account is contributed by H.R.H. Prince Rajburi Direkheddi, Minister of Justice, Bangkok.

(*c*) Phua Mia, Art. 74.

(*d*) Laksana Kooni, R. *v.* Paa, Dika, 745, 128.

(*e*) Laksana Kooni.

CHAPTER VII.

PERSONAL CAPACITIES OF HUSBAND AND WIFE—PRIVATE INTERNATIONAL LAW.

The place in which the marriage is celebrated may not be that of the domicil of either of the parties before, or at the time of, or after the marriage, or the place where they are resident after the marriage. It may have been resorted to for no other purpose than that of celebrating the marriage, and they may have quitted it when the ceremony was performed. The domicil of the wife may not have been in the same country as that of her husband. As the laws of the several places in which the marriage was celebrated and in which the parties were domiciled or are afterwards resident may, in respect of the powers which they confer on the husband, and the incapacity to which they subject the wife, be at variance with each other, it is necessary to ascertain which of these conflicting laws ought to prevail in deciding on the powers, capacities, and incapacities incident to their status, whether *inter se* or as regards third parties (*a*).

The present chapter deals with the personal capacities and incapacities of married persons, leaving the consideration of their proprietary rights against each other and against third parties to be dealt with subsequently (*b*). It will be seen that the two branches of the subject are not now, as was formerly thought, governed by the same law, viz., the law of the matrimonial domicil (*c*), but the former is governed by the parties' personal law (*d*). But this, being the husband's personal law, is not allowed to prejudice the rights of the wife or the interests of third parties. The principal points on which it is necessary to ascertain what is the proper governing law are: (1) the personal capacities of the spouses generally; (2) the limitation of the husband's marital power; (3) the limitation of the wife's capacity.

I. Personal Law (not Lex Loci Celebrationis) Governs Personal Capacities of Spouses Generally.—The question whether the status

(*a*) Burge, 1st ed., i., 244.
(*b*) Chapter XV.
(*c*) See Burge, 1st ed., i., 246—251.
(*d*) See p. 360, *post*.

has been constituted by means of a legal marriage is perfectly distinct from the consideration of the rights, powers, and capacities which the status confers.

The inquiry whether the status has been constituted has been, as already pointed out (*a*), answered in the largely preponderating number of legislations, jurisprudences, and juristic authorities by making it dependent on the personal law of the parties so far as essentials are concerned and on the *lex loci celebrationis* so far as formalities go, though the older view still prevailing in the United States and adopted by Burge, and again favoured by recent English decisions (*b*), referred the validity of the marriage in respect of all matters to the latter law. Even adopting the latter view, however, Burge was of opinion that the connection of the parties with the law of the country where the marriage is contracted ceases, unless that place be the domicil of the husband; and then its law governs, not because the marriage was celebrated there, but because it is the country of the husband's domicil. The parties, if they do not by an express agreement on their marriage stipulate as to their future rights and capacities, are presumed to submit to them as they have been defined by some municipal law; and the law which it is presumed they contemplate is not that of a country in which they have no intention to reside, and to which, therefore, their status cannot be subject, but that of the country in which, as it is the place of their domicil, their rights and capacities are to be exercised (*c*).

À fortiori, in the former view, the personal law governs the personal relations of the spouses to each other and to third parties.

Older Jurists.—Burge's Opinion.—The civil law adopted the presumption that the law of the domicil should govern the future personal capacities of the spouses (*d*). The old jurists concur in selecting the law of the domicil of the husband and wife as that which determines the personal powers and capacities incident to their status, and not the law of the place in which the marriage was celebrated. Where they have not the same domicil, the husband's domicil prevails.

Law of Wife's Domicil not followed.—It has been stated that the

(*a*) See pp. 244, 246, 265.

(*b*) Ogden *v.* Ogden, [1908] P. 46; Chetti *v.* Chetti, [1909] P. 82, and see pp. 240 *et seq.*, 250.

(*c*) Burge, 1st ed., i., 241, 245.

(*d*) Dig. lib. 44, tit. 7, l. 21; lib. 42, tit. 5, l. 3.

wife, even before she leaves her residence, ceases to retain her former domicil, and acquires by her marriage that of her husband. No regard, therefore, is had to the law of the country in which the wife was domiciled at the time of her marriage, unless the husband abandons his former and establishes his future domicil there (*e*).

Husband's Personal Law Governs.—The law of the country where the husband is domiciled before his marriage will not be that to which resort is had if on his marriage he abandons it and selects a new domicil in the country of his wife's former domicil or in any other country. When, therefore, the husband at the time of his marriage abandons his former and selects a new domicil, the law of the latter is that to which resort is had in deciding on the rights and capacities of the husband and wife (*ee*).

Ignorance of Wife of Law of Husband's Domicil Immaterial.—By some jurists it has been considered that the rule excluding the law of the wife's domicil ought not to be applied if she has contracted her marriage in ignorance of the law of her husband's domicil and in the confidence that her rights would be governed by that of her own domicil. Such an exception has not, however, been entertained. Wesel condemns it: "Scire enim debuit statuta loci quò migrat, quæque, sequendo forum mariti, approbasse intelligitur. Et quis credat, vel mulierem, vel nuptiarum arbitros et pararios tam oscitanter et negligenter matrimonium contrahere, ut non antè inquisiverint in mores et consuetudinem domicilii mariti quò migratum iret? Videmus enim non rarò et compendii causâ nuptias contrahi" (*f*).

Schrassert, in stating it to be the universal rule, "Inspiciendam esse consuetudinem ejus loci, ubi tempore initi matrimonii maritus habuit domicilium," adds, "hic enim in matrimonialibus habetur pro loco contractus, *tam in ignorante muliere, quàm sciente*, et tam respectu rerum, quàm personarum" (*g*).

Boullenois also rejects such an exception: "En vain voudroit-on distinguer entre la femme qui a été rendue certaine des loix du domicile de son mari, et celle qui ne l'a pas été. Toute femme est présumée s'en être fait instruire; ses parents, ceux qui s'entre-

(*e*) Burge, 1st ed., i., 245. See *post.* Code Civil, art. 108; Wharton, s. 43.

(*ee*) Burge, *ubi cit. sup.*

(*f*) Burge, 1st ed., i., 251, citing Mev. ad Jus Lub., part. 1, tit. 10, art. 12, n. 339; A. Wesel, de Conn. Bon. Soc. Tr., 1, n. 102, p. 37; Goris, Adv. Tr., 1. c. 6, n. 8.

(*g*) Schrassert, obs. 233, n. 1: Burge, 1st ed., i., 252.

mêlent pour lui procurer un établissement, sont présumés le faire pour elle; et si elle ne l'a pas fait, elle doit se l'imputer: elle est, en cette partie, assujettie au droit commun, qui veut que celui qui contracte, connoisse la condition de la personne avec qui il contracte, et la présomption est, qu'embrassant le parti du mariage et s'identifiant en quelque maniere avec son mari, elle adopte plutôt les loix selon lesquelles elle va être obligée de vivre dorénavant, que des loix auxquelles elle se met elle-même dans la nécessité de renoncer. 'Præsumuntur sponsa et facientes pro eâ scivisse consuetudinem, vel statutum domicilii viri, tum quia notorium, tum per legem, qui cum alio contrahit, ff. de reg. juris. Quod si scire, vel taliter pacisci neglexerunt, perinde est ac si scivissent sibique imputare debent. Mol. Cod. de Stat.' Et suivant Mascardus, 'contractus hujusmodi, prout sunt matrimonii, fiunt cum magna inquisitione, quæ inquisitio tollit præsumptionem ignorantiæ. Concl. 7, n. 67, de gen. stat. interpr.'" (*h*).

On Change of Parties' Domicil, Law of New Domicil Governs.—The husband and wife may have abandoned the country which was the place of their domicil at the time of their marriage and have acquired another domicil, and there may be a contrariety between the laws of their present and former domicil. In this conflict the question will arise whether the capacities and incapacities which are incident to their status according to the law of their former domicil are permanently retained by them, or whether they are subject to be varied by their change of domicil. Whatever contrariety of opinion may exist respecting the effect of a change of domicil on rights of property acquired under the law of the matrimonial domicil, there is a general concurrence amongst jurists in holding that although the law which confers those rights, powers, and capacities is strictly a personal law, yet its influence exists so long only as the parties remain subject to it by retaining their matrimonial domicil. When they quit that domicil and establish another their status is governed by the law of the latter, and their capacities and powers are those which that law confers.

Such is the doctrine of Rodenburg, "Fac igitur virum, qui per loci leges, ubi degit, uxorem habeat in potestate, collocare domicilium aliò, ubi in potestate virorum uxores non sunt; vel vice versâ. Dicendumne erit induere uxorem potestatem, quâ prius liberata, et

(*h*) Boullenois, tom. 2, part 2, tit. 2, c. 4, obs. 38; Burge, 1st ed., i., 252, 253.

exuere, cui alligata erat? in affirmativam sententiam deduci videmur per tradita Bergund (*i*). Et rectè; personæ enim status et conditio cùm tota regatur à legibus loci, cui illa sese per domicilium subdiderit, utique mutato domicilio mutari et necesse est personæ conditionem" (*k*).

J. Voet, after laying down the rule that the wife's rights and capacities are those which are conferred by the law of her husband's domicil, however injurious they may be to her interests, treats of the effect of his change of their domicil.

"Neque aliud dicendum erit, si fortè vel ex necessitate relegationis, vel suâ voluntate, maritus domicilium transferendo deteriorem redderet uxoris conditionem, ob auctam ex novo domicilio mariti potestatem, quæ in pristino minor erat; aut ob id, quod ex domicilii lege conjugibus permittitur sibi invicem ultimâ voluntate gratificari; cum id prioris domicilii jure appareret inhibitum; ac frustra uxor fuerit, aut hæredes ejus, si propterea a migrante marito id, quod interest, putarent, exigendum esse. Cùm enim per nuptias uxoris quidem conditio deterior fiat, dum illa, antea sui juris rerumque moderatrix, maritali subjicitur potestati ac tutelæ; maritus autem suam conditionem per nuptias non deteriorem sed plerumque meliorem reddat, aut saltem non imminuat liberum illud, quod ante nuptias habebat, arbitrium; absurdum foret, illum, cui antea libera competebat migrandi facultas, nunc matrimonio contracto destitui illâ migrandi licentiâ, aut saltem metu pœnæ et præstationis ejus, quod interest, absterreri, ne eò migret, quò forte vel dignitatis obtinendæ spes, vel valetudinis reive familiaris ratio, aliave plura vocare videbantur ac invitare" (*l*).

Boullenois maintains the same doctrine. "Quant au statut qui met la femme sous la puissance de son mari, il est du nombre de ceux qui, selon moi, dépendent absolument du domicile actuel, et qui n'affectent les personnes, qu'autant de temps qu'elles sont domiciliées dans l'étendue du statut, de sorte que la femme changeant de domicile, peut cesser d'être sous l'autorité de son mari, et elle peut y retomber, si elle retourne dans son premier domicile, ou dans un autre semblable" (*m*).

(*i*) D. Tract. 2, n. 7.

(*k*) Rodenburg, De Jure, tit. 2, c. 1, p. 105.

(*l*) Voet, de Judiciis, lib. 5, tit. 1, n. 101.

(*m*) Boullenois, tom. 1, tit. 1, c. 2, obs. 4, p. 61. These authorities are cited by Burge, 1st ed., i., 254.

"His positis, une femme domiciliée en Hollande, qui aura contracté sans autorisation, et dont l'obligation n'est pas nulle, va depuis s'établir dans un autre endroit où le défaut d'autorisation annulle les engagements de la femme ; cette femme pourra néanmoins être poursuivie après le décès de son mari, pour raison de l'obligation qu'elle aura contractée en Hollande, parce que c'est le lieu du domicile où l'obligation a été contractée, qu'il faut uniquement regarder. C'est la loi de ce lieu qui a décidé de son état personnel, et par conséquent de la validité de son obligation. Le changement de domicile change les habitudes civiles que nous ne tenions auparavant que de la loi de l'ancien domicile, mais ne sauroit annuller ce qui est bon dans son principe" (*n*).

Froland also adopts this doctrine in relation to personal capacities.

"Mais quand il est question de l'habilité ou de l'inhabilité de la personne qui a changé de domicile, à faire une certaine chose, alors le statut qui avoit reglé son pouvoir tombe entierement à son égard, et cede tout son empire à celui dans le territoire duquel elle va demeurer.

"De là vient que la femme qui a son domicile dans le pays du droit écrit, ou en Normandie, et qui vient s'établir à Paris, ne peut plus exciper du Velléien ; et que celle au contraire qui fait sa résidence ordinaire en cette ville, ou autres lieux où l'édit de 1606, qui a abroge cette loi Romaine, est observé, allant demeurer en Normandie, ou dans le pays de droit écrit, perd toute la capacité qu'elle avoit, et ne peut plus intercéder pour autrui, ni s'obliger avec son mari.

"Que celle qui ne sçauroit faire aucun acte sans l'autorisation expresse de son époux suivant la coûtume du lieu où elle réside, se retirant avec lui dans un pays où la loi n'est pas si rigoureuse, devient plus libre qu'elle n'étoit auparavant ; et vice versâ.

"Que la femme domiciliée sous une coûtume, qui ne lui permet pas de tester sans le consentement et l'autorité de son mari, choisissant pour nouvel établissement un endroit dont la coûtume n'a point de disposition semblable, acquiert une pleine et entiere liberté de disposer de ses biens, sans la participation de son mari ; et vice versâ.

"Que celle qui par le droit municipal de la province où elle fait son séjour actuel ne peut contracter ni aliéner sans le consentement

(*n*) Boullenois, tom. 1, tit. 1, c. 2, obs. 4, p. 61 ; see Burge, 1st ed., i., 255.

de sa famille et le decret du juge, est affranchie de cette premiere servitude, aussitôt qu'elle va demeurer sous une coûtume qui ne l'assujettit pas à pareille chose, en supposant, comme font plusieurs, que ce statut est un veritable statut personnel ; et vice versâ.

"Et que l'homme de Normandie qui ne pourroit tester du tiers de ses acquests, s'il n'avoit pas survêcu trois mois à son testament, peut en disposer avec effet, encore bien qu'il soit décedé vingt-quatre heures après sa disposition, si dans le tems de sa mort il demeuroit sous une coûtume qui ne requiert pas cette servie, en supposant encore, comme fait le Parlement de Paris, que l'art. 422 de la Coûtume de Normandie, qui la prescrit, soit un statut personnel" (*o*).

Pothier has expressed the same opinion (*p*).

It should be observed that this doctrine has been thus controverted by Bouhier.

"On demeure presque généralement d'accord, que la loi du domicile matrimonial détermine l'état de la femme, et par conséquent l'étendue du pouvoir qu'a le mari sur elle ; et l'on ne voit pas comment cet état, une fois déterminé, pourrait changer par une simple translation de domicile faite par le mari. Une femme, qui ne peut rien faire sans l'autorité de son mari, deviendrait tout d'un coup, par un changement de domicile, libre de cette sujétion, et ensuite y retomberait, si son mari retournait dans sa première demeure. L'état des femmes dépendrait du caprice des maris. Quoi ! une femme a contracté sur la foi d'une coutume qui lui permet la libre administration de ses paraphernaux, même de tester de ses biens sans l'autorisation de son mari ; et cette femme serait privée d'un aussi précieux avantage par un changement de domicile qu'elle ne peut empêcher ? Ce serait heurter de front la régle qui ne permet pas qu'on nous enlève, sans notre fait, un droit qui nous appartient ; et voilà pourtant le principe des partisans de l'opinion contraire. On ne peut pas dire que la femme se soumette, même tacitement, aux lois du nouveau domicile ; elle ne fait qu'obéir" (*q*).

The opinion of the President Bouhier was adopted by Merlin and maintained with great zeal in the first edition of his work. He has, in a subsequent edition, to which a reference has been already

(*o*) Froland, tom. 1, p. 172.

(*p*) Pothier, Introd. tom. 10, tit. 1, n. 13, p. 3.

(*q*) C. 23, n. 3. These authorities are cited by Burge, 1st ed., i., 256, 257.

made, retracted it, and admitted that the status, its rights and capacities, must be decided with reference to the law of the actual domicil (*r*).

Modern Opinion Adopts Personal Law.—The conclusion in favour of the personal law thus reached by the great majority of jurists has been established in the modern systems of law and jurisprudence, which mostly adopt the national law for this purpose.

Thus in France and Belgium the capacity of persons to marry and the modifications which the marriage exercises on the capacity of the parties belong to the *statut personnel* (*s*), and the *statut personnel* is governed by the nationality. Thus French and Belgian law governs the capacity of their citizens when abroad. "Les lois concernant l'état et la capacité des personnes regissent les Français même résidant en pays étranger" (*t*); and consequently a French citizen cannot in the eyes of French law make or do any legal act which he would be incapable of doing in France, although by the foreign law he would have sufficient capacity for the purpose, and a marriage contracted in a foreign country by a French citizen not having the required capacity in France will be treated as null there, however good it may remain in another country (*u*). The disposition contained in the 3rd par. of art. 3, Code Civil, is extended by analogy to foreigners residing in France who are governed as concerns their civil status and capacity by their national law (*x*).

(*r*) Burge, 1st ed., i., 257; Merlin, tom. 1, s. 10, pp. 532, 533.

(*s*) Aubry et Rau, 5th ed., vol. i., p. 135.

(*t*) Code Civil, art. 3, par. 3.

(*u*) Aubry et Rau, *loc. cit.*, p. 142.

(*x*) "En effet le projet du titre preliminaire du Code contenait une disposition ainsi conçue 'La loi oblige *indistinctement* ceux qui habitent le territoire': Voy. Locré, Lég., i., p. 380, art. 3. Dans la séance du Conseil d'État du 14 Thermidor an ix le mot *indistinctement* fut retranché sur la demande de Tronchet qui faisait remarquer que la rédaction etait trop générale, puisque les étrangers n'étaient pas soumis aux lois civiles qui réglent l'état des personnes: Voy. Locré, Leg., i., p. 399, n. 10. Lors de la communication officieuse, le Tribunat trouva que, même ainsi amendée, cette rédaction était encore trop vague et pouvait prêter à des raisonnements faux et dangereux. Il proposa donc de restreindre la portée de la disposition dont s'agit aux lois de police et de sûreté, et de la faire suivre immédiatement, pour mieux en fixer le sens, de deux autres dispositions qui originairement placées au titre de la *jouissance des droits civils*, rappelaient évidemment la distinction du statut réel et du statut personnel, telle qu'elle avait toujours été reçue en France: Voy. Locré, Leg., i., p. 563, n. 9. Cette proposition fut adoptée, et amena la rédaction définitive de l'art.

Where the spouses are of different nationality preference is to be given to the law of the husband's nationality (*y*), and a change of nationality is not considered to have effect on private rights (*z*).

II. **Limitation of Husband's Marital Power.—Change of Personal Law must not Prejudice Rights of Wife.**—Modern jurists have, however, formulated a reservation in favour of the wife's rights not being prejudiced by the husband's changing the matrimonial domicil or their personal law after the marriage. "The effect of marriage on the status and capacity of the wife . . . is governed by the law of the nationality possessed by the husband when the marriage was contracted"; the rights and duties of the husband towards the wife and of the wife towards the husband are recognised and protected according to the national law of the husband except for the restrictions of public law at the place of the spouses' residence, but they cannot be enforced except by means allowed equally by the law of the country where they are demanded. If the husband only changes his nationality the relations of the spouses remain governed by their last national law (*a*). In the German Code the personal relations of German spouses towards each other are determined by German law even though they have their domicil abroad, and even if the husband has lost German nationality but the wife has retained it (*b*). Foreign spouses domiciled in Germany and acquiring German nationality after

3. D'un autre côté, quand on remarque que l'al. 1er de l'art. 3 soumet expressément les étrangers aux lois de police et de sûreté et que l'al. 2 déclare le statut réel applicable même aut immeubles possédés par des étrangers, tandis que l'al. 3, qui s'occupe de la force obligatoire du statut personnel, ne fait plus aucune mention des étrangers, on ne peut douter que les rédacteurs du Code n'aient entendu, du moins en général laisser les étrangers résidant en France, pour tout ce qui concerne leur état et capacité, sous l'empire de leur loi nationale": Merlin, Rep., vo. Loi, s. 6, n. 6; Proudhon et Valette, i., p. 85, et suiv.; Duranton, i., 93; Demolombe, i., 98; Demangeat, n. 81; Brocher, i., 97; Despagnet, 298; Laurent, Principes, D. C. F., i., 84; Weiss, iii., 144 *et seq.*; Paris, 11 Août, 1817, S. 18, 2, 30; Bastia, 16 Février, 1844, S. 44, 663; Lyon, 25 Février, 1857, S. 57, 2, 625; cf. Dissertation, par Mathieu-Bodet; "Revue de Droit Français et Etranger," 1846, iii., p. 542; Aubry et Rau, *ubi cit. sup.*

(*y*) Vincent & Penaud, p. 771; Weiss, iii., 516—519; Despagnet, p. 339.

(*z*) Vincent & Penaud, p. 772; but see p. 360.

(*a*) Project of Hague Conference, 1894, 1895, J. 198; cf. Institute of Int. Law, Lausanne, 1888, Ann. x. 75; Argentine law refers the rights and duties of spouses to the law of their actual domicil whether changed after marriage or not: 1886, J. 293.

(*b*) Civil Code, Introd. Law, art. 14.

marriage become subject to s. 1357 of the German Civil Code so far as this is more favourable to third parties than the foreign laws (*c*). The same Code allows a wife to refuse to follow her husband's domicil in certain events; while the French and Italian Codes do not seem to contemplate her as ever being capable of acquiring a domicil distinct from that of her husband unless she has obtained a judicial separation from him (*d*).

From this change of domicil the French and Belgian Courts infer that the parties had the intention that the law of their new domicil should govern the marital *régime*. The jurisprudence of the Courts is not, however, definitively fixed in this sense.

The Swiss Code permits a wife to acquire an independent domicil if that of her husband is not known or if she has the right to live away from him (*e*).

In the United States a wife can, it seems, acquire a domicil distinct from that of her husband, or retain one which he has changed for another, for purposes of self-protection, *e.g.*, obtaining divorce or separation (*f*), but not otherwise, and her domicil is that of her husband unless his be a compulsory one (*f*). But although this is doubtless the doctrine of a preponderating number of adjudicated cases up to this time, there is a new tendency to be discerned in recent cases, in harmony with the extension of the rights of married women lately accomplished by statutory law. In this line of cases the determining feature which decides whether a married woman living in fact in a State different from the domicil of her husband does, or does not, partake of the domicil of her husband, is whether the separation itself amounts to a disturbance of the unity of the married relation. This applies irrespective of which party was at fault, and is not restricted to domicil for the purpose of obtaining a divorce (*g*). The modern doctrine as thus stated is asserted with much more assurance where the separation was due to the husband's fault. Thus it has been held in New Hampshire that the misconduct of the husband

(*c*) Civil Code, Introd. Law, art. 16.

(*d*) German Civil Code, s. 10; French Code Civil, art. 108; and see arts. 212—214; Italian Cod. Civ., art. 18; Spanish C. C., arts. 22, 58, 68.

(*e*) Art. 26. The existing law appears to be otherwise; see Federal Law of 1891, art. 4, and Bader's Commentary thereon (p. 19, 4th edition).

(*f*) Wharton, ss. 43—45.

(*g*) Wharton, 1905, pp. 106, 107; citing Watertown *v.* Greaves, 112 Fed. Rep. 183.

justified the wife in acquiring a separate domicil, so that she was no longer subject to the statute of the husband's domiciliary law, which requires the husband's assent to the execution of his wife's will (*h*).

Effect of Law of Country where Parties Reside or are Present.—Although the personal law will thus govern generally the personal relations of the spouses *inter se*, the law of the parties' residence or presence restricts the powers and obligations of the husband over the person of his wife to the limits set by its own provisions, whatever are the rights or obligations given by the husband's personal law (*i*). In France this has been upheld on the ground that "while it is true that the civil effects of a marriage between foreigners can only be governed by their personal law, this is not applicable to the effects of marriage, which are derived from the natural law and law of nations, such as the husband's obligation to receive the wife and provide for her needs" (*k*). Whether this extends to a criminal liability imposed by the law of the parties' residence on a spouse, *e.g.*, in France on an adulterous spouse, is not settled decisively (*l*), but on principle it seems that it should. It is now usual for the Court which has jurisdiction over spouses to enforce certain marital obligations, even though they do not exist by the *lex domicilii*, such as the wife's right to alimony and enjoyment of conjugal rights (*m*). In England matrimonial residence in the jurisdiction makes the Court competent to entertain applications by spouses who have not an English domicil for separation, protection, alimony, restitution of conjugal rights, and nullity where the marriage was celebrated in English dominions (*n*). In Quebec it seems

(*h*) Shute *v.* Sargent (1892), 67 N. H. 305; 36 Atl. 282.

(*i*) Bar, 379; Weiss, iii., 504; Fraser, Husband and Wife, 1318; Wharton, s. 120, citing Polydore *v.* Prince (1837), 1 Ware, 413.

(*k*) Trib. de la Seine, 1879, J. 489; and Cour de Paris, 1880, J. 300; Weiss, iii., 505.

(*l*) Weiss, iii., 503, citing 1880, J. 189; as against 1879, J. 170.

(*m*) Bar, 380; 1879, J. 66; Feraud-Giraud, 1885, J. 392; Wharton, s. 120. The scale of alimony will not, it seems, vary with the parties' change of domicil, 1893, J. 599.

(*n*) Connelly *v.* Connelly (1851), 7 Moo. P. C. 438; Yelverton *v.* Yelverton (1859), 1 S. & T. 574; Firebrace *v.* Firebrace (1878), 4 P. D. 63; Linke *v.* Van Aerde (1894), 10 T. L. R. 426; Le Mesurier *v.* Le Mesurier, [1895] A. C. 517; Armytage *v.* Armytage, [1898] P. 178, 185; Brennan *v.* Brennan (1902), 18 T. L. R. 467. No alimony is claimable where the marriage was null· 1896, J. 649.

that the Court of the residence of the spouses can decree a separation of property only, even perhaps (though decisions conflict) if they were married under a law which did not create community of property (*o*). In France, although the Courts will not, as a rule, take cognisance of questions where both parties are foreigners and are able to resort to their national Courts, they will entertain applications for alimony (though not perhaps to the extent recognised by French law in the case of its own subjects (*p*)) and they will grant protection in such cases, and will give an injured wife custody of the children, pending proceedings in the country of the parties, and decree separation, though not by mutual consent (*q*). The Italian Courts in cases where they cannot pronounce a judgment permanently affecting the rights of foreign spouses, have similarly authorised a wife to leave her husband's house (*r*). In Scotland the Courts have declared themselves competent to hear applications for separation and aliment though the residence of the spouses does not amount to a matrimonial domicil (*s*).

Donations inter Conjuges.—Weiss cites as a subject for the application of the personal law of the spouses the case of donations *inter conjuges*, which by the Italian law are forbidden except by will, and by the French law are allowed under certain conditions but are revocable, made either by Italian spouses in France or French spouses in Italy; the French Courts would then apply the Italian and the French laws respectively, unless the donation related to land, when perhaps the *lex situs* would govern (*t*).

(*o*) Lafleur, C. L. 89—91.

(*p*) Lavarello *v.* Ferrandez, 1894, J. 874; but Weiss doubts this.

(*q*) 1879, J. 489; 1876, J. 184; 1878, J. 494, 495; 1880, J. 300, 303; 1877, J. 45; 1881, J. 526; 1883, J. 629; 1885, J. 185; 1890, J. 297 (alimony), 890 (separation) though the contrary view was formerly held; see 1889, J. 474; Clunet, 1876, J. 220; but not if by mutual consent: 1904, J. 188; Bar, Gillespie, 380, 381, 450—452.

(*r*) Milan, C. A., 15 Feb., 1876; For. Stat., 1870, I. 431; 1876, J. 220.

(*s*) Fraser, Husband and Wife, 1295; Bar, Gillespie, 452.

(*t*) Weiss, iii., 509; Italian C. C. 1054; French Code Civil, art. 1096 1892, J. 940; 1891, J. 508; 1894, J. 562; 1901, J. 775. In Belgium the law is the same as the French. Weiss would apply the personal law even in the case of land (i., 511), and so would Clunet, 1891 J. 511; and Lafleur thinks it would be applied in Quebec, 113, 114; it would be applied in Germany (Wharton, s. 202); but in England the *lex situs* must be satisfied as to capacity: Dicey, 501. Bank of Africa *v.* Cohen (1909), 25 T. L. R. 285; W. N. 50.

Where the spouses are of different nationalities each must be capable by his or her personal law of making such a gift (*u*).

III. **Capacity of Wife as regards Third Parties.**—The country in which a married woman may contract an obligation may not be that of her husband's domicil, and by the law which prevails there the authority of the husband may be more or less extensive, and the incapacity of the wife greater or less than it was by the law of his domicil.

Older Jurists Favoured Wife's Personal Law.—According to the doctrine held by the older jurists, the wife retains the incapacity to which she was subject by the law of the husband's domicil or nationality, and therefore the validity of an obligation in respect of her capacity, and of the nature of the authority to be given by the husband to enable her to act, must be determined by that law, and not by the law of the place in which the obligation was contracted.

Rodenburg's language is "Uxores domi sub maritorum potestate ita constitutæ, ut sine iis nec alienent nec contrahant, nullibi locorum hanc incapacitatem exuunt. Cùm mulieris contrà juri scripto obnoxiæ contractus, apud nos celebratus, consistat omnimodo" (*x*).

Boullenois adopts this opinion: "Quand la loi du lieu du contrat porte des dispositions qui ne viennent pas de la propre nature du contrat, mais qui ont leur fondement dans l'état et condition de la personne, il faut suivre la loi qui régit la personne, et dont cet état dépend.

"Par exemple, un mari est domicilié dans un lieu où il n'oblige pas sa femme, s'il contracte seul et sans elle, quoiqu'elle soit sous sa puissance et sous son autorité, ce mari vient contracter dans un lieu où, à raison de cette autorité, il oblige sa femme en s'obligeant lui-même, elle ne sera pas pour cela obligée, parce que l'obligation de la femme ne naît pas de la nature du contrat, ni de l'endroit où son mari a été contracter; mais de l'autorité maritale, qui n'a pas cet effet dans le lieu du domicile du mari.

"C'est par cette distinction que Mævius, *loco cit.*, décide l'espéce que nous venons de rapporter. 'Ratio patet tum quia non ex contractu mariti uxoris nascitur obligatio, sed ex societate conjugali, et statuto non informante contractus maritales, tum quia maritus contrahendo, foro et statutis se subjicit, quoad contractum, non

(*u*) Weiss, iii., 512; 1892, J. 940

(*x*) Rodenburg, de Jure, tit. 2, c. 1, n. 1; Burge, 1st ed., i., 257.

autem mulierem insontem sine facto suo ad alias quàm domicilii leges obligare valet; tum denique quòd in illo loco nulla actio contra uxorem intentari potuit, ergò nec executio' " (*a*).

Pothier concurs in it. "Les lois, qui réglent les obligations des personnes, telle qu'est le Velléien qui ne permet pas aux femmes de s'obliger pour autrui, sont des statuts personnels, qui exercent leur empire sur toutes les personnes qui y sont soumises par le domicile qu'elles ont dans le territoire, en quelque lieu que soient situés les biens de ces personnes, et en quelque lieu qu'elles contractent. C'est pourquoi si une femme, domiciliée en Normandie, se rendait caution pour quelqu'un, quoique l'acte du cautionnement fût passé à Paris, où le Velléien est abrogé, le cautionnement serait nul.

"Mais quoiqu'une femme ait été mariée en Normandie, si son mari a transféré son domicile à Paris, cette femme ayant cessé, par cette translation de domicile, d'être soumise aux lois de Normandie, les cautionnemens, qu'elle contractera depuis cette translation de domicile, seront valables" (*b*).

Burge's View (*c*).—The propriety of leaving to the decision of the law of their domicil the validity of the wife's obligations, when it depends on her capacity to contract them, is founded on similar considerations of public policy and general convenience to those which, in cases raising the question of the validity of a marriage, have established as *jus gentium* the rule that the question is to be determined by the law of the country in which the marriage has taken place. It is more consistent with reason, as well as convenience, that the personal capacities resulting from the status should continue to be those which are attached to it by the law of the country where the parties have a permanent residence, than that they should be subject to be varied, when the parties had casually, and for a temporary purpose, visited a country where a different law prevailed.

There is little inconvenience in requiring that a person who deals with a female, who, from her sex, *may* be a married person, and subject to certain disabilities, should enquire whether she be married, and what is the degree of disability to which her coverture subjects her. If he does not by enquiry satisfy himself that no such disability exists, as will prevent her from contracting with

(*a*) Boull., tom. 2, tit. 4, c. 2, obs. 46, p. 467.

(*b*) Pothier, Traité des Obligations, par. 2, c. 6, s. 3, n. 388.

(*c*) Burge, 1st ed., i., 259.

him, it will be the effect of his own neglect, if his contract should be rescinded.

If it were a rule that the capacity of the wife was to be decided by the law of the country in which she contracted, it must prevail, whether the husband accompanied his wife or whether he was still remaining in his own domicil and had given no sanction to her resort to another country. The consequences which would then result from it would be repugnant to the respective rights of the parties. To permit her, during her absence from him, to enjoy a more ample capacity than is conferred by the law of his domicil is to give her a status distinct from that of her husband, a capacity different from that which she possesses under that law, and to abridge the authority of the husband.

Even if the capacity of the wife were more restricted *in loco contractus*, there would still be a great objection to the relaxation of the rule.

The wife can have no other domicil than that of her husband, and whilst he retains it, her incapacities, as well as his authority, are subject to the law of that domicil. Her capacity could not be restricted without enlarging his authority, and thus his status, and the authority incident to it, would be affected by a law to which he is not subject (*d*).

Modern Views.—The question of the capacity of the wife towards third parties naturally falls under the larger question of capacity or status generally, already considered ; and the balance of opinion favours in both questions the adoption of the personal law (*e*). The reasons given by Burge for adopting it for the present purpose in preference to the *lex loci* seem equally applicable for the larger question, to which he applies the latter law in the cases of marriage and majority. The tendency of the English decisions is certainly in favour of the personal law, though the decisions are not definite or uniform (*f*); while in Scotland and the United States the *lex loci* apparently still governs (*g*).

(*d*) Burge, 1st ed., i., 259—261.

(*e*) Weiss, iii., 505; Bar, Gillespie, 330, 331; Foelix, i., s. 89; 1899, J. 1010; 1903, J. 380, cases of wife acting without husband's authorisation.

(*f*) Guepratte *v.* Young (1851), 4 De G. & Sm. 217; Cosio *v.* De Bernales (1824), 1 C. & P. 266; Peillon *v.* Brooking (1858), 25 Beav. 218; M'Cormick *v.* Garnett (1854), 5 De G. M. & G. 278; Duncan *v.* Cannan (1854), 18 Beav. 128; and on appeal (1855), 7 De G. M. & G. 78; Lee *v.* Abdy (1886), 17 Q. B. D. 309. Foote would make the law of the matrimonial domicil govern (77).

(*g*) Fraser, Husband and Wife, 1317, 1318, citing Sforza *v.* Sandilands (1833),

There are three main distinct legal positions assigned to married women in the municipal systems of law, excluding that of perpetual guardianship which survives in very few: (a) Complete legal capacity, including power to possess, contract, alienate, hypothecate, and sue without the husband's authority, though his supremacy is admitted, as in Austria, Hungary, Norway, and Russia, and the projected Belgian Code (*h*), while in Germany a wife may contract as to personal services without the husband's authority, but her power to bind property, not being in the nature of privileged property, depends upon the matrimonial *régime* (*i*); (b) the common law view of Great Britain and the United States of the one personality of the spouses in law, which is now considerably modified by the effect of recent legislation (*k*); (c) general legal capacity, which requires to be supplemented for certain purposes by the authorisation of the husband, as in France, Belgium, Holland, Italy, Poland, Finland, Spain, and Geneva (*l*).

Personal Law of Wife generally Governs, but Lex Loci Contractus sometimes Alternative.—A conflict of law will then arise if a wife belonging to a country comprised in one of these classes undertakes an obligation in a country belonging to another.

Foreign View.—The jurisprudence of most countries adopts the personal law as the measure of a foreign wife's capacity, whether that be more liberal or more restrictive upon her than the *lex loci* (*m*). But in some municipal systems (*e.g.*, the German, see

5 Jur. 398; 2 Sh. & M'L. 214; Wharton, ss. 118—121, 166, citing Haydon *v.* Stone, 13 Rh. Isl. 91.

(*h*) Weiss, iii., 496, citing Russia subject to the Svod (C. C., s. 84); 1874, J. 146; Norway, law of June 29th, 1888 (1889), Ann. de Lég. Etr. 766; Greece, 1895, J. 186; 1902, J. 898.

(*i*) German Civil Code, ss. 1395—1400, 1443, 1449—1454, 1460, 1525, 1549.

(*k*) Weiss, iii., 496. The custom of the City of London allowing a wife trading alone in the city to sue alone is only available in the City Courts: Foote, 513.

(*l*) Weiss, iii., 498, citing Belgium (1875, J. 302); France, Code Civil, arts. 215, 219; Holland, C. C., art. 163; Italy, C. C., 134, 135; Poland, law of 1825, art. 184; Finland, 1889, c. 2, arts. 1—7; Spain, C. C., 60; 1889, J. 771. See Brazil, husband's authority required for wife suing, 1895, J. 1104; and Italy, for wife proceeding to the partition of a succession containing real property: 1877, J. 450.

(*m*) France, national law of parties, Genevese wife, 1897, J. 555; Italian wife, 1882, J. 617; 1884, J. 289; Russian wife, 1893, J. 868; 1169; German wife, 1880, J. 477; Swiss wife, 1885, J. 180; Spain, 1888, J. 138; Switzerland, 1889, J. 347; 1890, J. 513, 514; Russia, 1888, J. 155.

ante) the law which is the more favourable to the legal act of the married woman is adopted, and a restriction is placed on the general rule (*n*). In France the national law is applied even though the person is domiciled in France and his national law would apply to him the law of his domicil (*o*), but foreigners in France can only claim civil rights which their country grants by treaty to Frenchmen (*n*); an Englishwoman has been held capable of suing in France without her husband's authorisation as required by French law (*p*), and of binding her separate property as if unmarried (*q*), but a foreign wife whose law requires such authorisation cannot sue without it in France (*r*), and in France the general rule is subject to a proviso analogous to one which is found in a conflict of law as to majority (*s*) that the foreigner has not deceived the other party to the contract as to his age or nationality (*t*). Whether the capacity of a foreign spouse to deal with land in France should be decided by the personal law or by French law does not seem to be definitely decided. The decisions seem to favour the latter view, but not to allow rights to be claimed contrary to the *lex loci* as regards French land (*u*). The incapacity of a French wife follows her abroad, and French Courts will not enforce against her a judgment obtained abroad in a suit brought against her personally when she defended the case without her husband's authorisation (*a*).

United States.—In the United States, conflicts of law in respect of the capacity of a married woman to contract are determined by the same principles which we have seen to govern in the case of the capacities of infants. Accordingly the capacity of a married woman to enter into a voluntary transaction abroad is

Foreign wife not domiciled in Switzerland is governed there by the law of her nationality without *renvoi*: Federal Law of Civil Capacity, 1881, art. 10; 1894, J. 1095: Fischel *v.* Codmann (1894). Entscheidungen des Bundesgerichts, xx. 648, 652; 1899, J. 878; Egypt, Alexandria, 1895, J. 186; Quebec, Lafleur, C. L. 67; Germany, 1900, J. 635.

(*n*) See Introd. Law to C. C., art. 7. The Swiss law is the same, see Burge, ii., 482; and see France, Paris, 1874, J. 125; Russians in France, 1901, J. 558; Vaudois in France, 1891, J. 1202; 1901, J. 146; Frenchwoman marrying a foreigner residing in France, held not liable to make declaration of residence required from foreigners, 1901, J. 570; 1874, J. 125.

(*o*) 1896, J. 147; 1902, J. 1044.

(*p*) 1879, J. 62; 1876, J. 406.

(*q*) 1897, J. 539; 1898, J. 363; 1900, J. 138.

(*r*) Rennes, 1891, J. 209.

(*s*) Burge, vol. ii., pp. 481, 482.

(*t*) 1891, J. 205; 1899, J. 364.

(*u*) 1899, J. 744; 1902, J. 314.

(*a*) 1902, J. 116.

governed by the *lex loci contractus* irrespective of the law of her domicil, for it is said she has deliberately put herself into a position to work an injustice upon others with whom she deals should she set up an incapacity created by the latter law (*b*). Conversely, if she was incapable according to the *lex loci contractus*, the contract will be held invalid, although she was capable by the law of her domicil, and this has been held in the strongest possible case, namely that where the domicil was in the country of the *forum* (*c*).

The general principle as thus stated has been greatly complicated, however, through the tendency of the Courts to import considerations of public policy into discussions which otherwise would be restricted to a solution of the conflict of laws. This has been done mainly in States where the common law relating to the capacity of married women remains in full force, and where the Courts were therefore inclined to believe that it was part of the public and social fabric to deny validity to any contract of a married woman whatsoever (*d*). But where the law of the domicil and *forum* withholds from married women the capacity to make certain kinds of contracts only, such as contracts of partnership and suretyship, and has emancipated them from the prohibitions of the common law as to other kinds of contracts, it is generally held that the protective policy of the *forum* is partial only, and its enforcement of less importance to the community than the general policy of recognising the binding effects of contracts and the sovereignty of another State over all matters arising within its jurisdiction (*e*).

Louisiana has remained subject to the influence of the civil law also upon this topic, and hence, in conformity with Continental decisions, the law of the conjugal domicil has been held to govern the capacity of a married woman and to prevail over the *lex loci* (*f*).

Where Authorisation of Court is Required by Personal Law.—If by the wife's personal law authorisation of a Court is required to enable her to sue or do any other legal act, it is doubtful whether

(*b*) Bowles *v.* Field (1898), 83 Fed. Rep. 886; Brigham *v.* Gilmartin (1883), 58 N. H. 346; Milliken *v.* Pratt (1878), 125 Mass. 374; Minor, 1901, p. 144.

(*c*) Nichols & S. Co. *v.* Marshall (1899), 108 La. 518; 79 N. W. 282.

(*d*) Armstrong *v.* Best (1893), 112 N. C. 59; First Nat. Bk. *v.* Shaw (1902), 109 Tenn. 237.

(*e*) Milliken *v.* Pratt, *ante*. See also Minor, 1901, p. 147.

(*f*) Garnier *v.* Poydras (1858), 13 La. 177; Auguste Banking Co. *v.* Morton (1843), 3 La. Ann. 417; cited 1875, J. 318, 315; Marks *v.* Germania Bank (1903), 110 La. 659; 34 So. 725.

this can be given by a Court of any other country than her own (*g*).

Limitation of Form by such Law not Observed.—If, however, a limitation imposed on a wife by her personal law is one of form only and not of capacity, *e.g.*, the requirement of English law that any deed purporting to dispose of the land of a woman married before 1883 to which she is not entitled for her separate use or of her reversionary interest in personalty must be executed by her and her husband, and acknowledged by her (*h*), compliance with it may not be necessary; and in France a donation of land there between spouses who by their personal law were prohibited from making it has been upheld (*i*); but the opinion has been expressed that the forms of the personal law should be satisfied as well as those of the *lex loci* (*i*). As regards dealing with land the distinction drawn between legal and equitable interests and the necessity of the formalities connected with the former being observed must be remembered; while generally for dispositions not relating to land, the rule *locus regit actum* governs.

Suretyship.—So in the case of a wife whose personal law includes incapacity for suretyship, which by the Roman *S. C. Velleianum* and *Authentica qua mulier* was absolute if undertaken for her husband, and for other persons was only good with certain formalities, this

(*g*) Bar, Gillespie, 332; 1880, J. 189; cf. 1899, J. 196, Roumania. In France the Courts have held that they can thus supplement a foreign wife's want of marital authorisation, 1889, J. 616; and so Feraud-Giraud, 1885, J. 386, though Clunet criticises it, 1880, J. 189; and so in Switzerland, Geneva, 1890, J. 513.

(*h*) Ency. of Engl. Law, tit. Acknowledgment of Deeds, i. (2nd ed.), 125. Whether a wife can sue singly or not is a question of procedure for the *lex fori*, though her capacity to sue is governed by the *lex domicilii* in England: Foote, 512.

(*i*) So held in France as to real property: Seine, 1891, J. 508, Cour d'appel de Paris; 1892, J. 940. The better view, however, seems to be that the only rule applicable to this case is "*locus regit actum*," except where the French law requires special formalities as in the case of a mortgage or *contrat de mariage*. Thus there is nothing to prevent an Englishwoman selling land in France by a deed made in England and valid in English law, and such a deed would be transcribed in France. So a lease of French land made in England in English form would hold good in France. The *lex domicilii* is upheld by Bar, Gillespie, 330; Wharton, s. 121. Naquet urges that the rule "*locus regit actum*" should be facultative not compulsory (see 1904, J. 39), though the French Courts have decided for the latter view: 1899, J. 804, but see *ante*. Lafleur thinks that the formal validity of deeds affecting land by married women should be determined

was regarded as a question depending on the personal law (*k*); but as modified by modern law this is only recognised to the extent of a requirement that the wife should have had legal advice as to the consequences attaching to such an obligation of hers, and if for her husband, that the obligation was undertaken in his absence. This has been regarded as a formality which need not be observed, but the local law decides (*l*).

Limitation required by Lex Loci if not Required by Personal Law not Observable, unless in Case of Land.—Conversely, it seems that a wife whose personal law does not contain such a limitation should be able to contract validly such an obligation in a country where such a limitation is in force (*m*). Bar cites a French decision of 1831 (Court of Cassation) upholding the validity of the act of a Spanish lady, in becoming surety for her husband, mortgaging her lands in France, on the ground that French law (which allows such suretyship) governed as the *lex situs* and the *lex loci contractus*; and he approves it, not on these grounds but as treating the limitation as a protective form for the benefit of the woman (*n*). In Quebec the Civil Code prohibits a wife from binding herself either with or without her husband otherwise than as regards the common property, and makes any such obligation by her in any other quality void; and it has been held that a transfer of an insurance policy obtained by a husband in favour of his wife from an insurance company in Quebec and made in Ontario by the wife to the trustee in bankruptcy of the husband, where they were both domiciled, was valid under the law of Ontario (*o*).

On Change of Wife's Domicil Law of Actual Domicil Decides Capacity.—The effect of a change of domicil on obligations of a wife towards a third party is governed by the same considerations as have been described in the personal relations between her husband

by the *lex loci actus*, citing Prunier *v.* Menard (1896), 3 R. de J. 153 (116).

(*k*) Savigny, Guthrie, 158; Lafleur, 72.

(*l*) Bar, Gillespie, 336, citing the now repealed law of Hanover, where the S. C. was in force, 1880, J. 477, and formerly in Sardinia, 1878, J. 160, and the law of Spain. In France it has been held that a French wife can make a will without marital authorisation in the form of the country where she resides, though by that law such authorisation is necessary: 1874, J. 128.

(*m*) Bar, Gillespie, 377; 1880, J. 186.

(*n*) Sirey, xxxiii., i., 665.

(*o*) Lafleur, 72—74, citing C. C. of L.C., arts. 6, 1301, and Parent *v.* Shearer (1879), 23 L. C. J. 42.

and herself, *i.e.*, the law of the actual domicil at the time of the particular act governs (*p*). In Canada this question has been considered by the Courts, and although a leaning has been shown to the law of the original matrimonial domicil as retaining effect even after a new domicil has been acquired, the view above stated seems to be accepted in the jurisprudence of Quebec (*q*).

(*p*) Lafleur, 67—72.

(*q*) Laviolette *v.* Martin (1856), 2 L. C. J. 61; 5 L. C. J. 211; 11 L. C. R. 254; McNamee *v.* McNamee, 14 R. L. 30; Stevens *v.* Fisk (1883), 5 L. N. 79; 6 L. N. 329; 27 L. C. J. 228; 8 L. N. 42, 53; Cass. Dig. 235; cited by Lafleur, *ibid.* In France a Frenchwoman who has married a foreigner, upon obtaining a divorce from him, recovers full capacity to bind herself, alienate, and sue without her husband's authorisation, though not the same status as she had before marriage: 1879, J. 277.

CHAPTER VIII.

EFFECT OF MARRIAGE ON PROPERTY OF HUSBAND AND WIFE—ROMAN LAW.

There is a marked distinction between the mature Roman law and other systems of jurisprudence as regards the civil rights and capacities of husband and wife. Under the *manus* marriage, which has been already referred to, the wife ceased to be under the parental power or the power substituted for it, and all her property which she possessed or afterwards acquired became the property of the husband. Originally she had no right of succession at all to her husband's property after his death, and it was the prætor who afterwards granted her some such right if all next of kin of her husband—however far removed—failed, while in the later days of the Empire a privileged right of inheritance was granted to poor widows.

In case of a marriage with *manus* the wife occupied the position of a *filiafamilias* to her husband, and all her property and acquisitions passed to him. When the marriage was without *manus*, its only patrimonial effects were negative, in so far as the spouses could not steal from each other nor grant each other gifts. Whatever other results of the marriage might be desired had to form part of a special marriage contract between the parties about to be married. Without such special contract, it was understood that the husband was bound to maintain his wife and defray the household expenses.

In order to assist him in this burden it was customary for the wife to contribute towards the sustenance of the *onera matrimonii*, and such contribution to her husband's funds was called *dos*. Afterwards, in the latter part of the Empire, it became customary for the husband to set apart a sum in view of their marriage for the use of his wife after his death, called at first *donatio ante*

nuptias, donatio propter nuptias. Both the *dos* and the *donatio ante* or *propter nuptias* remained in the husband's administration.

In all other property belonging to them, the spouses each retained the rights of owners, uncontrolled by their relation of husband and wife.

Thus, with respect to the wife's property, there were the *bona dotalia*, or the property which was the subject of the *dos*, and the *bona extra dotem*, or the property not subject to it. The terms *receptitia* and *paraphernalia*, were applied to the latter.

As to the property of the husband, the term *antipherna* or *antidos* expressed that part which was the subject of the *donatio propter nuptias*.

The *dos* was contributed either by the wife herself, or by her father or paternal grandfather or great-grandfather, or by some other person on her behalf.

Dos.—This was either (1) *profectitia*, or (2) *adventitia*.

1. The *dos profectitia* is that which is derived from the father or the paternal grandfather: "Profectitia dos est, quæ a patre vel parente profecta est *de bonis* vel *facto ejus*" (*a*).

The *dos* is said to be *de bonis ejus*, when the immovable property which he gives had belonged to another, but had been *bonâ fide* purchased by the parent, and was in his possession. Having been *bonâ fide* purchased, it founded a title in case of eviction for the recovery of the price.

But if the *dos* comprised the money of another person deposited with the parent, the latter could not confer on his daughter or her husband such a title as would enable them to indemnify themselves, when it was recovered by the rightful owner. The latter is not, therefore, deemed to be *de bonis parentis;* but if the money had been spent by the husband and wife, they were in the same situation when the money was repaid by the parent to the rightful owner as if it had really belonged to the father, and in the latter case it was considered *profectitia de bonis ejus*.

The *dos* is said to be derived from the latter *facto ejus*, where it has been given, not only by himself, but by any person as his agent, or on his behalf, or by his direction, or where having been given without his previous authority, it had been subsequently

(*a*) Dig. xxiii. 3. 5.

ratified by him. Payment by the person who had joined the father as a surety for it, and the delivery, by the father's direction, of a gift which was about to be made to himself, are also cases of *dos profectitia facto parentis* (*b*).

2. *Dos adventitia* is that which is derived from a stranger, and every person was deemed a stranger except the father or paternal ancestor in the ascending line. "Extraneum autem intelligimus omnem, citra parentem per virilem sexum ascendentem" (*c*).

But even that which the daughter received from the father was *adventitia*, if it were given by him not *ex causa dotis*. A payment made to a daughter by her father, as the surety of another who had promised to give a *dos*, or payment by the father to his daughter of a debt which he owed her, are instances of *dos adventitia*, and not *profectitia* (*d*).

The delivery of the *dos* was obligatory on certain persons on account of their relation to the wife. From others it could only be demanded in consequence of their previous engagement to deliver it.

The father, paternal grandfather, and great-grandfather, were bound, and the husband could compel them to give a *dos* to the wife (*e*). Neither the emancipation nor wealth of the daughter exonerated the father from this obligation (*f*). He was only excused from giving it, when the daughter, during her minority, had married without his consent, or had been guilty of those acts which subjected her to a forfeiture of her *legitima* (*g*).

He could not be compelled to give it to a natural daughter (*h*).

Upon a second marriage he was also bound to repeat it, unless in the meantime his fortune had been impaired (*i*). The mother was bound to give a *dos* to her natural daughter (*k*), but not to a legitimate daughter, "nisi ex magna et probabili vel lege specialiter expressa causa" (*l*). The poverty and inability of the father

(*b*) Dig. xxiii. 3. 5. 1, 2, 7.

(*c*) Cod. v. 13.

(*d*) Dig. xxiii. 3. 5. 6, 11.

(*e*) Cod. v. 11. 7; Dig. xxiii. 2. 19; Voet, xxiii. 3. 8, 10; Vinn. Select. Jur. Quaest. ii. 14.

(*f*) Voet, xxiii. 3. 11, 12. But see Vinn., Select. Jur. Quaest. ii. 14.

(*g*) Voet, xxiii. 3. 13; Vinn, Select. Jur. Quaest. ii. 14.

(*h*) Voet, *ubi supra;* Perez. ad Cod. v. 11. 6. But see Vinn. Select. Jur. Quaest. ii. 14.

(*i*) Voet, xxiii. 3. 13.

(*k*) *Ibid.* 14.

(*l*) Cod. v. 12. 14; Voet, xxiii. 3. 14.

constituted such a cause (*m*). The brother might, for a similar cause, be compelled to give it to his sister of the whole blood (*n*).

Its amount or value was required to be "pro modo facultatum patris et dignitate mariti" (*o*).

It could not be demanded either from the wife or from any other relations, but those who have been mentioned.

Other persons might incur legal liability to give *dos*, not from their relationship to the wife, but *promissione*.

The Constitution of Dos.—The *dos* was formerly constituted in one of three ways. "Dos aut datur, aut dicitur, aut promittitur" (*p*). The *datio* consisted in the immediate transfer to the husband either of the property constituting the *dos* or of the rights over it (*q*).

The *promissio* took the shape of an ordinary verbal contract (*stipulatio*) to make over the dowry at a future date. The *dictio* was a simple specification of the dowry made by the bride or her debtor or a male ascendant, and the bridegroom probably signified his acceptance as in the formula given in the *Andria* of Terence: "Chremes. *Dos, Pamphile, est decem talenta.* Pamph. *Accipio*" (*r*).

In order to be effectual, it ought expressly to state either the specific subject, or the amount intended to be given; or it should state it to be that which might be fixed *boni viri arbitratu* (*s*).

Under Theodosius and Valentinian the *nudum pactum* whereby the *dos* was agreed upon was specially recognised as actionable, and thereafter the solemn forms of the earlier law fell into desuetude. The *dos* was now given in the same way as an ordinary donation.

The wife could not be compelled to contribute any part of her property as *dos*, but it was at her option to contribute the whole, or part of it, and not only her present, but her future property (*t*). A simple assignment of all the wife's property will not include her future property (*u*).

An assignment by her is not presumed from the circumstance of er permitting her husband to enjoy all her property, if that

(*m*) Cod. v. 12. 14; Voet, xxiii. 3. 14.
(*n*) *Ibid.*; Sande, Decis. Fris. ii. 8. 2.
(*o*) Dig. xxiii. 3. 69; Voet, xxiii. 3. 8.
(*p*) Ulp. vi. 1.
(*q*) Dig. xii. 4. 10.
(*r*) Act 5, scen. 4.
(*s*) Voet, xxiii. 3. 8; Cod. v. 11. 1, 3.
(*t*) Voet, xxiii. 3. 3; Perez. ad Cod v. 12. 8.
(*u*) *Ibid.*

permission has not been accompanied by any mention of his holding it as *dos* (*x*).

Every description of property, movable or immovable, corporeal or incorporeal, that which might thereafter belong, as well as that which then belonged to the party, might be the subject of *dos* (*y*). It might be constituted before, or at the marriage, or *stante matrimonio*, either by actual delivery, or by giving security for it, or by bequest; and that which had been already given might, during the coverture, be augmented, unless such augmentation was made in fraud of creditors (*a*).

The remission of a debt owing by the husband, and the delegation by the wife to the husband of her debtor, were as much dotal gifts, as the delivery of the amount of these debts would have been. If, property had been delivered to a person in order that *nuptiis secutis dos efficeretur*, and the person who had thus delivered it died before the marriage, yet the *dominium in favorem dotis* would pass on the marriage to the husband, although in any other case it would not have passed to that person, and therefore the gift would not have taken effect (*b*). When the *dos* was constituted *promissione*, the right of the husband to enforce by suit its delivery, awaited, and was dependent on the marriage, *neque enim dos sine matrimonio esse potest*. If therefore, the marriage was broken off, his right was at an end (*c*).

The delivery of the *dos* might, by the stipulation of the party, be postponed for a certain period after the marriage. If after the arrival of that period, or if, no period having been fixed, the person who had promised it had, at the expiration of two years from the marriage, failed to deliver it, he was chargeable with interest (*d*).

The dotal property was frequently valued, and a price was put on it, in order, either, that the husband might become the purchaser of it at that price (*aestimatio venditionis causa*) or, that the wife might have the option of recovering either the property itself; or the price at which it was valued, in case the goods constituting the *dos* were lost or diminished in value through the fault of the husband (*aestimatio taxationis causa*) (*e*).

(*x*) Voet, xxiii. 3. 3; Perez. ad Cod. v. 12. 8.

(*y*) *Ibid.*, n. 6.

(*a*) Novell. 97, c. 2; Cod. v. 3. 19; Dig. xxiii. 3. 29; Voet, xxiii. 3. 7.

(*b*) Voet, xxiii. 3. 7.

(*c*) Dig. xxiii. 3. 3.

(*d*) Voet, xxiii. 3. 9; Cod. v. 12 31, 2.

(*e*) Voet, xxiii. 3. 17, 19, and xxiii. 5, 3.

The husband acquired a *dominium* in the dotal property, which was determinable on the dissolution of the marriage, unless he had become the purchaser of it at an estimated value. In that case, although it was not determinable, it was competent for the wife, if he were insolvent, to recover so much of the dotal property as still remained in his possession (*f*).

Powers of Husband over Dos.—At first the proprietorship of the husband was absolute, but afterwards a double limitation was imposed upon his rights, viz., a prohibition of alienation and an obligation of restitution in certain cases. As to the first limitation, the husband, in respect of his *dominium*, might recover in his own name any part of the *dos* which was withheld. He might even institute an action against his wife, if she had withdrawn any part of it. He had the administration and management of the dotal property, and received for his own use its annual fruits, rents and profits, in consideration of which he sustained the expenses incident to the marriage. If a debt owing by him to his wife were the subject of *dos*, he was not chargeable with interest on it during the coverture (*g*). He had the power of alienating such part of the dotal property as was movable, whether valued or not, subject to the obligation of making ultimate restitution of its value.

He could not, even with her consent, alienate or subject to any charge or incumbrance any part of the *dos* which was immovable, unless he had become the purchaser of it at an estimated price (*h*). Originally he was able to do so with the consent of his wife (*i*); but under the *Lex Julia de fundo dotali* (part of the *Lex Julia de adulteriis*) hypothecation was forbidden even with the wife's consent. Justinian placed alienation on the same footing as hypothecation, and extended its prohibition to the wife as well as to the husband. An alienation or a charge on the dotal immovable property was thus *ipso jure* void (*j*). But it might be sustained, if the wife had, for two years after the alienation, consented to it (*k*), or the price for which it had been sold had been invested in the purchase of real property, more, or equally advantageous (*l*).

As to the second limitation, originally the *dos* as a rule remained

(*f*) See note (*e*), p. 384.
(*g*) Voet, xxiii. 3. 19; Dig. xxiv. 3. 11, and xxv. 2.
(*h*) Dig. xxiii. 5.
(*i*) Dig. xxxi. 77. 5 (3).
(*j*) Voet, xxiii. 5. 5.
(*k*) Voet, xxiii. 5. 6.
(*l*) *Ibid.*

the property of the husband. But gradually the rights of the wife and her heirs were extended, and by Justinian's law the *dos* returned to the wife or the donor in a number of cases. On the dissolution of the marriage by divorce or by the death of the husband, leaving the wife surviving him, the *dos profectitia* belonged to her, if she were *sui juris*, but if she had not been emancipated, it reverted to her father (*m*). If the wife died, leaving the husband surviving, it would seem that whether she were *in patria potestate*, or emancipated, the *dos profectitia* reverted to the father, notwithstanding she left children, but it is contended by some jurists, that if she were emancipated, it ought to belong to her heirs (*n*).

The *dos adventitia*, on the death of the wife, whether she survived or predeceased her husband, always belonged to her, or her heirs, unless it had been given on condition that it should revert to the donor on her death (*dos receptitia*) (*o*).

Although the restitution of the dotal property was demandable only on the dissolution of the marriage, yet there were cases in which, *stante matrimonio*, it might be restored to the wife, not, however, with the power of alienating it, but merely for the purpose of security, and for the maintenance of herself and family out of its annual profits. Thus, if the husband was dissipating the property, and there was danger of his becoming insolvent, if he were banished, or if there was an opportunity of making an advantageous purchase of a farm, she could obtain its delivery (*p*). If it had been lost, without the neglect or fraud of the husband, he was excused from restoring it, unless, indeed he had taken it at a stipulated price, as the purchaser, in which case it continued at his own risk, and he must make good that price (*q*). It was to be restored with all its accessions (*r*). If he had sold that part of it of which he had the power of disposition, he was accountable only for the price at which it had been *bonâ fide* sold (*s*).

Such part of the dotal property as consisted of immovable estate was to be restored immediately after the dissolution of the marriage,

(*m*) Voet, xxiv. 3. 5 *et seq.*; Perez, ad Cod. v. 18. 4, 5.

(*n*) Hotman. de Dot. c. 11; Zoesius, xxiv. 3. 11.

(*o*) Voet, xxiv. 3. 7; Zoesius, ad eund. loc.; Perez, ad Cod. v. 18. 4, 5.

(*p*) Voet, xxiv. 3. 2.

(*q*) Voet, xxiv. 3. 10, 20.

(*r*) Voet, ad hunc tit. n. 12.

(*s*) *Ibid.*, n. 14.

but one year was given for the restitution of that which was personal. The *fructus*, or rents and profits of the dotal property of the year in which the marriage was dissolved were apportioned (*t*), and the husband, or his estate, received a proportionate share of them for that part of the year which preceded the dissolution of the marriage by the death of his wife or himself (*a*).

The husband or his estate was entitled to retain the dotal property until repaid those expenses which were absolutely necessary, "quæ si factæ non sint, res aut peritura, aut deterior futura sit" (*b*).

"Et in totum, id videtur necessariis impensis contineri, quod si a marito omissum sit, judex tanti eum damnabit, quanti mulieris interfuerit eas impensas fieri" (*c*).

But he could not retain it for the expenses which were called, in the civil law, *utiles*: "quas maritus utiliter fecit; remque meliorem uxoris fecerit, hoc est, dotem" (*d*).

"Veluti si novelletum fundo factum sit; aut si in domo pistrinum, aut tabernam adjecerit; si servos artes docuerit" (*e*).

"Item impensæ utiles sunt veluti pecora prædiis imponere, id est, stercorare" (*f*).

Originally the obligation of restitution was a matter of express contract, enforceable by an *actio ex stipulatu*. In time an obligation independent of any express stipulation was admitted, which was enforceable by the *actio rei uxoriæ*, a *bonæ fidei actio* which allowed the above-named and a number of other retentions by the husband. Justinian merged the two actions into one *actio ex stipulatu*, whereby an implied stipulation of restitution for the benefit of the wife and her heirs was established in all cases. This action was made an *actio bonæ fidei*, but most of the *retentiones* fell away (*g*).

The wife had by Justinian's law a tacit hypothec on all the estate of the husband for the restitution of her dotal property (*h*).

Donatio Ante Nuptias and Propter Nuptias.—In the later period of the Empire an institution was known under the name of *donatio*

(*t*) Voet, xxiv. 1. 11.
(*a*) Voet, xxiv. 3. 12.
(*b*) Dig. L. 16. 79.
(*c*) Dig. *ibid.*; Poth. Pand. xxv. 1. 2.
(*d*) *Ibid.*; Voet, xxv. 1. 5.
(*e*) *Ibid.*
(*f*) *Ibid.*
(*g*) Inst. iv. 6. 29.
(*h*) Cod. v. 13. 1. 1.

ante nuptias, which was a gift by the husband to the wife. It had its own rules which gradually developed into a system placing the *donatio* on the same footing as the *dos*. It then became obligatory that there should be a gift of property on behalf of the husband *ad sustinenda onera matrimonii*. Before the reign of Justinian, it must have preceded the marriage. But it was by that Emperor permitted to be made or augmented after the marriage, and for that reason it was termed *donatio propter nuptias*. It was treated as a security for the wife's *dos*, and *quasi causa remunerandi dotis*. It corresponded in many particulars with the constitution of the *dos*. The husband was entitled to receive the profits of it. During the marriage the husband remained the owner of the goods which constituted the *donatio*. He had the administration thereof, but could not alienate the immovables. On the dissolution of the marriage by the death of the wife or by divorce through the fault of the wife, the goods remained the property of the husband. If the divorce were through the fault of the husband the property went to the wife, if there were no children, otherwise to the children. On dissolution of the marriage through the death of the husband, the wife had the usufruct of the property and shared the ownership with the children (*i*).

It was even enacted in Novel 97, that the *donatio* should be of equal value or amount with the *dos*.

It will have been seen from the preceding summary that the wife's property was either that which was the subject of the *dos* (*bona dotalia*), or that which was *extra dotem* (*bona extradotalia* or *paraphernalia*). The first of these terms was applied to that part of her property which she made over to her husband as a contribution towards the expenses of the joint household.

She retained over every part of her property which was *extra dotem* an absolute right, not only of administration, but of alienation, and it was wholly exempt from the interference of the husband (*k*).

The only part of the husband's property in which he did not retain the sole and absolute power of alienation incident to the ownership, was that which had been given *propter nuptias* or *bona antidotalia*. As to the rest of his property, he retained the absolute and uncontrolled power of alienation, and the wife had no interest in, or power of interfering with it.

(*i*) Inst. ii. 7. 3. (*k*) Dig. xxiii. 3. 9. 3; Cod. v. 14. 8.

Such are the rights, powers, and interests, which the husband and wife derived from the law, in the absence of any agreement by which they might have established for themselves a different provision.

Marriage Contracts.—The civil law admitted nuptial agreements (*pacta dotalia*), giving to the husband and wife other interests and powers than those which have been mentioned.

Thus, they might stipulate that the survivor should have a certain share of the gains of the dotal and anti-dotal property, or that on the death of the wife the dotal property should belong to the husband. But as marriage and *dos* were institutions of public interest (*jus publicum*), the liberty of the parties to vary the provisions of the law was somewhat restricted (*l*).

So it could not be stipulated that on the husband's death, it should be returned to any other person during the wife's life, because such a stipulation would be inconsistent with the nature of *dos*. For the same reason, a stipulation that the wife should enjoy for her own use the annual profits of the dotal property would be invalid (*m*).

All stipulations which restricted the rights of the wife as to the restitution of the *dos* or regarding the period within which such restitution had to take place, were invalid (*n*). Also those which were contradictory to the spirit of marriage, *e.g.*, if the husband surrendered the *beneficium competentiæ*, or the wife stipulated for sureties for the restitution of the *dos* (*o*).

Contracts Between Spouses.—As the husband and wife had each a separate and distinct character, and separate and distinct capacities, the civil law permitted them to contract with each other for a valuable consideration. They could, therefore, buy and borrow from, as well as sell and lend to each other (*p*).

Donationes Inter Conjuges.—As they possessed the full power of disposing of all their property not dotal nor anti-dotal, the law, in order to protect them from any undue exercise of that mutual influence to which their relation exposed them, interposed restrictions on their making dispositions in favour of each other. Whilst,

(*l*) Dig. xxiii. 4. 12. 1.
(*m*) Dig. xxiii. 4. 4, and 5. 2.
(*n*) Dig. xxiii. 4. 2; *ibid.* 14, 15, 16.
(*o*) Dig. xxxiv. 3. 14. 1; Cod. v. 20. 2; Dig. xxiii. 4. 5. 1; Cod. v. 14. 5; Dig. xxiii. 4. 6.
(*p*) Dig. xxiv. 1. 5. 5; *ibid.* 7, 31, 49.

therefore, it permitted donations *ob causam* as *propter nuptias*, it prohibited those *sine causâ*. Donations, therefore, between them (*q*) were prohibited.

Not only were the husband and wife the objects of this prohibition, but also other persons to whose power they were subject (*r*), and the donation, whether it be made directly by the husband and wife to each other, or by the intervention of a third person, was equally invalid.

The donation was *ipso jure* void and transferred no title to the donee, but the donor might recover it back.

There were some donations which it was permitted them to make to each other, when the donor did not thereby become *pauperior* or the donee *locupletior* (*s*). Instances of such donations were, when property, the subject of the gift, belonging to another, was given with or without the latter's consent, in which case either the dominion or the power of acquiring a title by *usucapio* was transferred to the donee. Gifts made by the wife to procure some dignity for the husband, or of apparel, ornaments, &c., made by the husband to the wife, were not included in this prohibition.

Although it might have been originally void, yet, if the donor had died or become civilly dead, and there had been no revocation of it, the gift was sustained. The validity which it thus acquired had relation to the time when it was made, and the title to the property and its profits was deemed to have been from that period perfect.

The prohibition was confined to donations *inter viros*. Those *mortis causâ* were valid.

(*q*) Dig. xxiv. 1. 1, 1.
(*r*) Cod. v. 16. 1, 4.
(*s*) Sande, de Prohib. Rer. Alien., p. 18.

CHAPTER IX.

EFFECT OF MARRIAGE ON PROPERTY OF HUSBAND AND WIFE—ROMAN-DUTCH LAW.

In the Dutch Provinces the provisions of the civil law, which established the *dos* and *antidos*, and allowed the husband and wife to retain the separate and absolute ownership of the rest of their property, might be adopted by parties in their nuptial contracts, but they formed no part of the common law.

The property of the husband and wife, and their rights and interests, *stante matrimonio*, were subject either to the dispositions made by the law, or those which they had themselves made by contract on their marriage.

The subject of this chapter is accordingly dealt with, both for the general Roman-Dutch law as in force in the Dutch Republic and for its variations (if any) in the different British Colonies, under the heads of—1. The Statutory Community; 2. The Contractual Régime.

SECTION I.

The Statutory Régime.

The first subject of enquiry in this connection should be the provisions made by the law of Holland, Zeeland and the other Provinces should there be no agreement between the married parties.

Community of property — though of Germanic origin — was not, among the Germanic races, the oldest form of relationship between spouses regarding their property. The ancient rule that immovable property should belong to the family and be administered by the men who could bear arms and defend themselves, the reluctance to alienate the immovable property from the family, and the curtailing of the rights of inheritance of women owing to their inferior position, were all reasons why a woman should possess hardly anything in her own right beyond certain movable property.

To the marriage property she contributed nothing. As soon as the price paid for the bride had developed into a *dos* promised and paid to herself by the bridegroom (*a*), the wife became owner jointly with

(*a*) Cf. p. 13.

her husband (though not always in equal shares) of the few movable articles which she had possessed before her marriage, that part of her husband's property which he had given to her as a *dos*, and the property which husband and wife obtained together during marriage *quod simul conlaboraverint* (so-called *overwinst*) (*b*).

The wife's title to the *dos* depended upon the birth of children during marriage. If that event took place the marriage was called *beërfd*, and the survivor of the spouses became entitled to the whole of the *dos* which had to be reserved for the children. In the case of a marriage without children (*onbeërfd*) the wife retained part only of the *dos* (*c*).

Besides the property thus owned by a married woman jointly with her husband, she possessed in her own right the donation made to her by her husband on the morning after the wedding, and for that reason called the *morgengave* or morning gift. Very probably it was a symbolical recognition by the husband of the legality of his marriage, which could only be legally constituted or confirmed by the *concubitus* (*pretium virginitatis*) (*d*).

These conditions gradually changed. Commercial intercourse loosened family relations and family ties, and diminished their influence. The population became less inseparably attached to the soil, and women were allowed a share in the inheritance of immovable property. This rendered it possible for a bride to bring property of considerable value to the marriage, and her title to it could not be ignored. The social standing of women improved, and the change was reflected in the laws of the different tribes.

The Franks gradually recognised the right of the wife to inherit immovable property, and placed her on the same footing as her husband.

The Lex Ribuaria recognised the wife's right not only to own the property which she had brought to the marriage and her share of the *dos*, but also to one-third part of the property acquired by husband and wife during the marriage.

Among the Westfalians, according to the Lex Saxonum (*e*), upon the birth of children of the marriage the wife, in return for the loss

(*b*) Fock. Andr., Bijdragen, ii. 43—51; Het Oud Ned. B. R., ii. 161—167; Wessels, History, i. 453—455.

(*c*) Fock. Andr., Het Oud Ned. B. R., ii. 165.

(*d*) Fock. Andr., Bijdragen, i. 68, 69; ii. 52, 53; Het Oud Ned. B. R., ii. 167; Wessels, History, i. 463.

(*e*) Arts. 47, 48.

of her share of the *dos*, received a half-share of the marriage property, which became common between husband and wife, that is to say, the birth of a child constituted community of property between husband and wife (*f*).

Thus community of property—so entirely in harmony with the intimacy of German family life—was gradually admitted into marriages among Germanic tribes, first in the towns, where property was mostly of a movable nature, later in the rural districts (*g*).

In early days this community had the character of a joint ownership. Afterwards it became chiefly a community *pro partibus indivisis* (*h*).

As far as the Low Countries were concerned the law was different in the various Provinces.

In **Friesland** community of all property (*communio bonorum*) between husband and wife has never been known. Immovables remained the property of the person who possessed them at the time of the marriage. If acquired during the marriage they became common property. There was a community (a) of profit and loss made during marriage (*communio quæstuum*), and after the marriage had lasted a year (except in the towns) also (b) a community of movable property. The character of this community was that of a *communio pro partibus indivisis* (*i*).

In **Groningen**, in the *Ommelanden*, from 1601, according to the *landrecht* of that year, there existed a community of movables and of profit and loss. Immovables never became common between husband and wife. In the town of Groningen, from 1374 onwards, community of all property was the rule. If there were issue born of the marriage the goods were held by parents and children jointly. If the marriage was childless the community was a *communio pro partibus indivisis* (*k*).

In **Drenthe** a distinction was made according to whether the marriage was with or without issue. If a child were born, the community was a joint one of all goods. If the marriage was

(*f*) Fock. Andr., Het Oud Ned. B. R., ii. 167—169; Wessels, History, i. 454, 455.

(*g*) Fock. Andr., *loc. cit.*, ii. 170; Wessels, History, i. 455.

(*h*) Fock. Andr., *loc. cit.*, ii. 170.

(*i*) Fock. Andr., Bijdragen, ii. 53—64; Het Oud Ned. B. R., ii. 170, 171; J. v. Sande, Dec. Fris., ii. 5, def. 1; Wessels, History, i. 455.

(*k*) Fock. Andr., Bijdragen, ii. 64—82; Het Oud Ned. B. R., ii. 171—173; Wessels, History, i. 455, 456.

without issue there was a *communio quæstuum* only, which afterwards included movables (*l*).

In **Overyssel, Gelderland, Utrecht, Holland** and **Zeeland** marriage constituted a community of property (*communio bonorum*) between husband and wife. In Overyssel its character was uncertain. It was originally regarded as a *communio pro partibus indivisis*, but in the eighteenth century it appears to have been recognised as a joint community. In Gelderland and Utrecht the community was probably a joint one, in Holland and Zeeland a community *pro partibus indivisis* (*m*).

In **Brabant** and **Limburg** marriage constituted between the spouses a joint community of movables. If there were no children born of the marriage, immovables acquired during marriage were part of a *communio pro partibus indivisis*. If there were children born, the community was a joint one of all immovables, whenever acquired and from whatever source derived (*n*).

Thus, although a community of some kind existed in each of the Provinces, that community and its consequences was not everywhere of the same scope nor of the same character. There was a material difference as regards the common liability of husband and wife for debts.

The various rules on this subject may be grouped under two main heads, viz.:—whether the community comprised the goods possessed, and the liabilities incurred, by the parties previously to the marriage, or only those which had been acquired and incurred after the marriage had been contracted.

The community itself, the *communio bonorum*, may be treated as universal or particular.

The former (*communio universitatis*) comprised all the property which belonged to the husband and wife at the time of their marriage, and that which they or either of them acquired during coverture.

The latter (*communio particularis*) comprised only the property which was acquired during coverture, and was called *communio quæstuum* (*aut damni et lucri*, profit and loss).

Before entering upon the details of either division, it will be

(*l*) Fock. Andr., Bijdragen, ii. 82—87; Het Oud Ned. B. R., ii. 172, 173.

(*m*) Fock. Andr., Bijdragen, ii. 87—91, 91—97, 97—109, 109—119; Het Oud Ned. B. R., ii. 175—177.

(*n*) Fock. Andr., Bijdragen, ii. 119—128; Het Oud Ned. B. R., ii. 173—175.

desirable first to consider the general character of the *communio bonorum* and the manner in which it was established.

The maxim of the Roman-Dutch law was *vir et uxor bona non habent separata*, or *man ende wijf hebben geen verscheyden goet* (*o*).

Community not a Partnership.—This maxim has led a number of authors to call the bond between husband and wife a partnership, and to compare its rules with those of the *societas* of the civil law (*p*). This is misleading. In a colloquial sense there can be no objection to compare the community of life and property existing between a husband and wife with a partnership of two persons, but legally there is an essential difference between the *communio bonorum* and the *societas*. Partnership, with its consequences, is entered into voluntarily, by agreement, while community of property is a legal consequence of the marriage, independent of the will of the parties. Consequently, a partnership may be dissolved at any moment, voluntarily, by agreement; but the community remains attached to the marriage as long as the marriage lasts. Again, while partnership is dissolved by the death of one of the partners, the community is not determined by death, but death brings the marriage to an end, and the dissolution of the marriage carries dissolution of the community with it. The marital property might, however, after the dissolution of the marriage, be kept in existence as a community called *boedelhouderschap*. This was not a new community, as would be the case if husband and wife were partners, but the old community which was kept alive after the marriage to which it belonged, and which called it into existence, had ceased to exist. It was the same community, although its title had changed, and there were different rules in different Provinces regulating continued acquisitions of property by the community and imposing special duties on the surviving spouse or *boedelhouder*. Again, debts are not always common between the spouses as they are between partners, nor can either of them be sued equally for their payment.

If at all, the *communio bonorum* can only be considered as a qualified partnership.

Division of Subject.—The subject is here dealt with under the following heads:—I. Commencement of the community. II. *Communio omnium bonorum:* (a) As to its assets; (b) as to its liabilities.

(*o*) A. Matthaeus, Paroem. Belg., ii. 8; J. v. d. Linden, Koopmansh., i. 3, 8.

(*p*) J. Cos, Rechtsgel. Verh., i. 21, and authors quoted by him.

III. *Communio quæstuum:* (a) As to its assets; (b) as to its liabilities. IV. The termination of the community, by the dissolution of the marriage. V. The continuation of the community after the death of the husband or wife, *Boedelhouderschap*. VI. The division of the property which had been in community, and the respective rights of the survivor and the heirs of the deceased.

I. *Commencement of the Community.*

The community was called into life by law (*landrecht*) (*q*). By the law of Holland and Zeeland, the *communio omnium bonorum* took place as the immediate consequence of the marriage, and commenced from the moment of its celebration, either *in facie ecclesiæ* or before the magistrate. In some Provinces (*e.g.*, in Groningen and Utrecht) and in some of the towns of Holland the title to it was not complete unless there had been *ingressus thori*, and the same was the rule as to the *communio quæstuum* of Friesland. In this Province, as far as movables were concerned, it was required, that there should have been *annua cohabitatio;* and in Drenthe and Brabant this community resulting from marriage was made dependent on the birth of a living child (*r*).

Although the community was a consequence of the marriage, the future spouses were not bound to adopt it.

In those Provinces where *communio omnium bonorum* was the rule, the husband and wife could by an ante-nuptial contract exclude it, wholly or in part. They could exclude the greater and retain the lesser, the *communio quæstuum*, and the latter would be retained if—without further dispositions—the *communio omnium bonorum* had been excluded. The exclusion might be made in express terms, or implied from the contents of the ante-nuptial contract.

Quicquid pactis dotalibus speciatim expressum non est illud relinqui providentiæ et dispositioni juris nostri municipalis: eatenus enim

(*q*) Grotius, Introd., ii. 5, 8, and notes by Groenewegen *ad loc. cit.;* J. Cos, Rechtsgel. Verhand., i. 1, and authors quoted by him.

(*r*) A. v. Wesel, de Connub. Societ., tr. i. 30 *et seq.*, ad 52; J. v. Sande, ii. 5; A. Matthæus, Paroem. Belg., ii. 53 *et seq.;* Grotius, Introd., i. 5, 17; Regtsgel. Obs. ii. Obs. 32, sub. 4; Neostad., de Pactis Antenup., Obs. 15, 16 and 17; Groenewegen, De Leg. Abr., Dig. xxiii. 2, 6, et Cod. v. 3, 6; Van Leeuwen, Cens. For., i. 1, 14, 5; L. Goris, Advers., tr. i. 2; Gayl., ii. Obs. 80, 11; Carpz., Def. For., iii. Cens. 19, Def. 9, nn. 3, 4, 5; J. Voet, Ad Pand., xxiii. 2, 93—95; v. Zurck, Codex Bat., *voce* "Gemeenschap"; Huber, Hed. Regtsgel., i. 11, par. 2, 4; Fock. Andr., *loc. cit.*

tantum contrahentes a consuetudine, vel statuto recessisse intelligendi sunt, quatenus instrumento nuptiali pacti sunt in contrarium ; cætera per se lex vel consuetudo adjicit et interpretatur. Igitur exclusâ pactis dotalibus bonorum communione, lucri damnique in matrimonio facti communio remanet (*s*).

In case of doubt, the presumption of law was in favour of the community (*pro communione potius quam contra eam*) (*t*).

So much was this community of common right, that a minor who had married with the requisite consent, could not obtain relief against it by *restitutio in integrum* (*a*).

As the marriage was the very essence of the title to community, there could not be any community until the celebration had taken place, nor if the marriage were declared null and void. It has been doubted whether community would take place in the case of a putative marriage. No doubt occurred if there had been *bona fides* in both parties, and if both were ignorant of the impediment to their union. But one party only might be innocent, and that party might possess the chief fortune, whilst the guilty party was possessed of little or none. If in that case the community were admitted, the latter would profit by his fraud. It was considered, therefore, that in case either of the parties knew of the impediment and intentionally did not reveal it, community should only follow when it would be in the interest of the innocent party, and not when it would be to the latter's detriment (*b*).

The law was similar with regard to marriages of minors, viz. :— in those Provinces where the consent of third parties was required

(*s*) A. v. Wesel, de Quæst. inter Conj. Com., tr. ii., c. nn. 224, 225 ; Neostad., de Pact. Antenup., Obs. 4 in notis (3) ; Coren., Obs. 30, Vers. "dan wierde," nn. 64 *et seq.* ; v. Someren, de Jure Nov., c. 12, n. 3 ; A. Matth., Paroem. Belg., Par. 2, n. 68 ; J. Voet, Ad Pand., xxiii. 2, 91 ; Grotius, Introd., ii. 12. 11 ; Regtsgel. Obs. ii. 32 ; Holl. Cons., iii. b. Cons. 182, nn. 10, 11 ; V. d. Keessel, Thes. Sel., Thes. 227 and 252 ; V. d. Linden, Koopmansh., i. 3, 8, on p. 28.

(*t*) Coren., Obs. 36, n. 66 ; Neostad., de Pact. Antenupt., Obs. 23 ; v. Someren, de Jure Nov., c. 12, n. 3 ; A. v. Wesel, *loc. cit.* tr. ii., c. n. 223.

(*a*) A. v. Wesel, de Con. Bon. Societ., tr. i., nn. 116, 117 ; Groenewegen, de Leg. Abr., Cod. ii. 34 jo. 30.

(*b*) A. v. Wesel, *loc. cit.*, tr. i., n. 53 ; J. Cos, Regtsgel. Verh., i. 2, 5 ; v. Sande, Dec. Fris., ii. 5, 2 ; Goris, in Advers., c. 1, n. 26, in notes ; A. Matth., Paroem. Belg., Par. 2, n. 17 ; J. Voet, Ad Pand., xxiii. 2, 89 ; Stockmans, Decis. 62, n. 7 ; Bynkershoek, Quæst. Jur. Priv., ii. 3.

for marriages of persons under a certain age. In all cases where a person knowingly married a minor without the requisite consent of parents or guardians, such person could not derive any pecuniary advantage from the marriage, either by way of community of property, or by any gift from the minor during the minor's lifetime or by his or her will, or otherwise (*c*).

In those Provinces where any marriage contracted without such consent was null and void, whenever a marriage had been entered into with a minor without the requisite consent of the parents or guardians, and such marriage was afterwards declared illegal, it was considered that no community had taken place, unless it were regarded to be to the minor's advantage and the minor would derive any benefit from it (*c*).

Similarly, community did not result in case a minor were abducted for the purpose of marriage against the wish of the parents, although with the minor's own consent, even if the marriage afterwards received the parents' consent (*d*).

These were the two exceptions to the rule that community of property was, by law, a consequence of the marriage (*e*).

As the community was the legal consequence of the marriage, all property which belonged to each party at the time of the marriage, or to which each became entitled during the marriage, passed into community by mere operation of law, without any act of transfer or delivery of it (*f*).

The property of a minor under guardianship which could not in other cases be alienated without the sanction of the Court became part of the community from the mere effect of the marriage (*g*).

(*c*) Eeuwig Edict of Charles V., October 4th, 1540, art. 17; A. Matth., Paroem. Belg., ii. 18; A. v. Wesel, de Conn. Bon. Soc., i. 55; Grotius, Introd., i. 5, 14, and ii. 11, 8; Goris, Advers., c. 10; v. Leeuwen, Cens. For., i. 13, 9, in med.; J. Cos, Rechtsgel. Verh., i. 3.

(*d*) Groot Placaatboek, Holl., viii. 535 (February 25th, 1751); V. d. Keessel, Thes. Sel., Thes. 218, jo. 72, and in his *dictata* on this thesis; J. v. d. Linden, Koopmansh., i. 3, 8.

(*e*) Other exceptions related to the marriages of persons of nobility and between Protestants and Catholics, but these have become obsolete.

(*f*) J. Voet, Ad Pand., xxiii. 2, 68; Rodenburg, de Jure Conn., ii. 5, 12, 13; Groenewegen, De Leg. Abr., Inst., ii. 8, Pr. 1; Grotius, Introd., ii. 11, 7, who entitles it "confusion of property"; V. d. Keessel, Thes. Sel., Thes. 216.

(*g*) L. Goris, Advers., tr. i. 1, 30; A. v. Wesel, de Conn. Bonn. Soc., tr. i. n. 116.

The community took place upon a second, or third, marriage no less than on a first marriage of either of the parties, without, however, prejudicing the rights of the children of the former marriage or marriages (*h*).

After the community had once been established, it could not be removed or amended during the marriage (*i*).

II. *Communio omnium bonorum.*

(a) **The Assets.**—The community consisted of every description o property, movable and immovable, corporeal and incorporeal, which either party possessed at the time of the solemnisation of the marriage or acquired afterwards during the marriage by any title whatsoever (*k*).

But all property which after a certain time, or after the death of either of the spouses, would go to third persons, was excluded. Such was (1) all feudal and similar property, as it was indivisible and could not be alienated without the consent of the overlord, though this was disputed by some authors with regard to hereditary feudal property (*l*); (2) all property which was burdened with a *fideicommissum*, whether it was limited in time or contingent, because—in the words of Voet—the property really belonged to some one else (*m*); (3) entailed property (*n*); (4) fruits of office, or obtained through public functions which were entirely personal (*o*).

(*h*) Grotius, Introd., ii. 11, 9; Holl. Cons., i. Cons. 47 and 48; A. v. Wesel, de Conn. Bon. Soc., tr. i, n. 58; J. Voet, Ad Pand., xxiii. 2, 89 and 122—123, and the authors quoted by him Bynkershoek, Quaest. Jur. Priv., ii. 2; J. Cos, Regtsgel. Verh., i. 6; Decisions and resolutions of the Court of Holland, 155, 422; J. v. d. Linden, Koopmansh., i. 3, 8; V. d. Keessel, Thes. Sel., Thes. 219.

(*i*) J. v. d. Linden, Koopmanshdbk., i. 3, 8.

(*k*) Grotius, Introd., ii. 11, 8; Groenewegen, De Leg. Abr., Inst., ii. 8, 1; J. Voet, Ad Pand., xxiii. 2, 69; Lybreghts, Reden. Vertoog, i. 10, 8; Holl. Cons., i. Cons. 19.

(*l*) V. d. Keessel, Thes. Sel., Thes. 220; J. Voet, Ad Pand., xxiii. 2, 71—76; Holl. Cons., iii. Cons. 25; Grotius, Rechtsgel. Obs., iii. Obs. 36; Grotius, Introd., ii. 11, 10, and Schorer's Notes, *ad loc. cit.*; Groenewegen, De Leg. Abr., Inst., ii. 8, 2, and authors quoted; Bort, Van de Holl. leenen, ii. 11; J. Cos, Rechtsgel. Verh., i. 7, and authors quoted by him.

(*m*) J. Voet, Ad Pand., xxiii. 2, 77; V. d. Keessel, Thes. Sel., Thes. 221; Grotius, Introd., ii. 11, 10, and notes by Groenewegen.

(*n*) J. Cos, Rechtsgel. Verh., i. 7; V. d. Linden, Koopmansh., i. 3, 8.

(*o*) Arntzenius, Inst. Jur. Civ. Belg., ii. 4, 18, 3; Holl. Cons., v. Cons. 75; J. Cos, Regtsgel. Verh., i. 11.

Contingent interests did not, however, form part of the community, if the contingency depended upon the happening of a future event which was certain to take place and which, when it happened, rendered the estate the owner's unrestricted property, or (in the case of a fief) if the overlord consented that the fief should be included (*p*). Although the property itself was excluded, for the reasons assigned, yet the community would have the benefit of its annual rents and profits (*q*).

Gifts of money, ornaments, apparel, &c., made *causâ nuptiarum* by the husband to the wife, either before or after the celebration of the marriage (*morgengave*), were acquired and retained by the wife, *pleno jure*, and did not fall into the community. The obvious ground of their exclusion was that the gift would have been nugatory if the husband could thus have resumed it on the marriage (*r*).

(b) **The Liabilities.**—The similarity which existed as regards the assets of the *communio omnium bonorum* was not maintained as regards its liabilities, and there was a good deal of diversity on this point in the law of the different Provinces. Speaking generally, it might be said that all debts became common which were contracted before the marriage either by the husband or by the wife, or during the marriage by the spouses jointly, or by the husband alone. In case the wife, with the consent of her husband, were publicly carrying on a trade, her debts incurred as public merchant also became debts of the community; otherwise she could not bind the community by herself.

Quemadmodum ergò per nuptias omnia quæ ante matrimonium coëuntium fuere propria et peculiaria, quæque eo contracto quoquo modo obveniunt, utrique conjugi fiunt communia, adeò ut una domus et commixta familia verè dicatur, ita non potest non esse consequens æris alieni inter conjuges communio (*s*).

(*p*) J. Voet, Ad Pand., xxiii. 2, 71; and authors quoted by him.

(*q*) Grotius, Introd., ii. 11, 10, and Schorer's Notes, *ad loc. cit.*; Rechtsgel. Obs., iii. Obs. 36; J. Voet, Ad Pand., xxiii. 2, 71; Bort, Holl. leenen, v. 2, c. 3, quaest. 5 *et seq.*; v. 3, c. 6, arts. 2, 2, 8; A. Matth., Paroem. Belg., ii. 23; A. v. Wesel, de Quaest., inter Conj. Conn., tr. ii. 2. 142—144; Coren, Cons. xxv. 33—35; Lybreghts, Reden. Vertoog, i. 10, 9, and authors quoted; J. Cos, Rechtsgel. Verh., i. 12.

(*r*) J. Voet, Ad Pand., xxiii. 2, 78, and authors quoted by him; Stockmans, Decis., xlvi.; J. Cos, Rechtsgel. Verh., i. 8.

(*s*) A. v. Wesel, de Damni inter Conj.

The liability which was thus incurred was the necessary effect of the community of the spouses in all the property of each other, "*secundum naturam est, commoda cujusque rei eum sequi, quem sequuntur incommoda*" (*t*). It has been assigned as an additional reason for this community in debts, that "*bona non dicantur, nisi quæ deducto ære supersunt*" (*a*).

"*Die de man ofte wyf trouwt die trouwt oock de schulden. Nubens viro, fœminamve ducens, ducit etiam nomina*" (*b*).

Ante-nuptial Debts.—1. The first question to be considered is the extent of the liability of the community for debts contracted by either the husband or the wife before their marriage.

It may be stated that so long as the coverture continued, if there were no ante-nuptial contract excluding the community of property, the matrimonial property might be taken in execution for the debts contracted by either the husband or the wife before their marriage (*c*). So effectively were their respective liabilities by operation of law joined together, that, if a person married a woman against whom a judgment had been obtained, such judgment would be executable against the common property without any citation or other proceedings to declare it executable (*d*).

The maintenance of children born of a former marriage formed part of the debts which came under the community and for which the common property became liable. Upon the dissolution of the marriage this liability ceased, however, to be a common liability and remained a charge upon the parent of those children only (*e*).

The right of the creditor to resort to the common estate for debts

Com., tr. ii., c. 3, n. 1; L. Goris, Advers., tr. i., c. 4, n. 1; J. Voet, Ad Pand., Dig. xxiii. 2. 52 and 53; Neostad., de Pact. Ant., Obs. 12; Van Leeuwen, Cens. For., iv. 23, 20; Grotius, Introd., ii. 11, 12; Regtsgel. Obs., iii. Obs. 27; Fock. Andr., Bijdragen, ii. 80, 86, 90, 93, 103, 112; V. d. Keessel, Thes. Sel., Thes. 222.

(*t*) Dig. L. 17, 10.

(*a*) L. Goris, Advers., tr. i., c. 4, n. 1.

(*b*) A. Matth., Paroem. Belg., ii. 22.

(*c*) Fock. Andr., Bijdragen, ii. 80, 94—97, 112, 113; Grotius, Introd., ii. 11, 12, and Regtsgel., Obs., iii. 37; Schorer, Notes ad Grot. Introd., ii. 11, 12; V. d. Keessel, Thes. Sel., Thes. 222; V. d. Linden, Koopmansh., i. 3, 8; J. Cos, Regtsgel. Verh., i. 9.

(*d*) J. Voet, Ad Pand., xlii. 1, 33; Holl. Cons., iii a., Appendix Decis., p. 7; A. Matthaeus, de Auct., i. 11, 45; A. v. Wesel, Ad Nov. Cons. Ultraj., art. 6, nn. 24, 25; Holl. Cons. i. Cons. 145, Quaest. 1.

(*e*) J. Voet, Ad Pand., xxxii. 2, 81 Schorer, Notes ad Grotius, Introd., ii. 11, 10.

incurred previously to the marriage by either the husband or the wife could only be enforced as long as the community lasted. During marriage the husband could be sued for their payment, on account of his being the head of the community and, as such, guardian of his wife. On being sued he could not deny that the common property was liable (*f*).

In the Provinces of Gelderland (*g*) and Utrecht (*h*), after the dissolution of the marriage, the creditor could enforce his right against either the husband or the wife or their heirs for the whole debt (*in solidum*). The same rule probably applied in the town of Groningen (*i*), and in the province of Drenthe (*k*). In Holland and Zeeland, debts incurred previously to the marriage by either the husband or the wife, and not sued for during the marriage, could, after dissolution of the community, only be recovered by the creditors from the party who had incurred them, or his or her heirs (*l*).

A decision to this effect was given in 1597 by the Supreme Court of Holland in a case where it was attempted to recover from a widower one moiety of a debt owing by his deceased wife at the time of their marriage. It was held that, as the wife, at the time when the debt was contracted, had no power to bind her future husband, and as he subsequently became bound only by force of the community, if the creditor neglected, during its continuance, to enforce the right which it gave him, he lost his resort against the husband, because that right ceased when the community ceased by the death of the wife (*m*).

Whether, in such a case, the party who had been proceeded against succeeded to the right of the creditor and could sue the other spouse or his or her heirs for a contribution of half the

(*f*) Grotius, Introd., ii. 11, 12; J. Voet, Ad Pand., xxiii. 2, 80, and authors quoted by him.

(*g*) Fock. Andr., Bijdragen, ii. 94—97.

(*h*) Fock. Andr., Bijdragen, ii. 106, and authors quoted by him; A. v. Wesel, de Conn. Bon. Soc., ii. 1—6; v. Someren, de Jure Novere., 13, 5; Schorer, Notes ad Grot. Introd., ii. 11, 12.

(*i*) Fock. Andr., Bijdragen, ii. 80—82.

(*k*) Fock. Andr., Bijdragen, ii. 86, 87.

(*l*) Grotius, Introd., ii. 11, 15; Holl. Cons., ii. Cons. 25; Groenewegen, de Leg. Abr., Dig. xxiii. 3, 72; S. van Leeuwen, R. H. R., iv. 23, 6; J. Voet, Ad Pand., xxiii. 2, 80.

(*m*) Neostad., de Pactis Anten., Obs. 12, 13; Groenewegen, de Leg. Abr., Dig. xxiii. 3, 72; Boel-Loenius, Decis., case 99; V. d. Keessel, Thes. Sel., Thes. 224.

amount of the debt thus contracted, was a disputed question (*n*). According to the majority of the authorities in Holland, contribution of that amount could be exacted (*o*). Others were of opinion that no such contribution could be claimed; that—in other words—after the dissolution of the community the debts contracted by one of the spouses previously to the marriage ceased to be common between the two spouses (*p*). Others, again, were of opinion that no definite rule could be stated, and that everything depended upon the rules laid down by the different towns (*q*).

In Gelderland (*r*) and Utrecht (*s*), and the town of Groningen, the spouse who had been sued and had paid, or his or her heirs, had always a claim for contribution of a moiety of the amount of the debt against the other party, or his or her heirs.

Post-nuptial Debts.—2. In the second place it is necessary to consider the extent of the liability of the spouses for debts contracted during their marriage.

In so far as the management and administration of the property in common was vested in the husband, the debts and charges incurred by him alone in that capacity were binding upon the common property, and might be recovered by the creditors against the common estate (*t*).

Owing to the guardianship which a husband exercised over his wife, and of the wife's general incapacity to bind herself, the husband could bind her for all debts incurred by him, and the presumption that such was the husband's intention arose from the fact that the liability for all debts incurred by the husband was common to both spouses (*a*).

(*n*) Schorer, Notes ad Grot. Introd., ii. 11, 12; Fock. Andr., Bijdragen, ii. 113—116.

(*o*) Groenewegen, Notes ad Grot. Introd., ii. 11, 15; S. van Leeuwen, Cens. For., i. 4, 23, 21; Holl. Cons., i. Cons. 150; Neostad., *loc. cit.*, Obs. 13, *in notis* (a); J. Voet, Ad Pand., xxiii. 2, 80.

(*p*) De Haas, Nieuwe Holl. Cons., p. 351; V. d. Keessel, Thes. Sel., Thes. 224.

(*q*) Boel-Loenius, Decis. case xciv. 627; Schorer, Notes ad Grotius, Introd., ii. 11, 12.

(*r*) Fock. Andr., Bijdragen, ii., 94; L. Goris, Advers., tr. i. 4, 1 *et seq.*, and 14 *et seq.*

(*s*) Fock. Andr., Bijdragen, ii. 106; A. v. Wesel, de Quaest. inter Conj. Cons., ii. 2, 189; Ad. Nov. Const. Ultraj., vi. 8 *et seq.*; v. Someren, de Jure Noverc., xii. 6; A. Matth., de Auct., i. 19, 40; J. Voet, Ad Pand., xxiii. 2, 80.

(*t*) Fock. Andr., Bijdragen, ii. 59, 73—74, 76—78, 80, 86, 90, 93, 103, 115—116.

(*a*) Fock. Andr., Bijdragen, ii. 115; Rodenburg, de Jure Conn., ii. 1, 3.

The wife had power to bind her husband to a limited degree only. As she was generally incapable of contracting debts or making contracts *stante matrimonio*, she could only bind the community and her husband for the debts incurred by her in connection with household expenditure or as a public merchant, if she carried on such business with his consent (*b*).

The result was that after the dissolution of the marriage all debts contracted during the marriage could be recovered by the creditors from the husband or his heirs *in solidum*. The husband and his heirs had in their turn an action against the wife and her heirs for contribution of a moiety of all amounts thus paid (*c*).

After the dissolution of the community the creditors might proceed against the wife and her heirs for the recovery of the common debts to the extent of one-half only (*d*), except with regard to mortgages which had been granted by the husband upon the common estate. A mortgagee could proceed against such estate for the whole amount of the mortgage, irrespective of the fact that on the dissolution of the community the mortgaged property might have been assigned to the wife or her heirs (*e*).

Jurists have had no hesitation in attaching to the property such debts or engagements contracted by the husband as were beneficial, or, at least, not injurious to the community; but it has been doubted whether those which had been contracted by him for purposes from which the wife could only derive loss and injury ought to affect the property of the community. Upon this point the majority of authors on the subject have come to the conclusion that in the case of *communio bonorum* the property of the community was liable for the husband's obligations as a surety, and even for debts contracted *Baccho, Venere*, &c. (*f*).

(*b*) Fock. Andr., *loc. cit.*

(*c*) Grotius, Introd., ii. 11, 17; Neostad., De Pactis Anten., Obs. 5, 6.

(*d*) Fock. Andr., *loc. cit.*; Grotius, Introd., ii. 11, 17; Neostad., *loc. cit.*; Holl. Cons., i. Cons. 151, Quaest. 2; J. Voet, Ad Pand., xxiii. 2, 52.

(*e*) This seems not to have been the case in Utrecht; A. Matth., de Anct., i. 11, 14, 15; J. Voet, Ad Pand., xxiii. 2, 52.

(*f*) Grotius, Introd., i. 5, 22; Rodenburg, *loc. cit.*, ii. 1, 8, 9; J. Cos, Rechtsgel. Verh., i. 14, 17; Groenewegen, de Leg. Abr., Cod. iv. 12, 1, 2; J. Voet, Ad Pand., xxiii. 2, 53, 54; Neostad., De Pactis Anten., Obs. ix. *in fin.*; Holl. Cons., ii. Cons. 79, and iv. Cons. 266; A. v. Wesel, de Con. Societ., ii. 1, 93, and ii. 3, 119 *et seq.*; de Damni inter Conj. Comm., tr. ii. 3, 52; v. Someren, de Jure Novere., viii. 5, 6.

The wife became liable, not only for the debts of her husband, but even for the liabilities which he had incurred. If he had been appointed guardian, the wife was, equally with him, accountable for his administration of the minor's estate, and bound to make good any debt owing as the result of that administration (*g*).

Maintenance owed by the husband to an illegitimate child procreated by him *stante matrimonio* became a common debt, if his wife had condoned the adultery. The wife's liability ceased after the death of her husband, as the father's liability for maintenance of his illegitimate children ceased with their father's death (*h*).

Costs adjudged in a civil suit, and penalties imposed for the non-performance of a contract against the husband were liabilities of the community (*i*).

A pecuniary penalty imposed by judicial sentence for a crime committed by either of the spouses fell on the offender alone, and was not chargeable against the community (*k*).

Some of the town "keuren," and some of the authorities, drew a distinction in this respect between more and less serious crimes, and charged the penalties imposed for the latter to the community, but not those imposed for the former. In the same way the pecuniary consequences of a crime committed in protecting the property of the community, or which had been beneficial, were considered to be recoverable from the community (*l*).

If the husband had committed an offence which had made his property liable to confiscation, the wife's interest in the community

(*g*) J. Voet, Ad Pand., xxiii. 2, 53; Rodenburg, de Jure Conn., i. 5 *in fin.*; Fock. Andr., Bijdragen, ii. 59; v. Sande, Dec. Fris., ii. 5, Def. 8; J. Cos, Rechtsgel. Verh., i. 13.

(*h*) Holl. Cons., i. Cons. 39; and iii. a. Cons. 165; Schorer, Notes ad Grot. Introd., ii. 11, 10; J. Voet, Ad Pand., xxiii. 2, 28; J. Cos, Regtsgel. Verh., i. 17; Lybreghts, Reden. Vertoog, ii. 10, 16.

(*i*) Groenewegen, de Leg. Abr., Cod. iv. 12, 2; A. v. Wesel, de Damni inter Conj. Comm. ii. 3, 70, 72; Rodenburg, de Jure Conn., ii. 2, 8, and ii. 3, 16.

(*k*) Grotius, de Jure Belli ac Pacis, ii. 21, 12; Holl. Cons., v. Cons. 62; A. v. Wesel, *loc. cit.*, tr. ii. 3, 56—59; Rodenburg, de Jure Conn., ii. 2, 6; Stockmans, Decis., lv. 5; v. Sande, Decis. Fris., ii. 5, Def. 8; J. Cos, Regtsgel. Verh., i. 19; Boel-Loenius, Decis., xcix. 640; V. d. Keessel, Thes. Sel., Thes. 225.

(*l*) L. Goris, Advers., i. 4, 7; Groenewegen, de Leg. Abr., Cod. iv. 12, 3; J. Cos, Rechtsgel. Verh., i. 19; Fock. Andr., Bijdragen, ii. 117; Lybreghts, Reden. Vertoog, i. 10, 16, seems of opinion that all pecuniary penalties become common.

was protected, and the husband's moiety only would be taken in execution (*m*).

A pecuniary penalty to which the wife was condemned, might be enforced, *stante matrimonio*, by execution against the community, although the husband would thereby suffer for an offence of which he was innocent. The adoption of this principle was justified on public grounds, because, if its execution were suspended until the dissolution of the marriage, the offence would remain unpunished in the meantime (*n*). The husband was, however, indemnified on the termination of the community by obtaining repayment from the wife's share (*o*).

Penalties which were not the result of a criminal action were chargeable against the community (*p*).

Besides debts contracted by the husband, there were other charges by which the property in community was affected.

Donations made by the husband *stante matrimonio* were charged to the community, unless they were made *in fraudem uxoris* (*q*).

Donations made by the father to his children, either at their marriage or to set them up in trade, were equally charged to the community, unless made *in fraudem uxoris* (*r*). The same was the case with donations made during a second marriage to the children of the first marriage, and the costs of maintaining and educating them, unless they had property of their own. Some authors were of opinion that half of any gift should be refunded to the second wife (*s*).

All funeral expenses and liabilities incurred after and on account of the death of one of the spouses were charged to the heirs of the deceased, and did not form part of the community (*t*).

(*m*) Grotius, Introd., i. 5, 22; Schorer, Notes ad Grot. Introd., i. 5, 22; Groenewegen, de Leg. Abr., Cod. iv. 12, 3; V. d. Keessel, Thes. Sel., Thes. 94.

(*n*) A. v. Wesel, *loc. cit.*, iii. 65; Rodenburg, de Jure Conn., ii. 2, 5.

(*o*) Rodenburg, de Jure Conn., ii. 2, 5.

(*p*) J. Cos, Rechtsgel. Verh., i. 19 *in fin.*

(*q*) A. v. Wesel, *loc. cit.*, ii. 3, 37; Rodenburg, de Jure Conn., ii. 2, 10; J. Cos, Regtsgel. Verh., i. 15.

(*r*) J. Voet, Ad Pand., xxiii. 2, 8, and xxiii. 3, 15; J. Cos, Regtsgel. Verh., i. 16, and authors quoted.

(*s*) J. Voet, Ad Pand., xxiii. 3, 16, and authors quoted; A. v. Wesel, de Quaest. inter Conj. Comm., tr. ii., 2, 191; de Pactis Dotal., ii. 3, 31; Rodenburg, de Jure Conn., 1, ii. 12, 15; v. Someren, de Jure Novere., ii. 1, 2; cf. also Schorer, Notes ad Grot. Introd., ii. 11, 10, and ii. 11, 17.

(*t*) A. v. Wesel, *loc. cit.*, ii. 3, 37;

III. *Communio Quæstuum.*

In the Provinces of Friesland, Drenthe, and Groningen (exclusive of the town), if a husband and wife had been married without an ante-nuptial contract, and in any of the other Provinces, if they had either by ante-nuptial contract adopted the *communio quæstuum*, or by such contract excluded the *communio omnium bonorum* without more, and without stipulating anything to the contrary, then the *communio quæstuum* was the legal consequence of their marriage.

The distinction between the two kinds of community was the strict exclusion from the *communio quæstuum* of everything in which either the husband or the wife could be deemed to have had any proprietary right antecedent to the marriage.

(a) **Assets of the Communio Quæstuum.**—The community consisted of all goods which were acquired by either the husband or the wife during marriage, and were comprised in the word *quæstus* (profits), that is to say, *lucrum quod ex emptione, venditione, locatione, conductione descendit* (*a*) or *quæstus intelligitur, qui ex operis cujusque descendit* (*b*). The term *quæstus* comprised everything which was acquired through art, trade, or by any other similar means (*c*); the term "profits" might be defined generally as including all fruits, income, and benefits which a person derived from his goods, or obtained through his industry, work, science, art, business, profession, or the like, or acquired through good fortune, and which increased his possessions.

The best definition is that which places the subjects of *quæstus* as a class in contradistinction to everything in which the husband or wife had a right, present or future, vested or contingent, at the time of their marriage.

Ut uno verbo plura dicamus, omne illud, quod deducta et extracta cujusque illata sorte, propriisque bonis superest, quæstum vel superlucratum appellamus, utrimque dividuum (*d*).

In that sense, it may be said that all property which was acquired during marriage by either the husband or the wife, and in which neither of them could be considered to have had any rights before the marriage, became part of the community.

Rodenburg, de Jure Conn., ii., 2, 10; J. Cos, Regtsgel. Verh., i. 15.

(*a*) Dig. xvii. 2, 7.

(*b*) *Ibid.*, l. 8.

(*c*) V. d. Marck, Inst. Jur. Civ., p. 236.

(*d*) A. v. Wesel, de Quaest. inter Conj. Comm., tr. ii. 2, 156.

This comprised all property, movable and immovable, bought during the marriage in the joint names of the husband and wife, without regard to the fact whether the purchase-money belonged to them jointly or to either the husband or the wife, but the spouse whose money had been used for the purchase became a creditor of the community (*e*). If the husband bought immovable property with his own money, it was considered—on account of his marital power—that he acquired it for the community, even if he acquired it in his own name (*f*).

Any property, movable or immovable, bought during the marriage with the proceeds of the *fructus* of the property belonging to either the husband or the wife—in other words, with the *quæstus* of the marriage—became common, whether it was bought in the husband's name or in that of the wife (*g*), and whether the proceeds were the *fructus* of property which belonged to the community, or of property which was actually excluded from it (*h*).

The term *fructus* was used to express the rents, issues or profits of property; or in the language of jurists, *quæ nascuntur ex rebus nostris, aut ex iisdem proveniunt accedente norâ obligatione* (*i*). Although, therefore, the estate might remain the exclusive property of the husband or wife, its *fructus* would form part of the community. The fact of the one spouse possessing no property did not prevent the *fructus* of the other's property from being in community (*k*). So completely did they form part of it, that the express exclusion from the community of the *corpus* of the estate would not operate as an exclusion of the *fructus* (*l*).

Fructus, which were distinguished as *naturales* and *civiles*, included not only the returns from the soil, like crops, &c., but

(*e*) J. Voet, Ad Pand., xxiii. 4, 33; v. Sande, Decis. Fris., ii. 5, 6; V. d. Keessel, Thes. Sel., Thes. 251.

(*f*) J. Voet, Ad Pand., xxiii. 4, 33; Groenewegen, De Leg. Abr., Cod. iv. 50, 5 and 6, par. 3; Everhardus, Jur. Cons., xxiv. 2. 1 *et seq.*; Coren, Cons. xviii.; L. Goris, Advers., tr. i. 1, 31, and i. 5, 2, 3; S. van Leeuwen, R. H. R., iv. 21, 6; Cens. For., i. 1, 12, 18, 19; Holl. Cons., v., Cons. 136, and iii b., Cons. 58; A. Matth., Observ. Rer. Jud., ii. Obs. 4, n. 10; A. v. Wesel, *loc. cit.*, ii. 2, 11.

(*g*) A. v. Wesel, *loc. cit.*, ii. 2, 16; J. Cos, Rechtsgel. Verh., iii. 1.

(*h*) J. Voet, Ad Pand., xxiii. 4, 32; A. v. Wesel, *loc. cit.*, ii. 2, 144.

(*i*) A. Matth., Paroem. Belg., Paroem. iii. 23.

(*k*) v. Sande, Decis. Fris., ii. 5, 3, "Deinde"; A. Matth., Paroem. Belg., Paroem. iii. 24; A. v. Wesel, *loc. cit.*, ii. 2, 144; J. Voet, Ad Pand., xxiii. 4, 32.

(*l*) Neostad., de Pact. Antenupt., Obs. 4.

also interest, annual stipends, salaries, rents, fines, wages, &c. In short, there was no annual profit derived from the property, nor pecuniary return from the employment, labour, skill, or science of either husband or wife, which was not comprehended in this term and formed part of this community (*m*).

Timber, fit for cutting, underwood, loppings, &c., were part of the *fructus* of the property (*n*).

In the case of *fructus naturales*, only such as were gathered in at the time of the termination of the community were divided between the representatives of the deceased and the survivor (*o*). If, therefore, these *fructus* were not gathered in until after the death of one of the spouses, the survivor would be entitled to the whole, and the heirs of the deceased would, as a compensation, receive one moiety of the expenses incurred in producing them (*p*). But with respect to the *fructus civiles*, as interest, rents, &c., the heirs of the deceased were entitled to a proportionate part up to the time of the death of their ancestor (*q*).

Exclusions.—From this enumeration it appears that the following subjects were excluded from the *communio quæstuum* :—

a. **Natural Increases.**—All increase during marriage in the value of property which belonged to either of the spouses at the time of the marriage, due to natural causes, and not the result of the industry or labour or expenditure bestowed upon it by either of the parties to the marriage (*r*).

Thus an island added to land belonging to either the husband or the wife by *alluvio* (if this were not brought about by artificial means), a rise in the price of landed property, of houses, and of shares and stocks belonging to either of the spouses, did not fall into the community (*s*).

b. **Ante-nuptial Title.**—Property which was acquired *stante matrimonio*, but by a title which came into existence before the marriage was contracted.

An estate purchased before marriage by either of the spouses,

(*m*) A. Matth., Paroem. Belg., Paroem. iii. 27 ; A. v. Wesel, *loc. cit.*, ii. 2, 149; J. Voet, Ad Pand., xxiii. 4, 32.

(*n*) A. v. Wesel, *loc. cit.*, ii. 2, 145.

(*o*) A. v. Wesel, *loc. cit.*, ii. 2, 161.

(*p*) A. v. Wesel, *loc. cit.*, ii. 2, 161 ; J. Voet, Ad Pand., vii. 1, 28—29.

(*q*) A. v. Wesel, *loc. cit.*, ii. 2, 161 ; J. Voet, Ad Pand., vii. 1, 28, 29.

(*r*) Lybreghts, Reden. Vertoog, i. 87.

(*s*) Holl. Cons., i. Cons. 1, and ii. Cons. 302 ; Schorer, Notes ad Grot. Introd., ii. 12, 11 ; V. d. Berg, Ned. Advysboek, iv. Cons. 32 *in fin.* ; J. Voet, Ad Pand., xxiii. 4, 47.

but delivered after the marriage had been contracted, did not form part of this community, but remained the sole property of the purchaser, even if the purchase price had been paid out of funds which had become common between the husband and the wife. In this case the other party could, on dissolution of the marriage, claim half of the money so used for the purchase. The delivery of the estate was considered as the consequence of the contract of purchase and sale which gave the purchaser a personal action against the vendor (*t*).

Even if the purchase had been made conditionally, or if it had been stipulated that the delivery and the payment should take place at a date subsequent to the marriage, the contract was considered to have been concluded before the marriage, and to carry its consequences with it after the marriage, and the price paid for it was treated as a debt contracted before the marriage, but paid out of the common fund (*a*).

On the other hand, if the estate were purchased *stante matrimonio*, although not paid for until after its dissolution, it would form part of the community (*b*).

If, by ante-nuptial contract, it had been stipulated that the money brought by the wife should be invested in the purchase of an estate, the view was advanced that the first purchase by the husband *stante matrimonio* should be deemed to have been made in performance of the stipulation, and the property should be deemed to belong to the wife and form part of her separate estate (*c*).

But the better opinion was that, as the husband administered the property of himself and his wife, and anything bought by him became part of the community, unless he expressly stipulated that his purchase was made for and on behalf of his wife, so the purchase made in order to carry out a stipulation contained in a marriage contract would become part of the community, unless the purchase

(*t*) J. Voet, Ad Pand., xxiii. 4, 39; A. v. Wesel, de Quaest. inter. Conj. Com., ii. 2, 18; Stockmans, Decis., Dec. lii. and cxxi. 10; Holl. Cons., iii b., Cons. 58; N. Valla, de Reb. Dub. Quaest., 13; v. Sande, Decis. Fris., ii. 5, Def. 3, *in verbis*, "soluto enim matrimonio"; v. Somneren, de Jure Novere., i. 6; A. Matth., Paroem. Belg., Paroem. ii. 11; J. Cos, Regtsgel. Verh., iii. 4.

(*a*) J. Voet, Ad Pand., xxiii. 4, 39; v. Sande, Decis. Fris., ii. 5, Def. 3, *in verbis*, "Similiter si ante"; J. Cos, Rechtsgel. Verh., iii. 4; *contra*, A. v. Wesel, *loc. cit.*, ii. 2, 19.

(*b*) v. Sande, Decis. Fris., ii. 5, 3: "Soluto enim matrimonio," *in fine*: A. v. Wesel, *loc. cit.*, ii. 2, 22.

(*c*) A. v. Wesel, *loc. cit.*, ii. 2, 24.

deed expressly (*ipsis verbis*) declared that the purchase was made for and on behalf of the wife only and in order to carry out the stipulation. If the deed did not contain such an express provision, the estate, so purchased, became part of the community, and the husband remained liable to make the investment (*d*).

Property re-purchased by the husband *stante matrimonio* under a power of re-purchase reserved on a sale made by him before the marriage was not deemed to be a new acquisition. The title to it had relation, not to the re-purchase, but to the contract of sale which had been made previously to the marriage: and being a power reserved to the vendor, it was treated as having been brought to the marriage by the vendor as a right in his own name which could be exercised by him at any time. It was, therefore, excluded from this community (*e*).

Similarly, if the husband previously to the marriage had bought an estate, on condition that he could resell it (*pactum de retrorendendo*), in the event of its being re-sold after the marriage had been solemnised, the proceeds of the sale did not fall into the community, but remained the property of the original buyer (*f*).

If either of the spouses had bought an estate previously to the marriage at a price which, by decree of the Court *stante matrimonio*, was declared to represent less than half its value, and the contract had on that account been rescinded, unless the purchaser paid the further sum required, then—if the purchaser paid the additional sum of money—the estate remained out of the community, as this did not amount to a new contract, but only to the payment of the balance of the sum due from the time when the contract was entered into (*g*).

If, on the other hand, *stante matrimonio*, for the same reason a sale was set aside of property which had been sold by either of the spouses previously to the marriage, and the seller obtained a restitution of that property during the marriage, he or she was entitled to enjoy it under his or her former title and not under the decree of restitution. It remained excluded from the community (*h*).

(*d*) A. v. Wesel, *loc. cit.*, ii. 2, 25; J. Voet, Ad Pand., ii. 4, 35; J. Cos, Rechtsgel. Verh., iii. 5.

(*e*) A. v. Wesel, *loc. cit.*, ii. 2, 24.

(*f*) A. v. Wesel, *loc. cit.*, ii. 2, 27—30; J. Voet, Ad Pand., xxiii. 4, 42.

(*g*) A. v. Wesel, *loc. cit.*, ii. 2, 32; J. Voet, Ad Pand., xxiii. 4, 42.

(*h*) A. v. Wesel, *loc. cit.*, ii. 2, 33, 34; A. Matth., Paroem. Belg., Paroem. iii. 12; J. Voet, Ad Pand., xxiii. 4, 42.

Property which had been recovered by a spouse *jure retractus propter proximitatem sanguinis*, was not deemed an acquisition *stante matrimonio*. The title by which it was acquired, was considered to be a right belonging to that spouse before the marriage, and the property itself was accordingly considered to have been vested in him or her before the marriage (*i*).

In these and similar cases, the question was, whether the estate returned to its owner by virtue of some cause or title which had its existence before the marriage, or from a new cause or title arising *stante matrimonio*. *Proprium me, an recens quæstus sit, æstimandum esse ex origine et causa, qua recuperatæ res sunt: ut si ex pristina, pristinum locum et statum recipiant, sin ex novo contractu ad priorem dominium redierint, in priorem conditionem non reverentur* (*k*).

If property, which had been derived from the family (*bona avita*, or *patrimonialia*), and which might be subject to a right of re-purchase by persons who belonged to that family, should be sold without the condition *retrovendendi*, and was afterwards acquired by a new purchase, or by any other title but that of the original *jus retractus*, it ceased to retain its original character, and was considered a new acquisition. On the other hand, if such property, having been sold under that condition, had returned to its former owner, it resumed its original character and quality, as if no intermediate sale had taken place (*l*). The same rule was applied if property which had been taken and detained by pirates or robbers returned to its former owner (*m*). But if the ownership had been changed *jure belli*, and was afterwards recovered by paying a certain price, it would be deemed an acquisition (*n*).

If during the marriage the husband sold his own or his wife's estate and bought a new estate with the proceeds, this was considered to form part of the community, as having been acquired during matrimony, unless there had been a special stipulation to the contrary in the purchase deed of the new estate, viz., that it should take the place of the estate sold (*o*).

(*i*) A. v. Wesel, *loc. cit.*, ii. 2, 37, 38; A. Matth., Paroem. Belg., Paroem. iii. 12; v. Sande, Dec. Fris., ii. 5, 3, *in verbis* "Perro"; J. Voet, Ad Pand., xxiii. 4, 38; J. Cos, *loc. cit.*, iii. 12.

(*k*) A. v. Wesel, *loc. cit.*, ii. 2, 39.

(*l*) Carpz., ii. 12, 5; A. v. Wesel, *loc. cit.*, ii. 2, 41.

(*m*) J. Voet, Ad Pand., xxiii. 4, 41; Grotius, de Jure Belli ac Pacis, iii. 9, 16.

(*n*) J. Voet, Ad Pand., xxiii. 4, 41; A. v. Wesel, *loc. cit.*, ii. 2, 43.

(*o*) A. v. Wesel, *loc. cit.*, ii. 2, 49—53;

Anything which was written off from the inventory, made at the commencement of the marriage of property belonging to either of the spouses, ceased to be separate property, and anything which had been acquired by means of it did not take its place, unless it clearly appeared that such was the intention, and that intention had been clearly expressed at the time when such transaction was carried out. This was so in the case of sale and purchase, as well as in the case of an exchange (*permutatio*) (*p*). It did not affect the right of the wife, after dissolution of the marriage, to demand restitution of what appeared on that inventory to have been hers at the commencement of the marriage, or compensation if it could not be accounted for and had not been replaced by other property of equal value (*q*).

Property which had been acquired *stante matrimonio* by *usucapio*, or by judgment (*adjudicatio*), became part of the community only if these titles had their commencement and completion during the community. If, in the one case, the party's *bonâ fide* possession had commenced, although the time during which such possession must continue had not elapsed before the marriage, or, if, in the other case, the suit had been instituted *before* the marriage, although judgment had not been given until *after* the marriage had been solemnised, the property so acquired would retain its former character, and would not be part of the community (*r*).

Property might also have been acquired by compromise (*transactio*). Some jurists were of opinion that if the party against whom the suit was instituted, were in possession of the property in dispute before the marriage, and put an end to such suit by paying a certain sum of money to his or her adversary, he or she ought, from the presumption of the law in favour of possession, to be

Rodenburg, de Jure Conn., ii. 4, 27; v. Sande, Decis. Fris., ii. 5, Def. 3, *in verbis* "Quod si maritus"; J. Cos, Rechtsgel. Verh., iii. 10; *contra*, A. Matth., Paroem. Belg., Paroem. iii. 13 *et seq.*; L. Goris, Adv., i. 5, 5.

(*p*) v. Sande, Decis. Fris., ii. 5, Def. 3, *in verbis* "Res permutata"; J. Voet, Ad Pand., xxiii. 4, 35; J. Cos, Rechtsgel. Verh., iii. 11; *contra*, A. v. Wesel, *loc. cit.*, ii. 2, 55.

(*q*) Grotius, Introd., ii. 12, 15, and notes by Groenewegen, *ad loc. cit.*; J. Voet, Ad Pand., xxiii. 4, 35; A. v. Wesel, *loc. cit.*, ii. 2, 49; v. Sande, Decis. Fris., ii. 5, Def. 3, *in verbis* "Soluto enim matrimonio."

(*r*) v. Someren, de Jure Noverc., i. 7; A. Matth., Paroem. Belg., Paroem. ii. 23; A. v. Wesel, *loc. cit.*, ii. 2, 77—80; J. Voet, Ad Pand., xxiii. 4, 39 *in fin.* and 40; J. Cos, Rechtsgel. Verh., iii. 14.

deemed to have had a good title when the suit was instituted, and the property ought not to be considered as an acquisition; but that, on the other hand, if he or she had not been in possession before the marriage, and had, by the compromise, procured its delivery by his or her adversary, it ought to be deemed an *acquæstus* and included in the community (*s*).

Other jurists considered that this question depended on the proportion which the sum given as a compromise bore to the value of the property in dispute. If the sum were large, they treated the compromise as a purchase (*t*).

If the husband granted rights (*jura in re aliena*) on his estate or on that of his wife, with her consent, and reserved to himself or her an annual rent, these respective interests would continue to belong to him or her exclusively, and would not be the subject of the community (*a*).

If, on the other hand, the husband acquired full ownership of an estate in which he already possessed a *jus in re*, that estate would belong exclusively to himself, and not to the community (*b*).

In order to prove the separate property of the husband and the wife, it was usual to attach an inventory of all the possessions to the ante-nuptial contract. If this were either not done or improperly done, proof could be given *aliunde*. If it were doubtful whether the estate belonged exclusively to either the husband or wife at the time of the marriage, or had been acquired *stante matrimonio*, the law established certain presumptions. If either of the spouses were in possession of the property before the marriage, the law presumed that the *dominium* was also in the possessor, unless the other spouse proved that there was possession only, and that the *dominium* had been acquired *stante matrimonio*. On the other hand, if *stante matrimonio* the husband and wife for the first time had possession of an estate, the law presumed that it was an acquisition, and the *onus probandi* rested on the party who alleged that it was derived by succession or by some other title which had its existence before the marriage (*c*).

(*s*) A. v. Wesel, *loc. cit.*, ii. 2, 67 and 68; J. Voet, Ad Pand., xxiii. 4, 40.

(*t*) A. v. Wesel, *loc. cit.*, ii. 2, 70.

(*a*) A. v. Wesel, *loc. cit.*, ii. 2, 70.

(*b*) A. v. Wesel, *loc. cit.*, ii. 2, 73—75; Coren, Consil., xviii. 38 *in notis;* J. Voet, Ad Pand., xxiii. 4, 42.

(*c*) A. Matth., Paroem. Belg., Paroem. iii. 29; Holl. Cons., iii b. Cons. 164, sub. 4; V. d. Keessel, Thes. Sel., Thes. 230.

c. **Successions.**—In view of the general rule that property, acquired *stante matrimonio* but by a title which came into existence previously to the marriage, did not fall under *quaestus* and remained excluded from the community, some authors extended this rule to property acquired during marriage by succession, whether by will or *ab intestato*, unless it had been stipulated to the contrary either in the will or in the ante-nuptial contract (*d*).

Others distinguished between inheritances which came from blood relations and devolved on either the husband or wife *jure sanguinis*, whether *ab intestato* or by testamentary bequest. Such property was excluded from the community, because it was considered that the acquisition was in consequence of a right which was already in existence before the marriage, either by law or by nature, and recognised by the testator. If the testator, however, were a stranger in blood, to whose goods no right could exist before marriage, such exclusion would not exist. Property devised to either of the spouses by a person who was not a parent nor a relation by blood would become part of the community. Upon the same principle these authors excluded from the community a legacy given by a parent, or other relation, for it was in some degree a discharge of a natural debt which he owed, but no such debt was due by a stranger, and, therefore, a legacy given by a stranger was deemed part of the community (*e*).

A third group of authorities were of opinion that it depended upon the words used in the marriage articles for the exclusion of the *communio omnium bonorum*. If only present goods had been mentioned as being excluded from the community, and not future ones, the inheritance and legacies were considered to become common property (*f*).

Donations.—A similar difference of opinion existed on the question whether donations were included in the community (*g*).

(*d*) Grotius, Introd., ii. 12, 11, and iii. 21, 10; V. d. Keessel, Thes. Sel., Thes. 252; Holl. Cons., iii b., Cons. 54, sub. 4, and vi. 2nd part, Cons. 208. See, however, to the contrary, Holl. Cons., vi. 1st part, Cons. 40 on p. 75, 4°, and Cons. 90.

(*e*) A. v. Wesel, de Quaest. inter Conj. Com., ii. 2, 81—83; J. Voet, Ad Pand., xxiii. 4, 43; J. v. Someren, de Jure Novere., iii. 7, 8; J. Cos, Regtsgel. Verh., iii. 15—17.

(*f*) Neostad., De Pact. Anten., Obs. iv. note *in notis* (a); Lybreghts, Reden. Vertoog, i. 88; Holl. Cons. vi. 1st part, Cons. 40, 4°, and Cons. 90; vi. 2nd part, Cons. 174.

(*g*) J. Cos, Regtsgel. Verh., iii. 18.

In Friesland, at first, distinction was made between donations on the one hand and inheritances and legacies on the other. Donations were considered to become part of the community of profit and loss, but inheritances and legacies were not. Afterwards this difference disappeared, and all acquisitions of this kind, together with annuities, were excluded by law from the community of profit and loss (*h*).

In the other Provinces some jurists placed donations on the same footing as inheritances and legacies, and without drawing any distinction as to their origin excluded them from the community as not being the fruits of labour and industry or personal enterprise (*i*).

Others, arguing in the same strain, made the same distinction with regard to origin in the case of donations as they did in the case of inheritances and legacies, and considered that donations made by those to whom, either in the direct or collateral line, the donee would have succeeded *ab intestato*, were to be deemed the exclusive property of the donee, and did not form part of the community (*k*).

Thus the share of the succession which the husband had acquired by his sister having renounced it in his favour was to be deemed his exclusive property, unless he had purchased it from her (*l*).

Others, again, excluded donations made by parents to children, but included those which were made by collaterals or strangers (*m*).

Thus the question whether inheritances, legacies, and donations to which either the husband or the wife became entitled *stante matrimonio* should be considered as *quæstus* remained undecided (*n*).

(b) **Liabilities of the Communio Quæstuum.**—In the same way as

(*h*) V. Sande, Decis. Fris., ii. 6, Def. 3, 1; Huber, Hedend. Regtsgel., i. 2, 16—18; Statuten van Friesland, 1732, i. 3, arts. 6—8.

(*i*) Coren, Cons., xviii. n. 23; A. v. Wesel, de Quaest. inter Conj. Comm., tr. ii. 3, 91; Grotius, Introd., ii. 12, 11, and iii. 21, 10; V. d. Keessel, Thes. Sel., Thes. 252; Van Leeuwen, R. H. R., iv. 24, 6; Van Leeuwen, Cens. For., i. 1, 12, nn. 18, 19, and authors quoted; Holl. Cons., iii b., Cons. 58, and v. Cons. 76; Everhardus, Jur. Cons., xxiii. 2, 1 *et seq.*

(*k*) Christinaeus ad L. L. Mech., ix. 3, 1 *in notis;* A. v. Wesel, *loc. cit.*, nn. 93, 94; J. Voet, Ad Pand., xxiii. 4, 45; A. Matth., Paroem. Belg., Paroem. iii. 8; Rodenburg, de Jure Comm., ii. 1, 16.

(*l*) A. v. Wesel, *loc. cit.*, n. 103.

(*m*) Valla, de Dubiis, tr. xiii. 2.

(*n*) Schorer, Notes ad Grot. Introd., ii. 12, 11; Bynkershoek, Quaest. Jur. Priv., ii. 2, 5, *in verbis* "Satis disputandum est"; Regtsgel., Observ., iv. Obs. 26, and authors there quoted; J. Voet, Ad Pand., xxiii. 1, 39 and 199.

the assets of the *communio quæstuum* were limited to acquisitions made *stante matrimonio*, so the joint liabilities of husband and wife who had excluded the *communio omnium bonorum* comprised such only as had been contracted during the marriage by either of them, as far as they could validly bind themselves (*o*).

They covered, generally speaking, such liabilities as the *communio omnium bonorum* became charged with during matrimony, exclusive of those only which were inconsistent with the idea of a community limited in time and in purpose.

Debts contracted by the husband or the wife previously to the marriage never became common, but remained chargeable to the person who contracted them and his or her estate only. They could be sued for either during the marriage or after the dissolution thereof, and the debtor, after paying them, had no redress whatever nor any claim for contribution against the other party to the marriage contract (*p*).

As regards liabilities contracted during the marriage, those incurred by the husband in exercising his *jus mariti* were binding on the wife and her estate in the same way as they were binding on the community in the case of a *communio omnium bonorum*. But anything which affected the estate of one of the spouses, or which could only affect the community on account of its happening *stante matrimonio*, either did not affect the community at all, or did so only under certain circumstances.

As between the husband and wife, the liability consisted in the property of either of them being applied to the payment of a moiety of the matrimonial debts ; and if either of them had not brought any property into the community, or was burdened with debts, or if the whole of the property belonging to either of them had been dissipated *stante matrimonio*, it would follow that the property of the other would be applied in paying the whole of the debts made during marriage.

On account of this liability the community was called *communio damni* as well as *lucri*.

The *damnum* which was the subject of the community must be that *quod ex causa societatis et juris maritalis non aliunde accidit*. An

(*o*) Fock. Andr., Bijdragen, ii. pp. 59—116, *seriatim*.

(*p*) v. Sande, Decis. Fris., ii. 5, Def. 8 ; Huber, Hedend. Rechtsgel., i. 1, 11, 4 ; J. Voet, Ad Pand., xxiii. 4. 50 ; J. Cos, Regtsgel. Verh., iii. 21.

accidental loss to the property belonging to either of the spouses was not shared by the party whose property had not been affected. Diminution in the value of such property, its destruction and loss through fire, the insolvency of debtors to either estate, and similar losses, had to be borne by the party concerned as owner, and did not form a loss to the community (*q*).

A similar rule existed regarding all expenses incurred which might be considered extraordinary or useless. These could only be charged to the estate on which they had been bestowed, and if the husband, on account of his marital power, had ordered them for his wife's estate, her property alone would have to pay the expenditure, and the husband could not be made to contribute (*r*). All other expenses incurred by the husband—those called *utiles* and *necessariæ*—became charges of the community, and were compensated by the increase in value of the estate on which they were bestowed, though there was diversity of opinion as to the extent of such compensation (*s*).

On the other hand, a gift made by the husband to children of a former marriage could not be charged to the second wife's estate if, in the case of the second marriage, the *communio omnium bonorum* had been excluded. Though the wife could not recall the gift, the amount of the donation would be deducted from the common fund before it was divided at the time of the dissolution (*t*).

Obligations entered into by the husband as a surety were not chargeable to the wife (*u*).

(*q*) A. v. Wesel, de Damni inter Conj. Comm., tr. ii. 3, 14; Rodenburg, de Jur. Conn., ii. 1, 12; Coren, Cons., xxviii. 38; L. Goris, In Advers., tr. i. 4, 14 *in notis;* v. Sande, Decis. Fris., ii. 5, Def. 8; Grotius, Introd., ii. 12, 15, and Groenewegen's Notes at Grot. Introd. *loc. cit.;* J. Voet, Ad Pand., xxiii. 4, 49; V. d. Keessel, Thes. Sel., Thes. 257; Holl. Cons., i. Cons. i. p. 1, and ii. Cons. 170, 284 326, p. 655; J. Cos, Regtsgel. Verh., iii. 22, 23, and authors quoted.

(*r*) J. Voet, Ad Pand., xxv. 1, 2; A. v. Wesel, de Quaest. inter Conj. Comm., tr. ii. 2, 179, 19.

(*s*) J. Voet, Ad Pand., xxv. 1, 3; V. d. Keessel, Thes. Sel., Thes. 257; v. Sande, Decis. Fris., ii. 5, Def. 3, *in verbis* "Reparationes," and Def. 8 pr. and *in verbis* "Porro damni," and iii. 15, 4; J. Cos, Rechtsgel. Verh., iii. 2, 3, and authors quoted; v. Someren, de Jure Noverc., xii. 5.

(*t*) J. Voet, Ad Pand., xxiii. 3, 16; J. Cos, Regtsgel. Verh., iii. 21.

(*u*) Groenewegen, De Leg. Abr., Cod. iv., 12, 8; J. Voet, Ad Pand., xxiii. 2, 53; v. Sande, Decis. Fris., ii. 5, Def. 8, *in verbis* "An etiam"; Jur. Fris., 82, 12, 14; Statuten en Ord., 1723, i. 3 à 5, Hof., 1631; A. v. Wesel, *loc. cit.* ii. 3, 45, 46; J. Cos, Rechtsgel. Verh., iii. 14.

Pecuniary penalties were not chargeable to the innocent party, except in so far as the community had profited by the proceeds of the delict for which a penalty had been imposed (*a*).

Community in Colonies.—South Africa.—The above-mentioned rules of the Roman-Dutch law with regard to the consequences of marriage on the property of husband and wife, in case no special regulations were made to the contrary—*i.e.*, the community of goods and of profit and loss—are in force in the Union of South Africa (*b*), and Southern Rhodesia (*b*).

Act 13 of 1891 of the Cape Colony excludes policies of insurance from the community of property between spouses, subject to certain conditions and limitations (*c*).

Natal.—Law No. 22 of 1863 as amended by Law No. 17 of 1871 and Law No. 14 of 1882 has somewhat modified the common law principle that community of goods is the legal consequence of any marriage between spouses whose matrimonial domicil is in Natal unless specially excluded by ante-nuptial contract.

The law of 1863 excludes community of goods (and all liabilities and privileges resulting therefrom) from all marriages solemnised or to be solemnised outside South Africa irrespective of the matrimonial domicil of the spouses, unless the parties to such marriages by instrument in writing duly registered express their wish that the provisions of that law shall not apply to their marriage (*d*).

With regard to marriages already solemnised in Natal or elsewhere in South Africa the spouses can bring themselves under the provisions of the law, if they express their wish to that effect by a post-nuptial contract (duly registered with the Registrar of Deeds) (*e*).

Law No. 14 of 1882 extends the same privileges to future marriages solemnised in Natal or elsewhere in South Africa

(*a*) v. Sande, Decis. Fris., ii. 5, 8, *in verbis* "Similiter si maritus."

(*b*) Maasdorp, Institutes of Cape Law, 2nd ed., i. 5, on pp. 34—39; i. 6, on pp. 56—65; i. 9, pp. 96—99; De Bruyn, Opinions of Grotius; Morice, The English and Roman-Dutch Law, 2nd ed., pp. 8—10; J. W. Wessels, History of Roman-Dutch Law, pp. 453—457; Nathan, The Common Law of South Africa, i., pars. 397—405, on pp. 230—236; Roos-Reitz, Principles of Roman-Dutch Law, pp. 17, 18.

(*c*) Ss. 17 *et seq.*

(*d*) S. 2.

(*e*) Roy and Taylor *v.* Sturrock and others (1900), 21 N. L. R. 11; L. R. (1900) A. C. 225.

by providing that the intended husband and wife can bring themselves under the provisions of Law 22 of 1863 by a duly registered ante-nuptial contract or other instrument in writing expressing their wish to that effect (*f*).

The matrimonial *régime* with regard to the property of persons who have not brought themselves under the provisions of Law 22 of 1863 nor excluded community of property by ante-nuptial contract remains that of the *communio omnium bonorum* of the Roman-Dutch law.

Law of Ceylon.—The law as to the property of spouses in Ceylon is governed by the Matrimonial Rights and Inheritance Ordinance, 1876 (*g*), which was proclaimed on June 29th, 1877. A woman, marrying after the Ordinance a man of a different race or nationality from her own, is taken to be of the same race and nationality as her husband, for all the purposes of the Ordinance, so long as the marriage subsists and until she marries again. Save to this extent the Ordinance does not apply to Kandyans or Muhammadans, or to Tamils of the Northern Province who are subject to the Thesavalamai (*h*). The right of spouses married before the Ordinance are governed by the pre-existing law (*i*). Those of spouses married after the Ordinance, and domiciled and resident in Ceylon, are, during the subsistence of the marriage and the domicil, governed in respect of movable property by the provisions of the Ordinance (*k*). So are the rights of all spouses married after the Ordinance as to immovable property in Ceylon (*l*). *Communio bonorum* is no longer a consequence of marriage in respect of either movable or immovable property (*m*). Immovable property to which a woman, married after the proclamation of the Ordinance, was entitled at the time of her marriage or has become entitled to since, subject to the trusts of any will or settlement affecting it, belongs to her as her separate estate, and can be disposed

(*f*) Ss. 1 and 2.

(*g*) No. 15 of 1876, as amended by Ords. 2 of 1889 and 3 of 1890.

(*h*) S. 2. It has been suggested (but apparently there is no decision on the point, which was raised, however, in a recent case—S. C. No. 26 C. R. Batticaloa No. 13793, S. C. Mins., July 5th, 1909) that the saving clause has abrogated, by implication, the old customary law of the Mukkuvars of Batticaloa to which it contains no reference.

(*i*) S. 5.

(*k*) S. 6.

(*l*) S. 7.

(*m*) S. 8.

of by her by any lawful act *inter vivos* (*n*), with her husband's written consent, or by last will without such consent (*o*).

A married woman has the same rights in regard to her wages and earnings as in England (*p*). All jewels and personal ornaments belonging to a married woman, all tools and implements of husbandry used by her in carrying on a trade separately from her husband (*q*), and all implements of husbandry and live or dead stock, belonging to her during marriage and *bonâ fide* kept upon and employed for the cultivation or proper uses of her immovable property, are her separate estate, and, subject to the trusts of any will or settlement affecting them, may be disposed of by her by act *inter vivos* with her husband's written consent, or by last will without such consent, as if she were unmarried (*r*). The husband's consent may be judicially dispensed with (*s*). Donations *inter conjuges*, whether the spouses were married before or after the Ordinance, and whether in community as to property or not, are valid (*t*). When a question arises as to the mode and time of any acquisition of property by a woman married after the Ordinance, or any person claiming under her, and any creditor or alienee of her husband, she or the person claiming under her must prove the manner and time at which she became entitled to the property (*a*). Provision is made for the summary decision of questions as to property arising between spouses whether married before or after the Ordinance (*b*). There are provisions similar to those of English law as to policies of insurance by spouses (*c*). All movable property (*d*) to which a woman married after the Ordinance was entitled at the time of her marriage, or becomes entitled during coverture, subject to any settlement (*e*) affecting it, and except so far as the Ordinance otherwise provides, vests absolutely in her husband (*f*). A married woman, having adequate separate property,

(*n*) This includes a mortgage: Silva *v.* Dissanayake (1892), 2 C. L. R. 123; Marie Cangary *v.* Karuppasamy Cangany (1906), 10 N. L. R. 79.

(*o*) S. 9.

(*p*) S. 10.

(*q*) A wife who is a *publica mercatrix* may sue alone: Fernando *v.* Jacobis Appu (1879), 2 S. C. C. 204.

(*r*) S. 11.

(*s*) S. 12.

(*t*) S. 13.

(*a*) S. 14.

(*b*) S. 16.

(*c*) Ss. 17, 18.

(*d*) Including even a *chose* in action: Babapulle *v.* Rajaratnam (1900), 5 N. L. R. 1.

(*e*) As to the meaning of "settlement" see In re Krickenbeck (1884), 6 S. C. C. 132.

(*f*) S. 19.

is as liable to maintain her children as if she were a widow (*g*). Nothing, however, in the Ordinance (*g*) relieves the husband from his liability (*h*) to maintain her children. The 6th section of the Placaat of October 4th, 1540, relating to marriage settlements, is not in force in Ceylon (*i*).

Law of British Guiana.—In British Guiana the consequences of marriage on the property of the husband and wife are now regulated by the Married Persons' Property Ordinance, No. 12 of 1904, as amended by Ordinance No. 2 of 1905. Previously to that Ordinance this matter was regulated by the common law of the Colony, viz., the Roman-Dutch law; and with regard to all marriages solemnised before the commencement of the Ordinance of 1904 the rights of husband and wife to their property remain governed by the law which would have been applicable thereto if the Ordinance had not been passed (*j*). With regard to all marriages solemnised after the commencement of the 1904 Ordinance, the respective matrimonial rights of husband and wife as to movable property are governed by the provisions of the Ordinance, if the married persons were or are at the time of their marriage domiciled or resident in the Colony. In respect of immovable property the provisions of the Ordinance apply, if such immovable property is situate in the Colony (*k*).

Community of goods no longer exists between husband and wife as a consequence of marriage, either in respect of movable or immovable property (*l*), and the married woman is placed in a similar position to that which she has under the English Married Women's Property Act of 1882. The law of British Guiana, however, differs from the English statute in two respects, viz.: (1) The Ordinance of 1904 does not affect property acquired after it came into force by persons married before its commencement (*m*). (2) The Ordinance places the husband and wife in exactly the same position towards each other as ordinary creditors (*n*).

IV. *Termination of the Community.*

Dissolution of the Marriage.—General Law.—As the community had its origin in the lawful union of husband and wife, so it ceased

(*g*) S. 22.
(*h*) See Ord. 19 of 1889.
(*i*) S. 23.
(*j*) S. 3.
(*k*) Ss. 4, 5.
(*l*) S. 6.
(*m*) S. 3.
(*n*) S. 9.

on their separation, *unumquodque eo genere dissolvitur, quo colligatum est* (*o*).

This separation might take place (1) whilst the husband and wife were both alive; or (2) it might be caused by the death of either of the married persons.

(1) Dissolution of the marriage during the lifetime of the spouses took place by judicial sentence pronouncing divorce between husband and wife on the ground of adultery or malicious desertion. With its dissolution all the consequences of the marriage ceased to exist. The community, and the husband's right of administering any of the wife's property, came to an end (*p*), and each party became entitled to demand division of the common property, either according to the rules of the common law, or according to the provisions of the ante-nuptial contract. The profits and losses (*lucra et damna*) on the respective shares of the divorced parties then became distinct from each other (*q*). If divorce were pronounced on account of adultery, the guilty party equally lost all advantages which he or she would otherwise be entitled to enjoy on account of such community or ante-nuptial contract (*q*).

The community might, however, come to an end without the marriage itself being dissolved, viz., by a *separatio a mensa et toro*. The husband and wife might mutually agree to separate from bed and board and even divide the property which they held in common, but such a voluntary arrangement between the spouses could never affect the rights which third parties might have against the common property (*r*). It was necessary for the separation to be pronounced by the Court and for the judgment to be published, in order to dissolve the community (*s*). There was, however, a controversy on the point whether the decree of separation was in itself sufficient to dissolve the community, or whether it was necessary that the Court should specifically pronounce such dissolution and determine its consequences.

Those who were in favour of a specific dissolution by judicial decree held that, unless the judgment were accompanied by an interdict restraining the husband from interfering with his wife's property,

(*o*) Dig.; J. Voet, Ad Pand. xxiv. 3, 28.

(*p*) Grotius, Introduction, i. 5, 25; iii. 21, 11.

(*q*) A. v. Wesel, de Fin. vel Cont. Com., tr. ii. 4, 27.

(*r*) Schorer, Notes ad Grot. Introd., i. 5, 20; J. Voet, Ad Pand., xxiv. 2, 19; Lybreghts, Reden. Vertoog, i. 12, 22—23; J. Brouwer, De jure Conn. ii. 29, 4.

(*s*) Lybreghts, Reden. Vertoog i. 12, 20—21.

it would not in any degree abridge his marital power in the administration and alienation of her property, or in his binding her and her property by his contracts, nor would it enable the wife to make any dispositions of her own (*t*). The husband and wife might agree upon a division of the community and submit such agreement for sanction to the Court, but the Court was in no way bound and could exercise its discretion in the matter. If no such mutual arrangement had been made by the parties, either of the parties could request the Court to pronounce a dissolution of the community, and leave it to the Court to exercise its discretion on this point (*a*).

On the other hand, a number of authorities held that the decree of separation carried with it, as a necessary consequence, the dissolution of the community and the cessation of the marital power. In their opinion the separation had the effect of releasing the wife from all liability for her husband's debts and obligations, and of excluding the husband from the further administration of his wife's property (*b*).

The separation terminated upon the reconciliation of the parties, which *ipso jure* put an end to the consequences of the separation and restored the usual results of the marriage, viz., the marital power and the community, or the provisions of the ante-nuptial contract, as they had been before the separation took place (*c*).

(2) The community was also terminated by the death of either of the spouses, and so completely, that a previous agreement that the heir should succeed to the community was held to be void (*d*).

Colonies.—South Africa.—In the Colonies where *communio bonorum* is recognised as the legal consequence of a marriage, the rules of Roman-Dutch law above mentioned regarding the dissolution of the community are followed.

(1) During the lifetime of husband and wife. The community is

(*t*) J. Voet, Ad Pand., xxiv. 2, 17; Neostad, de Pactis. Anten. Obs. 7, in notig. et Obs. 8; Holl. Cons. iii. b, Cons. 352, on p. 708 (Grotius); Bynkershoek, Quaest. Jur. Priv. ii. 9; J. Cos, Huwelyck, par. 170, and Rechtsgel. Verh. vii. 34; V. d. Keessel, Thes. Sel., Thes. 90.

(*a*) Holl. Cons. iii. b, Cons. 242 *in fine* (Grotius).

(*b*) A. v. Wesel, de Comm. Bon. Societ., ii. 4, 38 *et seq.*; Rodenburg de Jur. Conjug., iii. 1, 14; Arntzenius, Inst. jur. Bel. Civ., iii. 295; Schorer, Notes ad Grot. Introd., ii. 11, 17; Fock. Andr., Het Oud Ned. B. R. ii. 198.

(*c*) V. d. Linden, Koopmanshdbk., i. 3, 9, on p. 32.

(*d*) A. v. Wesel, de Fin. vel Cont. Com. Bon. Soc., tr. ii. 4, 53; Grotius, Introd., iii. 21, 11; Groenewegen, ad eund.; J. v. Sande, Dec. Fris. ii. 5, Def. 9.

terminated by divorce in the same manner as if the marriage had been dissolved by the death of either of the spouses. A special order is usually asked for and granted, regulating the rights of the parties with respect to the property (*e*). With regard to a separation *a mensa et toro* the views of J. Voet and the authors named above (*f*) are followed. Unless the Court orders a division of property and the termination of the community, the community is considered to be continued between the parties. It is usual in an action for judicial separation to petition for an order of Court as regards the property, and a spouse who is entitled to a decree of separation is also entitled to an order cancelling such community and granting a division of the joint estate between the spouses (*g*).

(2) By death of either of the spouses. In this case the general Roman-Dutch law rules prevail.

Ceylon.—In the case of marriages solemnised previously to June 29th, 1877, the Roman-Dutch general law rules as to the dissolution of the community are applied. (1) During the lifetime of the spouses. Divorce puts an end to the *communio bonorum* and *quaestuum* (*h*). With regard to a *separatio a mensa et toro* the views of J. Voet seem to be followed, though the existence of a contrary opinion is recognised (*i*). (2) In case of dissolution by death of either of the spouses the general law rules prevail (*j*).

British Guiana.—In the case of marriages solemnised previously to the commencement of Ordinance No. 12 of 1904, the Roman-Dutch law rules regarding the dissolution of the community prevail.

V. *Continuance of Community: Boedelhouderschap.*

Though at the death of either of the spouses the community came to an end, an estate was left to which the survivor together with the next of kin of the predeceased was entitled (*k*). If there were children of the marriage and the marriage property had been held in joint ownership by the spouses, it remained joint property between the survivor and the children. If there had existed between the spouses

(*e*) Maasdorp, Institutes of Cape Law, 2nd ed., i. p. 93.

(*f*) See p. 424, note (*t*).

(*g*) Maasdorp, Institutes of Cape Law, 2nd ed., i. pp. 79, 80; Nathan, The Common Law of South Africa, i. pars. 496, 497, on p. 284.

(*h*) Pereira, Laws of Ceylon, ii. 139, jo. 131.

(*i*) Pereira, *loc. cit.* ii. 141, jo. 131.

(*j*) Pereira, *loc. cit.* ii. 131.

(*k*) The survivor nowhere took the whole inheritance by law. Fock. Andr., Het Oud Ned. B. R. ii. 182.

community of property in the sense of "holding in common," the children or other next of kin of the predeceased spouse inherited half the common property and remained owners in common with the surviving spouse until division (*boedelscheiding*) (*l*).

The surviving spouse, being already in possession, was the "holder of the estate" (*boedelhouder* or *boedelhoudster*) (*m*). It was his or her duty to make an inventory and to divide the estate. If no inventory were made and the property were not so divided the consequences varied in the different Provinces (*n*). It may be considered, that, as a rule—generally observed—when in the end the division did take place, it was made of the estate as the estate was at the time of the division and not as it was left at the time of the dissolution of the marriage, unless interested parties proved that there were profits which concerned them alone or losses which did not concern them at all (*n*).

A number of statutes went, however, beyond a mere recognition of this rule of evidence, and provided that those who were entitled to the estate, in case a division did not take place, retained an estate in community, subject to profit and loss in common. The community was called "continued," that is to say, the estate remained common property as between the survivor and the heirs of the deceased—either in the ascending or descending line, and in certain cases the nearest collaterals, without any distinction whether they had attained majority or were still minors—subject to such rules regarding profit and loss as were laid down in those statutes of the various Provinces and towns which provided such community (*o*).

This applied to the community of profit and loss in the same way as to the community of all property, and to the same parties (*p*).

Effect of Continued Community.—The extent to which the estate might be subject to acquisitions and losses, made by the parties during the period between the dissolution of the marriage and the time of the division, was differently regulated in the various Provinces.

It depended upon the rights of the children to the estate.

(*l*) Fock. Andr., *loc. cit.*

(*m*) Fock. Andr., Bijdragen, ii. 147.

(*n*) Fock. Andr., Bijdragen, ii. 148—161.

(*o*) J. Voet, Ad Pand. xxiv. 3, 28, and authors quoted by him.

(*p*) J. Voet, Ad Pand. xxiv. 3, 29; V. d. Keessel, Thes. Sel., Thes. 266; Fock. Andr., Bijdragen, ii. 148.

Originally, if during the marriage, any one of the children had been paid a sum of money or had been given a substantial amount of property on his or her marriage or setting up in life, or if any of them had been, as it was called, *uitgeboedeld*, that is to say, placed outside the estate, they were not allowed to participate at all in the estate left on the death of either of their parents. In later times, such children were allowed to do so, on condition that they brought into the estate (into "hotchpot") not only the amount which they had received at the time, but all that they had gained by their own efforts during that time (*r*).

As long, however, as any child did not take part in the division it stood outside the estate, and everything which it acquired remained its own property and did not go into the common estate.

The children who remained within the estate (*in den boedel*), on the other hand, had no property of their own, and their acquisitions were added to the common estate until the division took place.

The acquisitions of the *boedelhouder* came into his hands as the holder of the estate, and formed with that estate one undivided mass, unless the *boedelhouder* could prove that certain property had been acquired and earmarked by him as his own (*s*).

With regard to the increase of the estate, a distinction was made between profit and loss accruing to the property itself and inheritances which were acquired by the participants of the estate.

Parties to Continued Community.—It is very likely that these regulations were based upon the idea that originally they represented the intentions of the parties. However that may be, they remained statutory provisions (town *keuren*) which prevailed wherever such statutes were in force. They cannot be considered as recognising a general law principle, for in the general law such principle did not exist. Unless founded upon special custom or statute, the principle that the community which existed between the spouses during marriage was, after the dissolution of the marriage by the death of either of the spouses, tacitly continued between the surviving spouse and the heirs of the predeceased one, did not prevail, and although the undivided estates remained common between them in the absence of any special provisions to

(*r*) A. v. Wesel, de Fin. vel Cont. Comm., tr. ii. 4, 137; Fock. Andr., Het Oud Ned. B. R. ii. 182, 183.

(*s*) Fock. Andr., Bijdragen, ii. 149; Het Oud Ned. B. R., ii. 184.

the contrary, the community as such was not continued (*t*). The absence, however, of an inventory and the delay in making one shortly after the dissolution of the marriage caused a good deal of confusion, and the growing antagonism against the holding of estates in common for long periods after the death of either of the spouses, in case there were minor children left of the marriage, gave rise to legislation and the framing of statutory measures in order to prevent such delay in making an inventory or in dividing the estate.

In the course of time it was enacted in a number of Provinces and towns that any parent, whose children born of the marriage were minors at the time of the death of his or her spouse, should, at as early a date as possible, make an inventory of the estate which had been so left to the survivor and the children of the marriage. The surviving parent who did not comply with this obligation became liable to pecuniary penalties (*a*).

As a punishment for such negligence (*in pœnam negligentiæ*) the community was continued to the extent to which it benefited the children (*si liberis lucrosa esset*). The husband, if he were the survivor, did not retain the powers which were vested in him during the marriage. Any alienation by him by way of mortgage or sale could not be upheld, unless it were to the benefit of the community, and had been approved by the relations of the children and was sanctioned by the Court (*b*).

If the community were not likely to be prosperous, the children might refuse to exercise their right to the community, and require an inventory of the mother's share, to be made and delivered to them, together with the interests or profits (*fructus*) derived from it (*c*), subject to a deduction on account of the children's maintenance (*d*).

In the Province of Gelderland and in many towns of the Province

(*t*) Groenewegen's Note to Grot. Introd., ii. 13. 1; Holl. Cons., i. Cons. 105; ii. Cons. 272, 273 and 274; J. v. Someren, de Jure Novere., vi. 2, 3; J. Voet, Ad Pand., xxiv. 3, 28; V. Leeuwen, R. H. R., iv. 23, 9; Bynkershoek, Quaest. Jur. Priv., iii. 10; V. d. Keessel, Thes. Sel., Thes. 266—271; J. v. d. Linden, Koopmanshdbk., i. 5, 4; Regt-gel. Obs., iii. Obs. 40.

(*a*) Fock. Andr., Het Oud Ned. B. R., ii. 184; Bijdragen, ii. 153—154, 159—161; Grotius, Introd., ii. 13, 2—3; Regtsgel, Obs. iii., Obs. 39.

(*b*) J. Voet, Ad Pand., xxiv. 3, 31: Grotius, Introd., ii. 13, 3 *in fin.*; v. Someren, De Jure Novere., vi. 1, 14.

(*c*) J. Voet, Ad Pand., xxiv. 3, 30; A. v. Wesel, De Com. Bon. Soc., ii. 4, 87—88; v. Someren, De Jure Novere., vi. 1, 6, and vi. 2.

(*d*) A. v. Wesel, *loc. cit.* ii. 4, 91.

of Holland this principle was not restricted to the case of minor children. It extended to all estates which remained in the hands of a surviving parent who neglected either to divide the estate or to make an inventory. A distinction was made according to the parties between whom and the surviving spouse the community was continued. (a) If they were blood relations in the ascending and collateral lines, profit and loss accruing to the estate itself became common, but all acquisitions by way of inheritance on either side remained outside the community. (b) If there were children who were of age, profit and loss accruing to the estate itself became common, and also all acquisitions by way of inheritance on the part of the surviving spouse. (c) If there were minor children, they could, in addition to the advantages under (b), elect between a division of the estate as it was left at the time of the death of their predeceased parent and compensation for damages suffered by them on account of the negligence of the surviving parent (*e*).

In classifying the various rules on this subject in the different Provinces and towns, it may be said that community existed between the surviving spouse and the next of kin of the predeceased spouse—either children of the marriage or the ascendants or the nearest relations—in the following cases, viz. :—

Continuance of Community by Law.—According to statute, either (1) without prejudicing the surviving spouse, or (2) to his disadvantage.

(1) The surviving spouse was not prejudiced in case the community was continued with the will of the parties, and each of them, being tenants in common, could, in the free exercise of his or her legal rights, at any moment, end the community by insisting that an inventory should be made and the goods distributed. (a) If the estate remained undivided between the surviving spouse and the next of kin of the deceased other than the children, the property remained in community with any accretion or diminution by way of profit and loss, but property obtained by any of the parties from outside, that is to say, by way of inheritance, donation, or otherwise, did not become part of the community (*f*). (b) The same rule applied in case the estate of the predeceased parent remained undivided between

(*e*) Fock. Andr., Bijdragen, ii. 154, and authors quoted in note (2); also *ibid.*, p. 161.

(*f*) Fock. Andr., Bijdragen, ii. 154—155; Het Oud Ned. B. R., ii. 184—185.

the survivor and the children of the marriage who were all of age, with this modification only, that all property obtained by the surviving parent by way of inheritance, donation or otherwise became part of the community, while property similarly obtained by any of the children did not become so.

(2) The community might be continued to the prejudice of the surviving spouse (*in pœnam parentis superstitis*). In order to protect the minor children of the marriage, and to prevent the surviving parent from obtaining an advantage by delaying the making of an inventory and by postponing the division, the law considered the community as continued, if the inventory were not made and the division did not take place within a certain period (*g*).

In respect of the continued community the minor children were considered to share all the profits but none of the losses. Losses were borne by the survivor alone. In respect of profits accruing to the minor children from elsewhere, like inheritances, donations, &c., the surviving parent did not enjoy a share, though all benefits in that respect which accrued to the surviving parent formed part of the community (*h*).

It was competent for the children when they became of age, or the divisions took place, to insist that the survivor should make two inventories, the one containing an account of the property as it existed at the time of the dissolution of the marriage, and the other containing an account of the actual state of the property at the time when the inventory was made (*i*).

If, on a comparison of those accounts, it should appear that at one period there had been an increase, and at another a decrease, the children could not claim the continued community for the former case and reject it for the latter, but they had to adopt or reject it wholly (*i*).

After an inventory had been made and the estate had been divided the property of the minor children was administered by the Orphan Chambers, or by the surviving parent under their supervision on his giving sufficient guarantee for a proper administration (*k*).

(*g*) Grotius, Introd., ii. 13, 3; Schorer, Notes ad Grot. Introd., ii. 13, 3, who is, however, inaccurate in not distinguishing between children who were minors and those who were of age; V. d. Keessel, Thes. Sel., Thes. 270; Fock. Andr., Bijdragen, ii. 160.

(*h*) Grotius, Introd., ii. 13, 3; V. d. Keessel, Thes. Sel., Thes. 270.

(*i*) J. Voet, Ad Pand., xxiv. 3, 30.

(*k*) V. d. Keessel, Thes. Sel., Thes. 14.

The necessity for a division of the estate did not arise (a) if the nearest relations consented to forego it, with the sanction of the Orphan Chamber, on account of the inheritance being inconsiderable (*l*); (b) if so directed by the will of the deceased, confirmed by the Orphan Chamber within six weeks after the death, and sometimes it was provided by the town regulations (*keuren*) that such directions were only effectual if the will also contained an exclusion of this power of the Orphan Chamber; (c) if it were difficult to divide the property. This would easily appear from the inventory (*m*).

Continuance of Community by Act of Parties.—The community might be continued by (1) contractual or (2) testamentary disposition.

(1) By contract. (a) By ante-nuptial contract the husband and wife were entitled mutually to institute each other heir and, at the same time, to provide that the community should be continued after the death of either of them between the survivor and the children of the marriage. If the children were still minors at the time of the dissolution of the marriage through the death of either of the spouses, it was necessary to obtain the consent of the Orphan Chamber, but even then the continued community did not include donations, inheritances, or legacies which were acquired by the children up to the time of the division (*n*). (b) After the death of either of the spouses, it might be so agreed between the survivor and the nearest relatives (with the sanction of the Orphan Chamber in case the children were still minors) on account of the inheritance being inconsiderable. Such community did not include donations, inheritances, or legacies which were afterwards acquired by the children up to the time of the division (*o*).

(2) By will. The husband and wife might, either of them, make arrangements by will similar to those just described as made by ante-nuptial contract (*p*). They could mutually institute each other heir and at the same time provide that the community should be continued after the death of either of them between the survivor and, either the children of the marriage, or the nearest relatives.

If there were children living of the marriage the same rules

(*l*) Cf. note (*o*), below.

(*m*) V. d. Keessel, Thes. Sel., Thes. 144.

(*n*) V. d. Keessel, *loc. cit.*, Thes. 165.

(*o*) Holl. Cons., iii. b., Cons. 26, sub. 5; V. d. Keessel, Thes. Sel., Thes. 144.

(*p*) Holl. Cons., iii. b., Cons. 332, sub. 7 on p. 667.

applied (both with regard to children who were of age and minor children) as prevailed if the continuation of the community had been decided upon in an ante-nuptial contract (*q*).

If no children of the marriage were living at the time when the marriage was dissolved through the death of either of the spouses, and the community were continued by will between the surviving spouse and the nearest relatives of the deceased, such community would be complete and embrace all acquisitions, even inheritances, legacies, and donations (*r*).

Inventory.—The continuance of the community came to an end as soon as the survivor made an inventory of the estate and caused the property to be delivered to the children if they had attained their majority, or to their guardians if they were still minors. If the deceased had not appointed a guardian, or if the surviving parent were the children's guardian, it was necessary to make an application to the Court, in order that a guardian might be appointed for the purpose of receiving the inventory and the share of the children (*s*).

The survivor might, by completing an inventory of all the property and by proceeding to a division, settle with the children or heirs of the deceased and put an end to the community. Until the inventory was made a division of the property was not valid (*t*).

The correctness of the inventory was verified on oath. If any part of the property had been omitted, the inventory was not, on that account, treated as a nullity, nor the community continued, but the children obtained redress by compelling the survivor to amend the inventory by inserting the property omitted (*a*).

After the community had once been terminated by the inventory it would not be revived, even if the surviving parent should continue for any length of time to make use of the property, as if it were still subject to it, but he would be accountable to the children for the profits which he had derived from the property (*b*).

By the making and accepting of the inventory the surviving

(*q*) V. d. Keessel, Thes. Sel., Thes. 269.

(*r*) Bynkershoek, Quaest. Jur. Priv., iii. 10; V. d. Keessel, Thes. Sel., Thes. 267.

(*s*) J. Voet, xxiv. 3, 33, and authors quoted by him. For questions which might arise in connection herewith cf. v. Someren, De Jure Noverc., vi. 1, 2.

(*t*) V. Someren, De Jure Noverc., vi. 2, 6.

(*a*) A. v. Wesel, De Fin. vel Cont. Comm., tr. ii. 4, 12, 3; v. Someren, De Jure Noverc., vi. 2, 7.

(*b*) A. v. Wesel, *loc. cit.*, ii. 4, 134 *et seq.*

parent was enabled to divide the estate, that is to say, to prove the shares of the children (*bewys doen*), either by dividing the estate into as many shares as there were participants, or by carefully fixing the shares of the children and having these set out in a notarial act, or by buying out the children under a compromise arranged with the children's representatives and sanctioned by the Orphan Chamber (*c*). Such a compromise (*transactio*) respecting the amount and value of the property of the deceased which had to be delivered to the children would have the effect of terminating the community. If the children had reason to believe that the share assigned to them was less than it ought to have been, they might require the inventory to be exhibited; and if this fact was established, they could compel the survivor to make good to them the difference, with interest and profits (*d*).

Statutes of Batavia.—In the possessions of the Dutch East India Company no custom recognising the continued community seems to have existed and the statutes seem to have introduced it by way of punishment only (*in pœnam negligentiæ*). The rules which appear in the Statutes of Batavia (*e*) only refer to estates to which minor children were entitled, and of which their surviving parent had delayed making an inventory. They were mainly to the following effect :—

After the dissolution of the marriage by the death of either of the spouses, the survivor's duties were, if there were orphans (*f*), *i.e.*, minor children of the marriage, within six weeks after the funeral, (1) to make an inventory, even if there were no assets at all or the liabilities were greater than the assets of the estate (*g*); (2) to prove (*bewijs doen*) the property which was inherited by the children (*h*).

The Orphan Masters had to summon the surviving parent to appear before them in order that such proof might be rendered (*i*) in the presence of friends of the deceased, who were equally summoned

(*c*) Fock. Andr., Bijdragen, ii. 159—160, note 1.

(*d*) A. v. Wesel, *loc. cit.*, ii. 4, 151, 152.

(*e*) Nederlandsch-Indisch Plakaatboek, vol. i., pp. 472 *et seq.*, and vol. ix.

(*f*) Regtsgel. Obs., iii. Obs. 40, on p. 118. Orphans are described in the Nieuwe Statuten, Ned. Ind. Plakaatboek, vol. ix., *voce* "Orphan Masters," par. 33, as children who have lost both or either of their parents and have not yet attained the age of twenty-five years.

(*g*) Nieuwe Statuten, *loc. cit.*, pars. 15—18.

(*h*) *Ibid.*, par. 14.

(*i*) *Ibid.*, par. 13.

to appear before the Orphan Masters together with the surviving parent (*k*).

The survivor could not be released from this duty by will made by the predeceased parent (*l*), but the Orphan Masters were entitled, after having heard the next friends of the minors, to allow the survivor either to extend the period of six weeks, or to continue to administer the property as an undivided estate (*m*), on giving sufficient security to the satisfaction of the Orphan Masters for the proper administration thereof (*l*).

Unless other measures were taken, all property belonging to the minor children was taken into custody by the Orphan Masters, and if, during their minority, the orphans acquired any further property through inheritance, by way of legacy or donation, or otherwise, proof of such property had to be rendered to the Orphan Masters in a similar way and the property had to be handed to them for custody and administration, unless the surviving parent could give sufficient hypothec, or at least two sureties, at the discretion of the Orphan Masters, as a guarantee for his proper administration (*n*).

Any property whatsoever acquired by minors after the death of either of the parents remained their own whether the community was continued or not, and the surviving parent could not in any way obtain any interest in it unless this had been specially provided in the will or the document containing the legacy or donation (*o*).

Penalties.—The non-observance of these rules carried serious consequences with it for the surviving parent. (1) The offender might be punished by fines (*p*) or by imprisonment until the provisions had been complied with, and an inventory and proof had been rendered as well of the property passing on the death of the predeceased parent as on the further acquisition by the minors of property from others (*q*). At the same time the Orphan Masters were authorised, after the expiration of the period of six weeks, to go to the house of the surviving parent and make an inventory themselves. (2) If no inventory and proof had been rendered within

(*k*) Nieuwe Statuten, *loc. cit.*, par. 20.

(*l*) *Ibid.*, par. 18; resolution passed by the Governor General in Council, September 14th, 1690.

(*m*) *Ibid.*, par. 14.

(*n*) *Ibid.*, par. 27; resolution passed by the Governor General in Council, March 16th, 1753.

(*o*) *Ibid.*, par. 40; resolution March 16th, 1753.

(*p*) *Ibid.*, par. 28; resolution March 16th, 1753.

(*q*) *Ibid.*, par. 14.

six weeks after the funeral of the predeceased parent, the community was considered to continue to the detriment of the surviving parent. All profits which accrued to the survivor after the period of six weeks—either through his or her own exertions or by way of inheritance or otherwise—formed part of the community. The children did not participate in any loss which might be suffered by the common property, and which had to be borne by the survivor exclusively (*r*). Payments of interest had to be made by the survivor out of his or her own share, and the common property could not be encumbered until the inventory had been made and proof had been sanctioned (*s*). All goods left out of the inventory were presumed to have been the property of the children of the deceased (*t*). (3) No widow or widower who had minor children was allowed to re-marry unless proof of the property belonging to those minors had been previously rendered to the Orphan Chamber, or unless, with the consent of the Orphan Chamber and the nearest relatives, the property had been registered and left in the administration of the surviving parent under proper guarantee and surety for the safe administration thereof. Non-observance of this rule carried with it loss of one-eighth of the share belonging to the surviving parent for the benefit of the minor children (*u*).

Though the surviving parent could not benefit by any property left to the children, he or she was entitled to enjoy the interest of the minors' property until the minor children had reached the age of eighteen for sons, or fifteen for daughters, in consideration of the parents' liability to provide maintenance for their children.

Colonies.—Union of South Africa.—The absence of a universal rule in Roman-Dutch law recognising the continuation of a community after the dissolution of a marriage by death of either of the spouses as part of the common law, and the diversity of local legislation on this point in the Dutch Republic, have resulted in rendering *boedelhouderschap* obsolete in South Africa. The South African legislatures have never sanctioned it, and the provisions of the Statutes of Batavia are only partly reflected in the Cape Ordinances of 1833. Unless specially directed by will or by agreement *boedelhouderschap* may be said not to be recognised in South Africa (*a*).

(*r*) Nieuwe Statuten, *loc. cit.*, par. 30.
(*s*) *Ibid.*, par. 31.
(*t*) *Ibid.*, par. 16.
(*u*) *Ibid.*, par. 32.
(*a*) De Bruyn's Opinions of Grotius, p. 51; Tennant, Notary's Manual,

The introduction of a general system of administration and distribution of estates of deceased persons by executors and administrators other than the heir or heirs of the deceased (*b*) has further assisted in rendering *boedelhouderschap*, even under special testamentary directions, of rare occurrence.

Cape Colony.—In the case of dissolution of a marriage between spouses who were married in community of property by the death of either of them, the joint estate remains under the charge of the survivor until the executors of the deceased or the Master of the Supreme Court, or, in case there are minor children left of the marriage, their tutor, testamentary or dative, or *curator bonis*, institute proceedings for the administration, distribution, and final settlement of the joint estate (*c*).

In the meantime the surviving spouse is bound within six weeks after the death of the deceased to make an inventory of all property, goods, and effects, movable and immovable, of what kind soever, which at the time of the death form part of the joint estate, and to lodge this inventory with the Master of the Court (*d*). The survivor cannot be relieved of this duty by the will of the predeceasing spouse, but if the survivor has by will been appointed sole heir and sole executor of the predeceasing spouse, he or she is not bound to frame an inventory or to lodge it with the Master (*e*).

If there are minor children left of the marriage, the survivor has an additional duty to perform. Within the time named the surviving spouse is bound (1) to make an inventory; (2) to prove (*bewys doen*) the property which is inherited by the minor children, that is to say, to ascertain and secure the minors' shares.

The survivor can pay the amount thus ascertained and due to the minor children into the Guardians' Fund, under the administration of the Master of the Supreme Court. It is customary, however, to leave the children's property under the administration of the survivor, and the survivor can apply for it. In that case, the survivor must bind himself or herself by bond, together with the

p. 219; Maasdorp, Institutes of Cape Law, 2nd ed., i., p. 93; Wessels, History of R. D. Law, p. 466.

(*b*) Introduced in the Cape Colony by Ordinance 104 of July 5th, 1833, and afterwards followed by all other Colonies in South Africa.

(*c*) Ordinance 104 of July 5th, 1833, s. 13.

(*d*) *Ibid.*, s. 14.

(*e*) *Ibid.*, s. 18; Ordinance 105 of July 5th, 1833, s. 18; Act 27 of 1895, s. 3.

superintending guardians and with sureties, or, in some cases, with sureties only, for the due payment of the shares to the children on their attaining their majority or marrying.

Such a bond passed by the surviving spouse for securing the inheritance due to the minor children from their predeceased parent is called *kinderbewys* (*f*).

A *kinderbewys* requires to be made before a notary public, and must be registered. It is the duty of the notary public to see that it is registered, under penalty of his becoming responsible for any losses which may occur (*g*).

Minors have a tacit hypothec on the estate of their parents for the payment of the shares due to them out of the estate of the deceased, whether such inheritance is secured by *kinderbewys* or not. The *kinderbewys* is considered as an additional security (*h*).

The survivor is entitled to the usufruct of the estate, for the maintenance and education of the minor children.

Penalties.—The statute provides penalties against the surviving spouse, if he wilfully neglects to cause an inventory to be made of the joint estate and to lodge this with the Master within the period named, or if he knowingly omits to enter in such inventory any article of property belonging to the joint estate.

(a) To guard against such failure, it is provided that in the ultimate distribution of the estate the survivor shall, on the one hand, forfeit all rights to, and shares in, anything which may accrue to the joint estate after the death of the predeceasing spouse and to any property omitted from the inventory, and that, on the other hand, he shall "bear solely and exclusively all loss which shall have been caused by the destruction or deterioration of any property omitted from the inventory, or which shall have accrued to the joint estate after the death of the predeceasing spouse by the loss or deterioration of any part thereof" (*i*).

(b) A widow or widower who has minor children may not enter upon a second marriage, nor can any Church or lay official celebrate the second marriage, unless the parent who is re-marrying has previously ascertained and secured the shares due to his or her minor

(*f*) Ordinance 105 of July 5th, 1833, s. 23.

(*g*) Proclamation, May 23rd, 1805, s. 13; Ordinance 105 of 1833, s. 22; Act 9 of 1882, s. 6; Act 19 of 1891, s. 9.

(*h*) Naude *v.* Naude's Trustees (1869), Buch. 166; Jennings *v.* Van Wyk (1890), 7 S. C. R. 228; Van Rooyen *v.* McColl and Others (1885), 3 S. C. R. 284.

(*i*) Ordinance 104 of July 5th, 1833, s. 15.

children in the inheritance of their predeceased parent, either by paying them into the Guardian's Fund or by deed of *kinderbewys* (*j*).

Any parent re-marrying in defiance of this provision forfeits one-fourth of his or her share in the joint estate for the benefit of his or her minor children of the first marriage (*k*).

Boedelhouderschap.—The community may be "continued" at the will of the persons interested.

(a) If, at the dissolution of the marriage by the death of either of the spouses, minor children are left of the marriage, the survivor may by will of the first dying spouse be appointed executor of his or her will, guardian of the minor children, and administrator of the joint estate during the minority of the children (*l*), and directions be given that the estate shall remain in community between the survivor and the minor children (*m*). This community is continued until the majority of the children, or such time as may be provided by the will of the predeceasing spouse. The children remain liable for the debts incurred by the survivor in connection with the administration.

(b) Such a continuation of the community may also be provided for by agreement between the survivor and the children of the marriage, if they are of age at the death of the first dying, or between the survivor and the next of kin, or by ante-nuptial contract between the spouses (*n*).

Similar rules are in force in the other parts of the Union and Southern Rhodesia (*o*).

Ceylon.—The recognition of continued community and *boedelhouderschap* in Ceylon seems to be doubtful (*a*).

The Statutes of Batavia have not been followed by further statutory rules. They are of practical interest only with regard to

(*j*) Proclamation of May 23rd, 1805, s. 14; Ordinance 105 of July 5th, 1833, s. 22; Act 12 of 1856; Act 9 of 1882, s. 6.

(*k*) Ordinance 105 of July 5th, 1833, s. 22.

(*l*) Ordinance 104 of July 5th, 1833, ss. 28, 37.

(*m*) Cloete *v.* Cloete's Trustees (1887), 5 S. C. R. 66.

(*n*) Maasdorp, 2nd ed., i. 236.

(*o*) Nathan, Common Law of South Africa, i. pars. 507—510; (Transvaal) Proclamation 28 of 1902, ss. 51, 59, 63, 64; (Transvaal) Law 5 of 1882, s. 5; (S. Rhodesia) Order in Council, October 22nd, 1889, s. 41; Proclamation, June 11th, 1899; Natal Bank *v.* H. T. Rood and Others, T. S. 1909, 243, and (1910) A. C. 570; 26 T. L. R. 622.

(*a*) Pereira, Laws of Ceylon, ii. 125, 130; Case No. 21,043, District Court of Colombo, Vand., App. C. p. xlvi.; Wyekoon *v.* Gunewardene, 1 S. C. R. 147.

property belonging to marriages which were solemnised previously to June 29th, 1877.

In Ceylon it is held that the general principles of the English law of administration and distribution by executors and administrators are in force (*b*).

British Guiana.—The Act of *Verweezing*, which means the same as *kinderbewys* in South Africa, was abolished by Ordinance No. 12 of 1904 (*c*). As regards the consequences of dissolution of marriage before the commencement of this Ordinance, the Roman-Dutch law rules are followed.

Continued Community in Case of a Second Marriage of the Surviving Parent—General Law.—The consequences of marriage on the property of the spouses were the same in the case of a second or subsequent marriage as they were in the case of a first marriage (*d*). The prevailing custom during the Middle Ages that a surviving parent delayed the division of the estate, especially if the children were minors, rendered it not uncommon that, in case of a second marriage of the surviving spouse, not only the marriage property of the first marriage remained undivided, but even the property of the second marriage was added to the common property of the first marriage.

On dissolution of the second marriage it was almost impossible to make out which part belonged to the children of the first marriage and which part was due to the second spouse and the children of the second marriage. The difficulties thus created, led to a number of regulations made by the *keuren* of different towns which provided in what manner division and distribution should take place on the dissolution of the second marriage. As a matter of course, such regulations were, all of them, arbitrary, and in most instances exceedingly complicated (*e*).

The manner in which the property should in such cases be divided, was often much disputed. In the Province of Holland, it was insisted on by some that on the dissolution of the second marriage the common property should be divided into two equal parts, of which the children of the former marriage should take one part. Those who objected to such a division as giving to those children an undue preference proposed a division into three parts, of which the

(*b*) Pereira, Laws of Ceylon, ii. 295; see Civ. Proc. Code, s. 712.

(*c*) S. 26.

(*d*) Grotius, Introd., ii. 11, 9; V. d. Keessel, Thes. Sel., Thes. 219 and 232; Fock. Andr., Bijdragen, ii. 169, 170, and n. (1) on p. 170.

(*e*) Fock. Andr., Bijdragen, ii. 162—167; Het Oud Ned. B. R., ii. 185—187.

children of the former marriage should take one, the stepmother another, and the father, and together with him the children of the second marriage, the remaining third. If the second wife had children of a former marriage, the division was to be made into four parts. If the father had married several times, the children of each marriage would take one share each *per stirpes*.

Others were content with either mode of division, but considered that in the absence of special regulations in particular cases it ought to be left to the discretion of the Judge, according to the circumstances of each case (*f*).

Upon the death of the surviving parent, before a division is made, the community ceased, and did not continue with the step-parent (*g*).

These arbitrary rules were not considered satisfactory. Gradually it came to be understood that it would be better if the legislature, instead of defining rules for the solution of an entangled community, prevented the occurrence thereof. In consequence, in many Provinces the rules set out above were adopted by legislation so as to render it compulsory for the surviving parent to make an inventory and division of the common property on the dissolution of each marriage, with the above-mentioned consequences attached to the non-observance of these rules.

At the same time it was enacted that the widower or widow who was left with children of the first marriage could not enter into a second marriage unless proof had been given (*bewijs gedaan*) of the children's portions in the inheritance of their predeceased parent; that if the second marriage were solemnised without this requirement being complied with, the re-married survivor lost the guardianship over the children of the first marriage, and all advantages left to him or her from the former marriage (*h*).

Such a prohibition, however, formed no part of the law of the Province of Holland.

Meanwhile another disadvantage had arisen, partly on account of these prohibitive measures. The surviving spouse might on his or

(*f*) J. Voet, Ad Pand., xxiv. 3, 2, and authors quoted; A. v. Wesel, de Conn. Bon. Soc., tr. ii. 4, 76 *et seq.*; v. Someren, de Jure Novere., vi. 2, 3; Holl. Cons. i., Cons. 105, 161; ii., Cons. 80; iii a., Cons. 131, pp. 258 *et seq.*; iii b., Cons. 16, Quaest. 3. Compare, however, V. d. Keessel, Thes. Sel., Thes. 273—276.

(*g*) v. Someren, de Jure Novere., vi. 1, 5; A. v. Wesel, de Fin. vel Cont. Comm., tr. ii. 4, 85.

(*h*) Fock. Andr., Bijdragen, i. 95, 97, 107, 165; ii. 147 *et seq.*, 167 and n. (1); Het Oud Ned. B. R., ii. 187.

her re-marriage enter into an ante-nuptial contract with the second spouse, or in some other way benefit the second spouse to such an extent as might be detrimental to the children of the first marriage.

In order to prevent this, regulations were made in a number of Provinces against allowing the second spouse to obtain undue benefit at the expense of the children of the first marriage.

These regulations resembled the provisions of the *lex hac edictali* of the Roman law (*i*). The surviving spouse was forbidden, on his or her re-marriage, to give, either by will or by way of *dos* or *donatio propter nuptias* or in any other way, to his second wife or her second husband more than the smallest portion which any of the children of the former marriage would be entitled to in the inheritance of the surviving parent who entered into the second marriage (*k*).

This rule was practically universal during the existence of the Republic. Previously to its being laid down by statute it was observed by the Courts in their decisions (*l*). It did not, however, prevent the community from taking place in a second marriage, nor did it exclude it (*m*).

Colonies.—Union of South Africa.—The certificate that the *kinderbewys* has been properly rendered by the surviving spouse is regarded as essential for a second marriage, and accordingly enforced in the South African colonies (*n*).

The provisions of the *lex hac edictali* have been abolished (*o*).

Ceylon.—The Roman-Dutch law rules apply as regards the survivor's duty to have a proper inventory made before he enters

(*i*) Cod. de Sec. Nupt. v. 9, 6.

(*k*) Fock. Andr., Bijdragen, 167—169; Het Oud Ned. B. R., ii. 167, 168.

(*l*) Grotius, Introd., ii. 12, 6, and ii. 16, 7; Groenewegen, Leg. Abr., Cod., v. 9, 6; Schorer, Notes ad Grot. Introd., ii. 12, 6; J. Voet, Ad Pand., xxiii. 2, 110; J. Cos, Verhandeling over de "Lex hac Edictali"; v. Someren, de Jure Novere., iii.; S. van Leeuwen, R. H. R., iv. 24, 8; J. v. Sande, Dec. Fris., ii. 3, Def. 4; Holl. Cons. ii., Cons. 80; iv., Cons. 188; Fock. Andr., Bijdragen, ii. 167—170, and authors quoted in n. (2); Het Oud Ned. B. R., ii. 187, 188.

(*m*) Grotius, Introd., ii. 12, 6; V. d. Keessel, Thes. Sel., Thes. 232; Fock. Andr., Bijdragen, ii. 169, 170, and n. (1) on p. 170.

(*n*) Compare pp. 436—437; De Bruyn's Opinions of Grotius, pp. 52, 53; Maasdorp, Institutes of Cape Law, 2nd ed. i., 19; Morice, English and Roman-Dutch Law, 2nd ed., pp. 17, 18; Nathan, The Common Law of South Africa, i., par. 407, on p. 237; Wessels, History of Roman-Dutch Law, p. 467.

(*o*) Cape Colony, Act 26 of 1873, par. 2; Orange Free State, Law Book, Chapter XCII., par. 1; Transvaal, Proclamation 28 of 1902, par. 127; Natal, Law 22 of 1863, s. 3; Maasdorp, *loc. cit.*, i. 19, 20; Morice, *loc. cit.*, p. 17; Nathan, *loc. cit.*, i. pars. 409, 410, on pp. 239, 240; Wessels, *loc. cit.*, p. 467.

upon a second marriage (*vertigting, verweezing*) (*p*). No statutory rules have been made for their enforcement.

The provisions of the *lex hac edictali* are impliedly abolished (*q*).

British Guiana. — As already seen, the Act of *Verweezing* is abolished (*r*).

VI. *Division of the Common Property.*

General Law.—When the interests of the husband and wife, in consequence of there being no ante-nuptial contract between them, were left to the operation of the law, the division which took place on the termination of the community depended on the nature of that community. If it comprised all property, the whole was divided into two equal parts. One of these was retained by the survivor, and the other was assigned to the heirs of the deceased (*s*). If there had been the *communio quaestuum* only, the same division was made of the *fructus* of the property. The property itself, which belonged to the deceased, passed to the heirs, and the survivor retained that which exclusively belonged to him or her (*t*).

Before the shares could be ascertained the debts, charges, and expenses to which the property was subject had to be deducted (*t*). It has been already shown what were the charges which had to be borne out of the common property, or which would fall exclusively on the property of one of the parties, and in what manner the one was indemnified if he or she had contributed to those charges more than his or her share.

In making the division questions arose respecting the liability of a child to collate or bring into hotchpot sums which might have been advanced to him or her by his or her parents. Those questions will be examined hereafter, when the doctrine of collation is under consideration.

Colonies.—South Africa.—These rules prevail in the Colonies where the community is the legal consequence of the marriage (*a*).

Ceylon.—Similar rules prevail regarding marriages solemnised previously to June 29th, 1877 (*b*).

British Guiana.—The Roman-Dutch law rules prevail regarding marriages solemnised previously to 1904.

(*p*) Pereira, Laws of Ceylon, ii. 142.
(*q*) See Ordinance 21 of 1844, s. 1.
(*r*) See p. 439.
(*s*) v. Someren, de Jure Noverc., xii. 1.
(*t*) A. v. Wesel, de Fin. vel Cont. Comm., tr. ii. 4; v. Someren, de Jure Noverc., vi., vii., and viii.
(*a*) Maasdorp, Institutes of Cape Law, 2nd ed., i. 94—100.
(*b*) Pereira, Laws of Ceylon, ii. 134, 135.

SECTION II.

The Contractual Régime.

The power of the wife to limit the marital power of her husband with regard to the administration of her property has been already referred to (*c*). She could do so: (a) Before her marriage, by ante-nuptial contract; (b) during her marriage, either (1) by *separatio bonorum* to be obtained from the Court on the ground of her husband's mismanagement and the fear that he might squander away the whole of her property, or (2) by having her husband placed under *curatela;* (c) after her marriage, by renouncing the community and her rights derived from it.

I. *Limitation of Marital Power before Marriage.*

Ante-nuptial Contract.—As soon as marriage ceased to be an actual purchase of the bride and became a formality by which the bridegroom handed a fictitious price, first to the bride's father or guardian, afterwards to the bride herself, as a pledge that he would fulfil the obligations implied in the marriage contract, it became customary to reduce these obligations to writing. As these obligations grew in importance it became necessary to do so, especially if a long time were likely to elapse before proof of them might be needed (*d*).

Two forms of deeds were used for this purpose, viz.: (a) the so-called *notitia*, which contained all the facts connected with the betrothal and the marriage; and (b) the *carta dotis*, which contained a description of the *dos* which was given or promised at the marriage (*e*).

Historical Development.—As the presence of the *momber* at the marriage ceased to be essential, and the marriage contract became a contract between the bride and the bridegroom exclusively, the *notitia* lost its importance, while that of the *carta dotis* became enhanced. It constituted the widow's title to part of her husband's property.

The character of the marriage property changed. In a number of Provinces of the Low Countries the common ownership of the

(*c*) Cf. p. 291, *ante;* Schorer, Notes ad Grot. Introd., i. 5, 19; J. Voet, Ad Pand., xxiii. 2, 63. If the marital power with regard to the wife's property were restricted so that the wife could act for herself, she could, whilst a minor, obtain relief by *restitutio in integrum* against contracts entered into by her. Regarding the right to restitution of a widow who had not yet reached the age of majority, cf. J. Voet, Ad Pand., iv. 4, 9.

(*d*) Fock. Andr., Bijdragen, ii. 129.

(*e*) *Ibid.*, ii. 130.

dos gradually produced the system of community of property between husband and wife. The character of the *carta dotis* also changed. Wherever community of property became the rule, the bride and bridegroom were left free, on entering upon marriage, to exclude it or change its terms and to make what conditions they liked to regulate their marriage.

Under these circumstances there was no longer any necessity to continue the double contract, and the marriage contract ceased to retain its double character, viz.: (a) a contract that the parties would marry each other, and (b) a contract to regulate certain financial relations between husband and wife. It became one single contract, providing that the parties should enter into marriage upon certain conditions of a pecuniary nature.

In consequence of this, a great number of marriages were not preceded by a contract at all, and if a contract were made it was done in order to exclude the community or to change its terms (*f*).

The forms in which these contracts were made, varied in different towns and Provinces. They developed from the mere verbal promise made in the presence of witnesses (*hylixlieden*) to the marriage articles of the present day, not everywhere, it is true, in the same manner or to the same extent, yet in a progressive and clearly defined series of stages.

In consequence of these conditions being made at the marriage ceremony in the presence of *dedingsluden* they were put into writing. At first, no time limit was fixed, but afterwards, in some places, it was provided that they should be written down within a year after the marriage, in order that the writing might in future times serve as proof of the conditions agreed upon. Then it became essential that they should be made in writing. At first the writing consisted of acts privately executed by the parties; afterwards the contract was contained in public documents, signed before a notary public and witnesses, or before the sheriffs of the town.

A further stage of their development was reached when it was provided that these contracts, in order to have force in law, had to be in writing, and to be signed or sealed (registration *probationis causa*).

Finally, it became compulsory that these acts should be signed or sealed in the presence of some public official, and be published

(*f*) Fock. Andr., Bijdragen, ii. 130, 131.

and registered (registration *solemnitatis causa*) (*g*). At this point, the ante-nuptial contract had reached its full development.

Definition.—An ante-nuptial contract, as described by van der Keessel (*h*), was an agreement entered into previously to the marriage between the husband and the wife, or between them and some other person or persons interested, with regard to the laws and conditions which should prevail during the marriage.

I. **Requirements.—Form.**—In order to be valid between the parties themselves, the marriage articles might be made orally or in writing. If in writing, they could be either privately or notarially executed (*i*), provided that the laws regarding stamp duties were duly observed (*k*). They might be entered into by implication, *e.g.*, if, after a divorce, the divorced parties married again and did not revoke their former marriage articles, these were considered to have been revived (*l*).

In order to be valid against third parties, the marriage articles had to be made in writing, in some solemn form, either before a notary public and witnesses or before the sheriffs of the town, or in the presence of the relations of both parties, or in the presence of a proper number of witnesses (*m*).

In some of the towns of Holland, and especially during the later period of the Republic, the contract had to be made not only in writing, but also before some public official (*n*).

It was not necessary that it should be contained in one document. It might refer to some other document which was already in existence, or had to come into existence, on some of the subjects contained in them, provided that such document had been properly described and corresponded with the description of it in the ante-nuptial contract (*o*).

(*g*) Fock. Andr., Bijdragen, ii. 129—140; Het Oud Ned. B. R., ii. 178, 179; Wessels, History, 457—461.

(*h*) Thes. Sel., Thes. 228.

(*i*) Grotius, Introd., ii. 12, 4; Schorer, Notes ad Grot. Introd., *loc. cit.*; Neostadius, de Pactis Anten., Obs. 18, 19; Holl. Cons., iii. b., Cons. 182 (Grotius); iv. Cons. 35; vi. 1st part, Cons. 45 and 90; J. Voet, Ad Pand., xxiii. 4, 2—4; v. d. Keessel, Thes. Sel., Thes. 229.

(*k*) Van Leeuwen, R. H. R., iv. 24, 1, in notis; V. d. Keessel, Thes. Sel., Thes. 229.

(*l*) J. Voet, Ad Pand., xxiii., 4, 5.

(*m*) J. Cos, Rechtsgel. Verh., ii. 5; v. d. Keessel, *loc. cit.*

(*n*) S. van Leeuwen, Censura For., i. 1, 12, 9; Regtsgel. Obs., ii., Obs. 35; J. Voet, Ad Pand., xxiii. 4, 2; v. d. Linden, Koopmanshdbk., i. 3, 3, on p. 17.

(*o*) Holl. Cons., ii., Cons. 303, on

An ante-nuptial contract thus publicly drawn was preferred to a private agreement and superseded it, unless it were a private agreement which exclusively contained provisions to be carried out between the parties themselves (*p*).

Registration was not compulsory. It had been made compulsory by a Placard of the Province of Holland, dated July 30th, 1624, but the provisions of that Placard were never carried out (*q*).

Time.—It was essential to the validity of an ante-nuptial contract that it should be made previously to the celebration of the marriage. After the marriage had been solemnised, it was no longer in the power of the parties to revoke or alter the contract by act *inter vivos* (*r*).

Parties.—The parties to the ante-nuptial contract were the persons who contracted the marriage. The validity of the contract depended on the same conditions as those which were required for a valid marriage. If the consent of the parents were required for the marriage, the same consent was necessary for the ante-nuptial contract, because such consent did not only refer to the marriage itself, but to the marriage as it was about to be celebrated under certain conditions.

Third parties (parents, relatives, friends), who were desirous to bestow some donation on the persons who were about to be married, might become parties to the contract (*s*). It was, however, essential that there should be an initial contract between the parties themselves who were to be married. Third parties could not by themselves enter into an ante-nuptial contract on behalf of the spouses, without their knowledge and co-operation. Such a contract would not be binding upon the parties to the marriage (*a*).

In case a marriage had been entered into by a person of age with a minor, but without the consent of the minor's parents, the person

p. 568 ; J. Voet, Ad Pand., xxiii. 4, 9.

(*p*) J. Voet, Ad Pand., xxiii. 4, 6—8.

(*q*) Regtsgel. Obs., i., Obs., 42 ; v. d. Linden, Koopmanshdbk., i. 3, 3, on p. 17.

(*r*) Grotius, Introd., ii. 12, 5 ; Schorer, Notes ad Grot. Introd., *loc. cit.* ; Groenewegen, Leg. Abr., Cod., iv. 29, 2, and authors quoted ; J. v. d. Berg, Ned. Advysboek, i., Cons. 310, on p. 707 ; v. d. Keessel, Thes. Sel., Thes. 231 ; Fock. Andr., Bijdragen, ii. 140, 141 ; J. Voet, Ad Pand., xxiii.

(*s*) Van der Keessel, Thes. Sel., Thes. 228 ; Fock. Andr., Bijdragen, ii. 142.

(*a*) Holl. Cons. ii., Cons. 164 and 165.

who was of age could not derive any pecuniary benefit from such marriage. If, in such a case, a marriage contract had been made, any covenant contained in it for the benefit of the party who was of age was considered null and void. The minor, on the other hand, was allowed to take advantage of any covenant for his or her benefit entered into by the party who was of age (*b*).

II. **Contents of Ante-nuptial Contracts.**—As an ante-nuptial contract was made between the parties who contracted the marriage, they could thereby alter any of the consequences attaching to the marriage which were not of the essence of the contract. During marriage none of its consequences could be altered unless by decree of the Court. The object of an ante-nuptial contract was to regulate the relationship between husband and wife during their marriage, not only with regard to their property, but also in other respects (*e.g.*, the religious education of the children), partly in addition to, partly in the place of provisions made by law.

What Stipulations Allowed.—Generally speaking, an ante-nuptial contract might contain any provisions which the parties thought fit to make, except such as were contrary to the character of the marriage, or to the dignity of the husband, or to natural reason, morality, and honesty, or militated against the law of the country (*c*).

The following are examples of stipulations contrary to the character of the marriage, *e.g.*, that the husband should be in the guardianship of his wife—"though, without covenant, such is, only too often, seen and experienced" (*d*)—or that the husband—if a minor—should not trade during his minority without the consent of his wife or should not appear in Court on behalf of his wife, but that the wife should institute legal proceedings herself and in her own name.

Provisions were void, as contrary to the dignity of the husband, if they contained, *e.g.*, covenants which exacted guarantees from

(*b*) Eeuwig Edict, October 4th, 1540, s. 6; Grotius, Introd., ii. 12, 7; Fock. Andr., Bijdragen, i. 147, 157, 158.

(*c*) Holl. Cons., iii b., Cons. 203, No. 11 (Grotius); J. Voet, Ad. Pand., xxiii. 4, 19; v. d. Keessel, Thes. Sel., Thes. 228; v. d. Linden, Koopmansh., i. 3, 4, on p. 17.

(*d*) Lybreghts, Reden. Vertoog, i. pp. 81, 82; Gail, ii. Obs. 95, adds: "Zonderling willen zy heerschen, wanneer zy wel gedoteert zyn."

the husband for the proper restoration of the property which the wife brought to the marriage, or which, if a suretyship had been entered into, stated that the sureties would not be bound (*e*).

Provisions were deemed to be illegal and to militate against the law of the country, if they permitted either party to do that which the law prohibited, or prohibited that which the law permitted them to do.

Such were covenants, *e.g.*, that the husband and wife should be able to make donations to each other, or that they could give each other a life estate, if such were forbidden by the law of their domicil. So too were covenants against the liberty of a person to make a will, *e.g.*, that the married parties were restrained from making testamentary dispositions in favour of each other (*f*).

The parties were entitled, however, whilst adopting the community of goods or of profit and loss, to stipulate that such community should not be regulated by the law of the matrimonial domicil, but according to the laws and customs of the country where the wife was domiciled previously to her marriage or of some country foreign to the domicil of either party (*g*).

Exclusion of Community (*h*).—In regulating the relationship regarding their property the future husband and wife might exclude *communio bonorum*, either with or or without the exclusion of the *communio quæstuum*. This was one of the most usual provisions of an ante-nuptial contract. The exclusion of the former did not *eo ipso* contain the exclusion of the latter, as the community was so inherent a part of the common law that anything which was not specially stipulated as excluded from that community remained under it (*i*).

If the community of goods were not entirely excluded the ante-nuptial contract might restrict its effect in respect of the property which it would comprise. It might be confined to movable property, or to immovable property situate in a certain

(*e*) Van Leeuwen, R. H. R., iv. 24, 4.

(*f*) J. Voet, Ad Pand., xxiii. 4, 20; Wassenaer, Pract. Judic., xi. 73; Rodenburg, De Jure Conj., iii. 1, 4, 5—7; A. v. Wesel, Ad. Novell. Const. Ultraject, tr. ii. 12, art. vii. 5.

(*g*) J. Voet, Ad Pand. xxiii., 4, 27, and authors quoted.

(*h*) Cf. p. 396.

(*i*) Grotius, Introd., ii. 12, 11; Holl. Cons., vi., 2nd part, Cons. 173, on p. 698, and Cons. 174; Lybreghts, Reden. Vertoog, i. 86, 87.

country. It might be agreed that the community would begin to take effect only at a certain time, or on the fulfilment of a certain condition, or that its adoption or rejection would depend on a certain contingency, *e.g.*, the birth of a child.

So marriage articles might be entered into, in order to keep certain property out of the community which belonged to either the husband or the wife at the time when their marriage was entered into (*k*). This might be done: (1) by attaching to the ante-nuptial contract an inventory setting out the goods which would remain the property of either of the spouses, or such goods as either of them would bring into the community (*l*). In case the parties had agreed that there should be community of profit and loss only between them, such an inventory was required to prove what goods were the exclusive property of either of the spouses before the marriage and had not been acquired since (*m*). (2) Or it might be done by stating in the marriage articles that all such goods would be included in, or excluded from, the community as might be acquired by either the husband or the wife during their marriage by way of inheritance or as a legacy, or a donation, or otherwise (*e.g.*, all such goods as the husband might at any time possess over and above 600 florins) (*n*).

If such goods were not specifically excluded but only those which the husband and wife possessed previously to the marriage, all goods obtained by them during their marriage became part of the community. Thus fruits, not specifically excluded, if gathered or obtained during marriage became common (*o*). This was of particular importance if both the community of goods and that of profit and loss were excluded, and the wife had to prove and identify her own property (*p*).

Notwithstanding exclusion of community of property the wife would be liable to bear half the expense of the common household. This duty might, however, also be suspended, and it might be stipulated that the wife should participate in the profits only, and not share in the losses, although such provision would only be

(*k*) Lybreghts, Reden. Vertoog, i. 83 *et seq.*

(*l*) Lybreghts, *loc. cit.*; Holl. Cons. vi., 2nd part, Cons. 119.

(*m*) Grotius, Introd., ii. 12, 9; A. Matthaeus, Paroem., ii. 57; J. Voet, Ad Pand., xxiii. 4, 26—28, and authors quoted; Fock. Andr., Bijdragen, ii. 141, 142; Het Oud Ned. B. R., ii. 180.

(*n*) Holl. Cons. vi., 1st part, Cons. 16; Lybreghts, Reden. Vertoog, i. 86.

(*o*) Grotius, Introd., ii. 22, 12; Lybreghts, Reden. Vertoog, *loc. cit.*

(*p*) Holl. Cons. iv., Cons. 412.

effective as between the spouses and could never be to the disadvantage of the creditors. The creditors would always have a claim against the wife for half the amount of the household debts, and she would have to recover such half from the heirs of her predeceased husband (*q*).

In regulating the relationship of husband and wife during their marriage the most important provisions were those which served to limit the marital power in order to secure the wife's property—if community of goods were excluded—against an abuse thereof by her husband, and to relieve her to some extent from liability for debts incurred by her husband.

Where Community Excluded, Wife could Stipulate for Administration of her Property.—It has already been stated that, if community of property were excluded, the wife could not exact guarantees from her husband for the proper restoration of the property possessed by her at the time when the marriage was entered into. She might, however, obtain certain guarantees against an abuse of the marital power. Notwithstanding the exclusion of community of property, the husband would, in consequence of his marital power, have the administration of his wife's property (*r*); but the wife might stipulate that she would have the free administration of her own property without her husband having power to incumber it or to alienate it without her consent (*s*).

The effect of such a covenant would be, in case the ante-nuptial contract had not been registered, that any alienation of the property on the part of the husband, without his wife's consent, rendered the husband liable in damages to his wife, and this right was secured by a tacit legal hypothec on her husband's separate property (*a*).

(*q*) This point was much disputed. Grotius, Introd., i. 5, 24; ii. 12, 9, and annotations by Groenewegen ad ii. 12, 9; Schorer, Notes ad Grot. Introd., i., 5, 24; J. Cos, Rechtsgeleerde Verhand., iii. 16; Neostadius, De Pact. Anten., Observ. ix., notæ in not., p. 35, and Observ. xxi., in notis, p. 63; Van Leeuwen, R. H. R., iv. 24, 3; Lybreghts, Reden. Vertoog, i. p. 94; v. d. Keessel, Thes. Sel., Thes. 249; J. Voet, Ad. Pand., xxiii. 4, 48.

(*r*) Cf. p. 291.

(*s*) Grotius, Introd., ii. 5, 24; Schorer, Notes ad Grot. Introd., i. 5, 23; Neostadius, De Pact. Anten., Obs. 21, and in notis; Groenewegen, Leg. Abr., Inst., ii. 8, pr. 6; Cod. v. 12, 30, 6; Van Leeuwen, R. H. R., iv. 24, 4; Coren, Cons. 7; J. Voet, Ad Pand., xxiii. 4, 21.

(*a*) Van Leeuwen, R. H. R., iv. 24, 4; Schorer, Notes ad Grot. Introd., i. 5, 24, who considers, however, this manner of limiting the marital power as contrary to law.

If the ante-nuptial contract had been registered and thereby publicity had been given to the covenant, the husband was not only liable in damages to his wife, but he was also unable to give a proper title to the purchaser or mortgagee (*b*). Besides having a tacit legal hypothec on her husband's property, the wife had then the right to reclaim the property from the purchaser with a *rei vindicatio*, and the mortgage granted by her husband would be invalid (*b*). The *rei vindicatio* would, however, only be available if the alienation had taken place of immovable property or of share certificates which were standing in the name of the wife. Regarding movable property and bearer certificates the simple transfer after payment of the price would constitute a sufficient title for the purchaser, and the wife would only have a claim for damages against her husband (*c*).

In such cases the wife could, notwithstanding her general incapacity and the absence of a *persona standi in judicio*, appear in Court herself without the assistance of her husband (*d*). Prescription would not run against the wife's right of action during marriage, as she was in this respect in the same position as a minor (*e*).

It was of course, presumed that in disposing of his wife's property against the provisions of the covenant the husband acted fraudulently. In the absence of fraud on his part, the wife was able to prevent her husband from interfering with her property (*f*). If the wife, having reserved to herself the administration of her own property, knowingly or negligently permitted her husband to receive her moneys, she could not afterwards avail herself of the above-mentioned privilege to undo the acts of her husband as to her property, and she would be in the same position as if by a contrary stipulation she had renounced the privilege (*g*).

A married woman who had reserved the free administration of her own property could legally contract with her husband and others as far as such administration was concerned (*h*).

(*b*) Note of Decker on Van Leeuwen, R. H. R., iv. 24, 4; Van Leeuwen, Cens. For., i. 1, 12, 5, 6; Coren, Consilia, Cons. 7, on pp. 18—20; J. Voet, Ad Pand., xxiii. 4, 21; xliv. 3, 11, *in fin.*

(*c*) v. d. Keessel, Thes. Sel., Thes. 97, 98.

(*d*) J. Voet, Ad Pand., ii. 4, 34, *in fin.*; Regtsgel. Obs., iv. Obs. 7; v. d. Keessel, Thes. Sel., Thes. 95; J. v. d. Linden, Judic. Practyk, i. 8, 3.

(*e*) J. Voet, Ad Pand., xxiii. 5, 8.

(*f*) Grotius, Introd., i. 5, 24.

(*g*) S. v. Leeuwen, R. H. R., iv. 13, 14.

(*h*) v. d. Berg, Nederl. Advysboek,

Wife could Stipulate for Return of her Property after Husband's Administration.—Without limiting the marital power in this respect or excluding it in any way, the parties to an ante-nuptial contract might mutually agree either: (1) that the community of goods and of profit and loss should be excluded, and that the husband should retain the administration of his wife's property, but that either he or his heirs should, after the dissolution of the marriage, return to the wife or to her heirs her property intact, and that the wife should not be liable for any debts incurred by the husband during the marriage (*i*), or for the wife's election between this and a community for profit and loss; or (2) that the community of goods would be excluded and that, at the dissolution of the marriage, the wife or her heirs would have the right of election, either to share the profit and loss made during the marriage, or to have her property restored to her as she possessed it at the time when the marriage was entered into, and not be liable for any of the debts incurred by her husband during their marriage. In case such a covenant had been inserted in an ante-nuptial contract the wife could exercise her choice, even during the marriage, against her husband's creditors, if he became insolvent (*k*).

If the wife had reserved to herself such right of election without expressly stipulating such privilege for and on behalf of her children or "heirs," it was doubtful whether the children or "heirs" could elect (*l*).

Remedy of Wife against Husband alienating her Property in Cases (1) and (2):—In the Provinces of Holland and Brabant the husband had the power, if he had retained the administration, to alienate

iii. Cons. 177, on p. 477; Schorer, Notes ad Grot. Introd., i. 5, 24; J. Voet, Ad Pand., xxiv. 1, 18.

(*i*) J. Voet, Ad Pand., xxiii. 4, 52; v. d. Keessel, Thes. Sel., Thes. 247, in which he maintains that such provision excluded *per se* every community of property and of profit and loss. Cf. Ordinance, October 4th, 1540, s. 6, *in fin.*

(*k*) Grotius, Introd., ii. 12, 10; Neostadius, De Pact. Anten., Obs. 9; Groenewegen, Notes ad Grot. Introd., ii. 12, 17; Groenewegen, Leg. Abr., Cod. v. 12, 3: J. Voet, Ad Pand., xxiii. 4, 53; Schorer, Notes ad Grot. Introd., i. 5, 24; Holl. Cons. iii b., Cons. 303 (Grotius); Fock. Andr., Annot. ad Grot. Introd., ii. 12, 10; De Haas, Nieuwe Holl. Cons., Cons. xxxviii.; v. d. Berg, Ned. Advysboek, ii. Cons. xc.; v. d. Keessel, Thes. Sel., Thes. 250.

(*l*) Holl. Cons. ii., Cons. 96 and 240; Holl. Cons. iii b. Cons. 303, on p. 513 (Grotius); Lybreghts, Reden. Vertoog, i. 91, 92; J. Voet, Ad Pand., xxiii. 4, 54; Bynkershoek, Quæst. Jur. Priv. ii. 1.

his wife's property during the marriage and to give a proper title as far as third parties were concerned. The wife would not be able to reclaim any property so disposed of, but she would have a claim for damages against her husband and—in both cases (1) and (2) above mentioned, if she exercised her right of election—would be entitled to take out of his property so much as was necessary to restore her property. In doing this, she had a preferential right over all other creditors (*m*).

This preferential right which the wife had in case of either stipulation (1) or (2) constituted a tacit legal hypothec in favour of the wife on her husband's property for the restitution of her own property, and this mortgage ranked before any conventional mortgage which the creditors might have obtained against the husband either previously to or during the marriage (*n*).

A married woman who had thus secured a priority over her husband's creditors for the restitution of her own property, was not prevented from becoming a surety for her husband and from thus personally contracting debts *stante matrimonio* (*o*).

As an illustration Voet adds that it became a rule with the States of Holland, not to admit anyone as a collector of revenues, or as a surety for the collection of the public revenues, whose wife had secured her own property by such a provision, unless she renounced the benefit of it in favour of the *Fiscus* (*p*).

The husband, on the other hand, had against his wife a claim for restitution of all necessary expenses incurred by him in the administration, or on behalf, of his wife's property (*q*). The right of the husband to alienate did not include the right to mortgage his wife's property (*r*).

Where Community Excluded and Marital Power Unlimited.—In case both the community of property and the community of profit and loss had been excluded, but the marital power had not

(*m*) Ordinance, October 4th, 1540, art. 6; Holl. Cons. v., Cons. 18; Lybreghts, Reden. Vertoog, i. 93; J. Voet, Ad Pand., xxiii. 5, 7.

(*n*) Groenewegen, Leg. Abr., Cod. v. 12—30, 2—5; v. d. Berg, Ned. Advysboek, ii. Cons. 90; Lybreghts, Reden. Vertoog, i. 93; J. Voet, Ad Pand., xxiii. 4, 53, 54; v. d. Keessel, Thes. Sel., Thes. 263; Van Leeuwen, R. H. R., iv. 13, 14; Cens. For., i. 1, 12, 3; Holl. Cons., ii. Cons. 79; iv. Cons. 266.

(*o*) J. Voet, Ad Pand., xxiii. 4, 56.

(*p*) Placaat, 16 Maart 1679; Holl. Placaatboek, iii. 799.

(*q*) Schorer, Notes ad Groet. Introd., ii. 12, 15; ii. 10, 9.

(*r*) v. d. Berg, Ned. Advysboek, ii. Cons. 90.

been in any way limited and no other stipulation had been made, the wife had, nevertheless, a claim for damages against her husband if he alienated her property without her consent, but such claim was postponed to those of all other creditors and did not carry with it a tacit legal hypothec over her husband's property (*s*).

Donations.—Although donations of any kind bestowed by the spouses on each other during marriage were absolutely void, they might be stipulated for previously to the marriage, or the ante-nuptial contract might secure that certain donations received during marriage should be enjoyed by the husband and wife jointly or by either of them. These comprised the following :—

1. **Morgengave**, a gift by the husband to his wife. The original idea of *morgengave*, viz., a gift from the husband to his wife on the morning after their marriage in proof of such marriage (*pretium virginitatis*), continued to be customary and recognised in the seventeenth and the eighteenth centuries (*t*).

Such a gift—if promised or granted by ante-nuptial contract—became the absolute property of the wife and could be disposed of by her at will. At her death it went to her heirs (*a*).

2. **Douarien.**—Next to this *morgengave* another form of gift on the part of the husband grew up, also denoted by the name of *morgengave*, but which was of an entirely different character.

It became a custom previously to the marriage for the husband to promise to his wife—or for her to covenant with him—in the ante-nuptial contract for the payment of a certain sum to the wife out of her husband's estate, in case she should survive him and there were no children of the marriage living (*b*).

This gift also received the name of *morgengave*, or—to distinguish it from its original—*doarium* or *douarie*.

Its meaning gradually extended and its character changed. It

(*s*) Eeuwig Edict, October 4th, 1540, art. 6; Grotius, Introd., ii. 12, 15, 17; J. Voet, Ad Pand., xxiv. 3, 21.

(*t*) Fock. Andr., Bijdragen, ii. 143, 144; Het Oud Ned. B. R., ii. 167, *et seq.*; J. W. Wessels, History, p. 463. Cf. p. 392.

(*a*) v. d. Berg, Ned. Advysboek, i. Cons. 206; ii. Cons. 151; iii. Cons. 250; Fock. Andr., Bijdragen, ii. 145, and authors quoted in note i; Holl. Cons., i., Cons. 149; ii. Cons. 207; Utr. Cons., i. Cons. 27, No. 5; Van Leeuwen, R. H. R., iv. 24, 13; *contra*, v. d. Keessel, Thes Sel., Thes. 248.

(*b*) Fock. Andr., Bijdragen, ii. 145 jo. p. 89.

no longer remained a gift from the husband to his wife. It became common to provide mutually in the ante-nuptial contract that there should be a gift to the surviving spouse independently of the fact whether there were any children living of the marriage or not (*c*).

These "douarien" (*in solatium viduitatis promissa*) were in the nature of gifts which took effect at the dissolution of the marriage by the death of either of the spouses. They could not be demanded, if the marriage were dissolved by divorce or a separation were pronounced (*d*).

Voet adds, as an illustration, that if a particular house should be assigned as the *doarium*, and during the lifetime of either party it was burnt down by accident, and another house rebuilt, it seemed that the latter could not be claimed by the party entitled to the *doarium* without repaying the expense incurred in rebuilding it (*e*).

Notwithstanding that some specific property might thus have been assigned as the *doarium*, the survivor did not acquire a lien or legal mortgage on the property of the deceased, as a security for it, but could only demand it after all the creditors of the estate left by the deceased had first been satisfied (*f*).

From the favour shown to this provision, it was decided that when the *doarium* had consisted of a certain annual sum, and the husband by his will had given to his wife an annuity of a greater amount, the latter legacy was held not to be in satisfaction of the former, and that she might claim both (*g*).

Several attempts were made to check the abuse of these *douarien* as a means of constituting a fund for the husband to fall back upon *in fraudem creditorum*. The best known of these attempts was the prohibition of Charles V. in his Eeuwig Edict of October 4th, 1540 (*h*).

3. **Settlements.**—The husband could promise his wife certain gifts (*lucrum*) to be paid to her on his death (*i*), but these could not be paid to her unless all creditors of the estate had first been satisfied,

(*c*) Regtsgel. Obs., iii. Obs. 38; Bynkershoek, Quæst. Jur. Priv., ii. 7.

(*d*) J. Voet, Ad Pand., xxiv. 3, 23.

(*e*) *Ibid.*, xxiv. 3, 24.

(*f*) Grotius, Introd., ii. 12, 17; Schorer, Notes ad Grot. Introd., *loc. cit.*; Regtsgel. Obs., iii. Obs. 38; Neostadius, De Pact. Anten., Obs. 10; J. Voet, Ad Pand., xxiv. 2, 25; v. d. Keessel, Thes. Sel., Thes. 259.

(*g*) J. Voet, Ad Pand., xxiv. 3, 26; Rodenburg, de Jure Conj. Tract., ii. 4, 6, 7.

(*h*) Art. 6. Cf. Wessels, History, 464.

(*i*) Fock. Andr., Bijdragen, ii. 144,

independently of the fact whether the husband and wife were married in any community or not (*j*).

Between the spouses such ante-nuptial contract was valid, and could not be altered or revoked during marriage; otherwise such revocation would amount to a donation between the spouses, and donations between spouses were void (*k*).

4. **Gifts by Third Parties.**—The ante-nuptial contract frequently contained donations to either of the spouses from third persons, who were parties to the contract, whether relatives or strangers, *e.g.*, the trousseau promised by the parents or other relatives to the bride (*l*). Such a donation might consist in the promise of a gift to take place at the death of the promisor (*m*). As such promises were part of the contract, they could not be revoked (*n*).

To these promises a condition might be attached to the effect that after the dissolution of the marriage the gift should revert to the donor or to some third person or to the side whence it came. It was much disputed whether such a condition was revocable by will of the donor or not (*o*).

Stipulations regarding Succession to Third Parties.—Of the same nature to these were stipulations whereby, in favour of the marriage, the succession to the inheritance of a third contracting party was regulated, *e.g.*, that either of the spouses would be the sole heir or a legatee of the third contracting party, or, if that party were one of the parents of either the bridegroom or the bride, that the husband and wife would succeed such parent together with the other children, or that the future spouses declared themselves content with the donation given by the parents, and renounced their rights to the future inheritance of those parents in favour of the other children, or that the parents of the bridegroom renounced

145, and authors quoted on p. 145, n. 3.

(*j*) Eeuwig Edict, October 4th, 1540, art. 6; Rechtsgel. Obs., iii. Obs. 38; Grotius, Introd., ii., 12, 17; Schorer, Notes ad Grot. Introd., *loc. cit.*; v. d. Keessel, Thes. Sel., Thes. 262.

(*k*) Neostadius, De Pact. Anten., Obs., iv. Cf. p. 451.

(*l*) Fock. Andr., Bijdragen, ii. 142.

(*m*) v. d. Keessel, Thes. Sel., Thes. 245, 2°.

(*n*) v. d. Keessel, Thes. Sel., *loc. cit.*; Holl. Cons. iii a., Cons. 27.

(*o*) Coren, Consilia, ix. 44; J. Voet, Ad Pand., xxiii. 4, 61; v. d. Keessel, Thes. Sel., Thes. 245, 3°.

their title to the *portio legitima* in their son's inheritance in favour of their future daughter-in-law (*p*).

Stipulations to this effect were irrevocable except by mutual consent (*p*).

Stipulations regarding Succession to Spouses.—The ante-nuptial contract might also serve to regulate the rights of succession to the property belonging to either or to both of the spouses. Besides the intestate and testamentary succession, Roman-Dutch law recognised —contrary to the maxims of Roman law, which did not allow *pacta successionis* (*q*)—the regulation of the succession by ante-nuptial contract, such right being constituted by custom (*r*) and acknowledged by statute (*s*).

Provisions of this nature took the place of a will or testament, and the inheritance—though devolving according to the provisions of the ante-nuptial contract—could not be said to have devolved by agreement. Hence it was impossible to enforce the provisions of the ante-nuptial contract by an action founded on such contract, and these provisions were at any time revocable (*t*), though only by mutual consent (*a*).

The power of disposition might be regulated in the same manner as in the case of a testamentary disposition.

I. Dispositions as between Husband and Wife.—(a) It might be provided that the whole inheritance should devolve upon the survivor, or that the survivor should enjoy a life estate in the property left by the predeceased (*b*), provided that such disposition did not militate against the laws regulating the *portio legitima* of the children (*c*). In reality the life estate took the place of the

(*p*) J. Voet, Ad Pand., xxiii. 4, 57* *in fin.*; v. d. Keessel, Thes. Sel., Thes. 246.

(*q*) Dig. xlv. 1, 61; Cod. ii. 3, 15; viii. 38, 4.

(*r*) Regtsgel. Obs., ii. Obs. 36; v. d. Keessel, Thes. Sel., Thes. 235; S. van Leeuwen, Costumen van Rynland, art. 92, p. 358. In the Provinces of Friesland and Utrecht the Roman law maxim was followed. Cf. Groenewegen, Leg. Abr., Cod. ii. 3, 15; J. Voet, Ad Pand., xxiii. 4, 57*.

(*s*) Polit. Ord., April 1st, 1580, s. 29 *in fin.*

(*t*) Neostadius, De Pact. Anten., Obs. ii. in notis; Van Leeuwen, R. H. R., iv. 24, 11.

(*a*) J. Voet, Ad Pand., xxiii. 4, 62; v. d. Keessel, Thes. Sel., Thes. 235. See, however, v. d. Linden, Koopmansh., i., 3, 5, on p. 20.

(*b*) Fock. Andr., Bijdragen, ii. 141, 142; Het Oud Ned. B. R., ii. 180; J. Cos, Rechtsgeleerde Verhand., iii. 14; J. Voet, Ad Pand., xxiii. 4, 57*.

(*c*) v. d. Keessel, Thes. Sel., Thes. 236; J. Voet, Ad Pand., xxiii. 2, 129.

ancient *dos*, which had the character of a provision for the widow, and such provision acquired increased importance when the grant of a life estate to the widow in any other way except by ante-nuptial contract was forbidden as offending against the above-mentioned laws which regulated the legitimate portions of the children (*d*).

(b) Husband and wife could mutually bequeath a child's portion to the survivor of them (*e*). If children were born of the marriage, this disposition had to be interpreted strictly, but if there were no children more freedom was allowed. So, if a child's portion was granted on condition that children were born, the legacy lapsed if no children were born. If, on the other hand, the legacy was granted without any condition attached to it, then, if no children were born, it was a moot point whether the entire inheritance fell to the wife or only half of it (*f*).

(c) Husband and wife could bequeath the inheritance belonging to either of them to third persons (*g*), who might be indicated in the ante-nuptial contract either by name or without being named. In the former case, if the beneficiaries were named, they might either be strangers to the contract or parties to it. If they were not, at the same time, parties to the contract, the dispositions acted as testamentary bequests, and could be revoked at any time by the husband and wife by mutual consent.

If they were parties to the contract and the person who made certain gifts to the husband and wife stipulated at the same time in the ante-nuptial contract that in case of death of husband and wife these gifts should return to him, such covenant did not constitute a testamentary bequest, but a contract which was binding upon husband and wife and irrevocable by a later testamentary disposition (*h*).

In the latter case the bequest became one to persons uncertain. It might be provided by ante-nuptial contract that, on the dissolution of marriage by death of either the husband or the wife, their property should be inherited by certain persons indicated by a class only, or that the goods should return to the side whence they

(*d*) Fock. Andr., Het Oud Ned. B. R., ii. 180, 181.

(*e*) v. d. Keessel, Thes. Sel., Thes. 237.

(*f*) *Ibid.*, 238; *contra*, S. van Leeuwen, Cens. For., i. 1, 12, 15; J. Voet, Ad Pand., xxiii. 2, 9.

(*g*) J. Voet, Ad Pand., xxiii. 4, 57*.

(*h*) *Ibid.*, xxiii. 4, 61; v. d. Keessel, Thes. Sel., Thes. 239.

came, and should be divided either among the relations of the deceased husband and wife according to the rules of intestate succession or among such persons as indicated by will. The wife might be instituted heir in a will made previously to the marriage or subsequently to the ante-nuptial contract, as neither marriage nor an ante-nuptial contract revoked a will (*i*).

In these cases the provisions of the ante-nuptial contract were revocable by either of the spouses, unless the dispositions were confirmed by mutual promise (*k*). If so confirmed, revocation could only be made by a mutual will (*k*).

II. **Dispositions regarding Children.**—It was possible for husband and wife by ante-nuptial contract, not only to regulate the succession to their own inheritance, but to do so equally on behalf of their children (*l*).

Although Roman-Dutch law did not contain the *substitutio pupillaris* of the Roman law, it gave the future spouses the power to regulate their children's succession by ante-nuptial contract or by will under the following circumstances.

Choice of Intestate Succession.—(a) In order to exclude any arbitrary dealing with the marriage property by the husband, parties could by ante-nuptial contract stipulate that the property left by their children—if these died before they had reached the age when they themselves could make a will, or after they had reached such age, but without having made one and without leaving lawful issue them surviving—should devolve, as regards succession to the inheritance, according to the laws regarding intestate succession prevailing in the country of the matrimonial domicil, or of the bride's domicil, or in some other country, *e.g.*, the Aasdom law of succession, or the Schependom law, or partly the one and partly the other, provided only that the law of the country of the matrimonial domicil did not prohibit such provisions (*m*).

In such cases the property passed *ab intestato* from the children according to the law of succession elected in the marriage contract (*n*).

(*i*) Holl. Cons., ii. Cons. 318; J. Voet, Ad Pand., xxiii. 4, 65.

(*k*) J. Voet, Ad Pand., xxiii. 4, 63, and authors quoted; v. d. Keessel, Thes. Sel., Thes. 240.

(*l*) J. Voet, Ad Pand., xxiii. 4, 57*, and authors quoted.

(*m*) Grotius, Introd., ii. 29, 3; v. d. Keessel, Thes. Sel., Thes. 241–243; J. Voet, Ad Pand., xxiii. 4, 66.

(*n*) Grotius, Introd., ii. 29, 3, *in fin.*

The power of election extended to all the goods left by the child or the children, without distinction (*o*), and might be inserted in the ante-nuptial contract *expressis verbis*, or tacitly, *e.g.*, by stipulating that after the children's death the goods should return whence they came (*p*).

(b) The parties to the ante-nuptial contract were not limited to intestate succession. It might also be provided, either without *fidei commissum* or by way of *fidei*-commissary disposition (*q*), that those of the children who would survive the others should succeed to the inheritance of the predeceased ones, and that after the death of the last surviving child the goods should return to the side whence they came, thus excluding the parents from the succession of their children if these died intestate (*r*) ; or

(c) It might be provided that the last surviving child should be succeeded by a stranger who was named in, or who was a third party to, the ante-nuptial contract. If the stranger were a party to the contract the child was bound by the provisions as to the inheritance and could not exclude the stranger by will, but such provision did not prevent the child from disposing of his property during his lifetime (*s*).

Unless otherwise provided these different dispositions could be revoked by a subsequent mutual will of the parents (*t*), and the children were in the same way not further bound by these provisions. They could during their lifetime dispose of the whole or part of the goods to which they had succeeded, and after having reached the age at which they were allowed to make a will they could do so by will (*a*).

Or Special Law might be Selected to Govern Property.—The provisions regarding the choice of law did not regard the inheritance and law of succession only. It might be stipulated that the law regulating the whole of the property during the marriage should be the law prevailing elsewhere than in the country of the husband's

(*o*) v. d. Keessel, Thes. Sel., Thes. 362.

(*p*) *Ibid.*, Thes. 360.

(*q*) *Ibid.*, Thes. 242; Groenewegen, n notis ad Grot. Introd., ii. 29, 3.

(*r*) Holl. Cons., iv. Cons. 4 ; J. Voet, Ad Pand., xxiii. 4, 66 ; v. d. Keessel, Thes. Sel., Thes. 241, 2°.

(*s*) J. Voet, Ad Pand., xxiii. 4, 66 ; v. d. Keessel, Thes. Sel., Thes. 243.

(*t*) Utrechtsche Cons., ii. Cons. 151, Nos. 4—9.

(*a*) Grotius, Introd., ii. 29, 3; v. d. Keessel, Thes. Sel., Thes. 241 and 360.

domicil, provided that in such case the laws adopted by the ante-nuptial contract did not militate against the law of the matrimonial domicil (*b*). In the same way it might be provided that part of the marriage property, *e.g.*, immovables, should be subject to the law of the country where they were situated, and the rest of the marriage property to the laws of the country of the matrimonial domicil (*c*).

Revocation of Ante-nuptial Contracts.—As a general rule it may be stated that the provisions contained in an ante-nuptial contract were revocable, though not by act *inter vivos*, nor all to the same extent or in the same manner.

Provisions regarding the exclusion of community of goods, fruits and income and profit and loss, could not be revoked by any act during the existence of the marriage. Such revocation would, in effect, amount to a gift between husband and wife (*d*). They could, however, be revoked by will, as the revocation would, in that case, amount to a legacy, provided that such will were made *mutuo consensu* (*e*). Either of the spouses had it in his or her power by testament to revoke such will and to restore the effect of the ante-nuptial contract as far as he or she were concerned, provided that he or she had not taken any benefits under such will (*f*).

A testamentary revocation was required to be express (*nominative*). An ante-nuptial contract was not considered to have been revoked by the general clause contained in a will whereby "all previously made testamentary dispositions" were revoked (*g*), though an ante-nuptial contract which contained the exclusion of community of property would tacitly be revoked by any subsequent

(*b*) Grotius, Introd., ii. 26, 11; ii. 29, 3; J. Voet, Ad Pand., xxiii. 4, 19 and 27.

(*c*) J. Voet, Ad Pand., xxiii. 4, 27.

(*d*) Neostadius, De Pact. Anten., Obs., iv. *in notis* on p. 21; Lybreghts, Reden. Vertoog, i. 8, 2, on p. 112; v. d. Keessel, Thes. Sel., Thes. 264; v. d. Linden, Koopmansh., i. 3, 5, on p. 19.

(*e*) Grotius, Introd., ii. 2, 9; i., Cons. 271; Holl. Cons., ii. Cons. 92, 156, 202 and 293; iii b. Cons. 185 (Grotius); iv. Cons. 32; Van Leeuwen, R. H. R., iv. 24, 12; v. d. Berg, Nederl. Advysboek, ii. Cons. 20, 21; Boel-Loenius, Dec. en Obs., Obs. cxxxvii., on p. 810; Lybreghts, Reden. Vertoog, i. 8, 3, 4; v. d. Linden, Koopmansh., i. 3, 5, on p. 20.

(*f*) Van Leeuwen, R. H. R., iv. 24, 12, and authors quoted; v. d. Keessel, Thes. Sel., Thes. 265.

(*g*) Neostadius, De Pact. Anten., Obs. iii. *et in notis;* v. d. Berg, Nederl. Advysboek, iv. Cons. 173.

testamentary disposition which was contrary to the provisions of such ante-nuptial contract (*h*).

The revocation of an ante-nuptial contract did not revive the community which had been excluded by it, and the consequence of such revocation had to be properly set out in the will (*i*).

Provisions regarding the law of succession which should apply to the inheritance of either of the spouses, or their children, could not be revoked by a mere general or tacit revocation (*k*).

Any testamentary disposition contained in an ante-nuptial contract could at any time be revoked by the spouses, either expressly or tacitly, by a subsequent will, even if a promise to the contrary had been inserted in the ante-nuptial contract. If such a revocation were made by either of the spouses without the knowledge and consent of the other, it would have effect with regard to his or her property only, and the party who was so revoking the contract could not take anything under it in case he or she were the surviving spouse (*l*).

After a revocation by mutual will either of the spouses might make a contrary disposition as far as he or she were concerned and reinstate the provisions of the ante-nuptial contract, and this could even be done by the survivor after the death of the predeceasing spouse, provided that the surviving spouse had not taken any benefit under the previous mutual will (*m*).

Gifts (a) between the future spouses or (b) by third parties to either of the spouses, whether by way of *morgengave*, *douarie*, or donation, were irrevocable, as in the former case the revocation would amount to a donation between the spouses during marriage, and in the latter the gifts did not form part of a will, but of a contract (*n*).

Interpretation of Ante-nuptial Contracts.—The general rule was that the provisions of an ante-nuptial contract should be strictly interpreted, and that an extension of such provisions should

(*h*) Holl. Cons., iii b. Cons. 185, No. 2; Lybreghts, Reden. Vertoog, *loc. cit.*, on p. 113.

(*i*) Van Leeuwen, R. H. R., iv. 24, 12, and authors quoted *in fin.*

(*k*) Lybreghts, Reden. Vertoog, *loc. cit.*, on p. 114, and authors quoted.

(*l*) Utr. Cons., ii. Cons. 151, Nos. 4—9; Boel-Locnius, Dec. en Obs., Obs. cxxxvii.; Lybreghts, Reden. Vertoog, *loc. cit.*, p. 115; i. 7, 8, on p. 107.

(*m*) v. d. Keessel, Thes. Sel., Thes. 265.

(*n*) v. Sande, Dec. Fris., ii. 2, Def. 4, on p. 125; Lybreghts, Reden. Vertoog, i. 7, 8, on pp. 102, 103; i. 8, 5, on pp. 114 and 115; v. d. Keessel, Thes. Sel., Thes. 264.

not be made by way of analogy (*de casu in casum*) (*o*), for the common law of the land should apply as much as possible, and deviations from such common law should not be stretched by any interpretation to cases on which the ante-nuptial contract itself was silent (*p*).

Any case not provided for in the contract was regulated by the common law (*q*), but wherever doubt existed the ordinary rules of interpretation prevailed, and the real intentions of the parties had to be ascertained (*r*).

No particular form of words was required so long as the meaning and intention of the parties had been clearly conveyed. A provision which had not been specifically stipulated, if it were a natural consequence of the stipulations made and might be considered not to constitute a *casus omissus*, was considered to form part of the contract (*s*). Doubtful expressions or a doubtful meaning might be interpreted by comparison with similar expressions used in the same contract, or even in other documents of the same nature (*t*).

In interpreting obscurities the law of the husband's domicil had to be applied, independently of the law of the place where the contract was made. This applied not only to its contents, but also as to the solemnities which had to be observed in drawing the document (*a*). With regard to immovable property the law of the country was applied where the property was situated (*a*).

II. *Limitation of Marital Power during Marriage.*

Unless protective measures in favour of the wife had been provided previously to the marriage, the extensive powers possessed by the husband might have enabled him to reduce his wife to beggary, if the law had not provided her with some means of limiting her liability either during marriage or after the dissolution thereof.

I. **Separatio Bonorum.**—If the spouses had been married under

(*o*) Van Leeuwen, Cens. For., i. 12, 10; J. Voet, Ad Pand., xxiii. 4, 70; J. Cos, Regtsgel. Verh., ii. 8, on pp. 64, 65; and cf. ii. 12, 13, 14; Lybreghts, Reden. Vertoog, i. 86, 88.

(*p*) Grotius, Introd., ii. 12, 11; Schorer, Notes ad Grot. Introd., *loc. cit.*; Van Leeuwen, R. H. R., iv. 24, 5; Holl. Cons. i. Cons. 42; iii b. Cons. 111, 121; J. Voet, Ad Pand., xxiii. 4, 74.

(*q*) J. Cos, Regtsgel. Verh., ii. 8, 10.

(*r*) v. d. Keessel, Thes. Sel., Thes. 251.

(*s*) Neostadius, De Pact. Anten., Obs. ix. note in notis on p. 35.

(*t*) J. Voet, Ad Pand., xxiii. 4, 71, 72.

(*a*) J. Cos, Regtsgel. Verh., ii. 6, and authors quoted.

community of goods, or the wife had not (if community had been excluded) by ante-nuptial contract retained the administration of her own property, and during the marriage it appeared that the husband was spending the common, or his wife's, property and was reducing his wife to poverty, the wife might claim at law a *separatio bonorum*, and an interdict by the Court prohibiting her husband from further administering her property (*b*).

This institution was taken over from the civil law (*c*). It was practised in the Dutch Provinces, though to a limited degree only, as judicial separation (*a mensâ et toro*) which included the separation of the common property, was more readily resorted to (*d*). The *separatio bonorum* could be obtained by the wife only and had to be pronounced by the Court, as the spouses could not, after marriage had once been contracted, by mutual voluntary arrangement change the law which regulated these effects of their marriage (*e*).

The grounds on which the wife could petition the Court were that the husband was squandering the common property or was so mal-administering her own estate that she might lose all of it and be reduced to poverty if he were allowed to continue the administration thereof (*f*).

The effect of the Court's judgment, granting this separation of goods, was, that the community of property came to an end, and that the husband lost the power of administering his wife's property; and also, that the wife was no longer responsible for the debts incurred by her husband (*g*). In order to have this effect, the judgment had to be published and the division of the common property actually carried out (*h*).

II. **Curatela of the Husband.**—Another method to safeguard a married woman against further loss in the future, and which was mostly resorted to under such circumstances, was the placing of the

(*b*) Grotius, Introd., i. 5, 24; J. Voet, Ad Pand., xxiii. 5, 7.

(*c*) Regtsgel. Obs., iv. Obs. 8; Fock. Andr., Annot. ad Grot. Introd., ii. 5, 24, on ii. p. 15.

(*d*) Fock. Andr., Het Oud Ned. B. R., ii. 189; Annot. ad Grot. Introd., *loc. cit.*

(*e*) Neostadius, De Pact. Anten., Obs. viii.; Fock. Andr., Het Oud Ned. B. R., ii. 190.

(*f*) Van Leeuwen, R. H. R., i. 6, 7; Fock. Andr., Het Oud Ned. B. R., ii. 189, 190.

(*g*) Fock. Andr., Het Oud Ned. B. R., ii. 190; Grotius, Introd., i. 5, 24.

(*h*) Grotius, Introd., i. 5, 24; J. v. Sande, Decis. Fris., ii. 5, 8, "ne tamen."

husband and his property under *curatela* on the ground of his being a spendthrift or for any other reason which might give cause for a *separatio bonorum* (*i*). The wife might be appointed *curator* (*k*).

The husband could only be placed under *curatela*, and be deprived of his power of administering the common property, or his wife's property, by judicial decree, which had to be published in order to have effect against third parties (*l*).

III. *Limitation of Marital Power after Marriage.*

Renunciation of Community.—If the husband and wife had been married in community of property and during marriage no measures had been taken to guard the wife against future loss through debts incurred by her husband, she was entitled to limit her loss at the dissolution of the marriage through the death of her husband by renouncing the community (*m*), that is to say, by leaving all the assets of the community to the creditors and not retaining anything herself.

She had to renounce immediately after her husband's death and before his funeral. The formal mode of making this renunciation or, as it was termed, the *solemnis abdicatio domus mortuariæ*, consisted in her depositing the keys of the house on her husband's coffin, and, as it was described in the symbolical language of the time, leaving the house "naked" in front of the coffin, *i.e.*, in borrowed clothes or her ordinary daily dress without taking anything with her. It was necessary that she should relinquish everything to the creditors. If previous to the renunciation she had concealed or removed any part of the effects, she remained liable to the creditors. The renunciation might also be made by bringing the keys into Court, or by making the formal renunciation before the sheriff or a notary and witnesses (*n*).

The effect was that neither she, nor her heirs, were responsible for

(*i*) Fock. Andr., Het Oud Ned. B. R., ii. 189; v. d. Linden, Koopmansh., i. 3, 7, on p. 28.

(*k*) J. Voet, Ad Pand., xxiii. 2, 48; Grotius, Introd., i. 11, 7; Schorer, Notes ad Grot. Introd., *loc. cit.*; Fock. Andr., Annot. ad Grot. Introd., i. 11, 7.

(*l*) Grotius, Introd., i. 11, 4.

(*m*) Grotius, Introd., ii. 11, 18; Fock. Andr., Annot. ad Grot. Introd., *loc. cit.*, ii. 89.

(*n*) Boel-Loenius, Dec. en Obs., Cas. lxv., pp. 433—437, and authors quoted by Boel in his note; Schorer, Notes ad Grot. Introd., ii. 11, 18; Fock. Andr., Het Oud Ned. B. R., ii. 190; J. v. Someren, de Jure Novercarum, vii. 1, 13; J. Voet, Ad Pand., xlii. 3, 12; A. Wesel, de Damni inter Conj. Com. tr. ii. 3, 129 *et seq.*

any of the debts contracted by her husband during the marriage, and that anything acquired by her afterwards could not be attached except for such debts as she had incurred before or after her marriage (*o*).

Renunciation being a remedy against liabilities incurred by the husband, it would not affect any debts incurred by the wife in a special capacity in which she could bind herself, *e.g.*, as public trader (*p*).

A married woman could also renounce the community of profit and loss. In that case she was entitled to take her own goods, that is to say, those which she possessed at the time of her marriage and which she inherited during the marriage.

This right of renunciation might also be exercised by her during her marriage in case her husband were declared a bankrupt (*q*).

IV. *Contractual Régime in Colonies.*

I. **Ante-nuptial Contracts.—Formalities and Requirements.—South Africa.**—Generally, it may be observed that, as regards the formal requirements, the law of the country where the contract is entered into will apply, and, that the language of the contract will be interpreted accordingly (*r*); but that, as regards the contents and legal consequences of an ante-nuptial contract, the law of the husband's domicil at the date of the marriage (matrimonial domicil) will govern, both as regards movable and immovable property (*s*).

Cape Colony.—Ante-nuptial contracts must be made (a) in writing, (b) before a notary public and two witnesses, and (c) must be registered in the office of the Registrar of Deeds (*t*). A notarial copy of the ante-nuptial contract must at the same time be left with the registrar, to be retained in his office. A private act, made and signed by the parties themselves (*onderhands*) cannot be registered (*u*). Registration and deposit in a public deed office are prescribed, so as to enable third parties (creditors) to take cognisance of the provisions of the ante-nuptial contract. An unregistered document—though valid as between husband and wife and their

(*o*) Schorer, Notes, *loc. cit.*; A. Wesel, *loc. cit.*, ii. 3, 136; Fock. Andr., *loc. cit.*

(*p*) Grotius, Introd., ii., 11, 19; Schorer, Notes ad Grot. Introd., *loc. cit.*; Fock. Andr., Het Oud Ned. B. R., ii. 190.

(*q*) Regtsgel. Obs., i. Obs. 31, and authors there quoted; Fock. Andr., Het Oud Ned. B. R., ii. 191.

(*r*) Maasdorp, Inst. of Cape Law, 2nd ed., i. 48.

(*s*) Maasdorp, *loc. cit.*, i. 48, 49.

(*t*) Proclamation of April 23rd, 1793; Proclamation of May 23rd, 1805, ss. 11, 12; Act 21 of 1875, ss. 2, 7.

(*u*) Act 21 of 1875, s. 9.

children, is invalid as regards creditors of either the husband or the wife (*b*).

Before the Act 21 of 1875, the effect of an unregistered contract was to deprive the wife of any tacit legal hypothec to which she otherwise might have been entitled on her husband's property, and to postpone her claim against her husband for the return of her own property to those of creditors who had a conventional special hypothec, even though it were of a date subsequent to that of the ante-nuptial contract (*c*).

Non-registration did not deprive the wife of her preference over concurrent creditors, nor of property which was clearly her own before the marriage (*d*).

The second section of the Cape Colony Act 21 of 1875, which renders the registration of an ante-nuptial contract essential, only applies to contracts which are (a) executed in the Cape Colony, or, (b) if elsewhere, by and between persons domiciled in the Cape Colony. Registration is, however, in any case necessary in order to give a married woman an hypothec over her husband's property.

Ante-nuptial contracts, made and executed by persons domiciled outside the Cape Colony, in accordance with the laws of the country of their domicil, are valid as regards third parties in Cape Colony without being registered. Unless the parties to it possess immovable property situated in the Colony, the sanction of the Court is required before the contract can be registered at all (*e*). In order to affect immovable property situated in the Colony the ante-nuptial contract requires to be registered at the Deeds Registry.

An ante-nuptial contract executed outside the Colony, by persons whose matrimonial domicil is in the Colony, may be registered in the Colony, even though not executed before a notary public. In that case it is required that a notarial copy of the ante-nuptial contract should be made by a notary public residing and practising in Cape Colony, or a duplicate original, and this should be deposited in the Deeds Registry. When registered and deposited the contract

(*b*) Act 21 of 1875, s. 2.

(*c*) Aschen's Executrix *v.* Blythe (1886), 4 S. C. R. 136.

(*d*) Steytler *v.* Dekkers (1872), 2 Roscoe, 98; Glynn *v.* Van der Byl and Others (1863), 4 Searle, 117.

(*e*) In re Orpen et Uxor (1856), 2 Searle, 274; Bernstein *v.* Bernstein's Trustee (1897), 14 S. C. R. 161; C. L. J., xiv. (1897), 195; Bosman's Trustees *v.* Bosman (1897), 14 S. C. R. 323.

will have the same effect against creditors as if made in Cape Colony itself (*f*).

Ante-nuptial contracts only take effect if and when followed by marriage. If duly registered and not followed by marriage, application may be made, after reasonable time, to have the registration cancelled (*g*).

An ante-nuptial contract should be executed and registered previously to the marriage ceremony. Under exceptional circumstances the Court may allow such a contract to be executed and registered after the marriage has been solemnised, without prejudice, however, to the creditors who have acquired a claim during the period which elapsed between the marriage and the date of registration (*h*).

Such creditors have the right to treat the property of the spouses as if the marriage had been one in community, as far as the recovery of the debts due to them is concerned (*i*).

The intention of the parties to exclude community of property or any other community must distinctly appear from some document executed before the marriage. It is no excuse for parties who are domiciled in Cape Colony that they were ignorant of the law of Cape Colony when they married abroad (*k*).

Transvaal.—The general rules laid down in the Cape Proclamation prevail, and this matter has been further specially regulated by Law No. 5 of 1882 (*l*). An ante-nuptial contract must be executed before a notary public, and be registered in order to be valid and effectual.

(*f*) Act 21 of 1875, s. 9; In re E. Harrison Irvine and Rosa Irvine (1896), 11 E. D. C. 61; C. L. J., xiv. (1897), 66.

(*g*) Ex parte Holms (1899), 16 S. C. R. 351.

(*h*) In re Moolman (1880), 1 S. C. R. 25; Twentyman and Another *v.* Hewitt (1833), 1 Menz. 156; Schoombie *v.* Schoombie's Trustees (1887), 5 S. C. R. 189; C. L. J., iv. 285; In re Steele (1893), 10 S. C. R. 206; Ex parte Taylor et Uxor (1895), 12 S. C. R. 348; C. L. J., xii. (1895), 283; In re Houghton (1898), 15 S. C. R. 8; In re Potgieter, C. L. J., iv. 286; Dall *v.* Registrar of Deeds, 5 H. C. G. 184; C. L. J., v. (1888), 247; In re Moore and Saayman, 4 C. T. R. 4; C. L. J., xi. (1894), 115; Ex parte Purchase and Wife (1884), 3 S. C. R. 84; C. L. J. (1884), 229.

(*i*) Roos-Reitz, Principles of Roman-Dutch Law, p. 16; Ex parte Wells and Wells (1905), T. S. 54; Ex parte Weight and Weight (1906), T. S. 707; Pollard and Pollard *v.* Registrar of Deeds (1903), T. S. 353.

(*k*) In re Levi and Wife, 6 C. T. R. 227; C. L. J., xiii. (1869), 269; In re Pieters, 9 C. T. R. 468.

(*l*) S. 5.

Section 5 of this Law has been held to be applicable to all ante-nuptial contracts executed outside the Colony, even by persons domiciled in the country where the contract was executed and the marriage was solemnised (*m*); but, on the other hand, it is declared not to be applicable to foreign ante-nuptial contracts (*n*).

The ante-nuptial contract should be executed and registered before the solemnisation of the marriage, but circumstances may relax the strictness of this rule (*o*).

Natal.—All persons married or to be married in South Africa (*p*) who want to exclude community of goods under the provisions of Law No. 22 of 1863 can do so by an instrument in writing signed by both parties about to be married or by husband and wife, in the presence of two witnesses, who should also sign. That instrument, in order to be valid, must be registered within six months after its execution with the Registrar of Deeds (*q*). All other ante-nuptial contracts must be executed and registered in accordance with the rules laid down above.

Persons whose marriages have been or are to be solemnised outside South Africa may adopt community of property or any other community by an instrument in writing signed by both parties in the presence of two attesting witnesses. The instrument, in order to be binding, must be registered (*r*).

Orange Free State.—This matter has been regulated by Law No. 7 of 1892.

All ante-nuptial contracts, in order to be valid and effectual, must be executed (a) in writing; (b) before a notary public or some other official who is acting in that capacity according to the existing laws (*s*); and (c) must be registered in the Deeds Registry. A duplicate original or notarial copy must be filed in the Deeds Registry Office at the time of the registration of the original (*t*). An ante-nuptial contract entered into outside the Colony, either by

(*m*) Tansend *v.* Crow (1885), 2 K. 74.

(*n*) P. and M. Louw *v.* The Liquidator of Hugo, Theron and Malerbe (1898), High Court S. A. R. Digest of L. R. S. A. R., Van Hoytema and Raphaely, 15. This decision is entirely in conformity with the practice followed in the Cape Colony.

(*o*) Ex parte Wells and Wells (1905), T. S. 54.

(*p*) *I.e.*, South Africa south of 25° South latitude: Law 22 of 1863, s. 8.

(*q*) Law 22 of 1863, s. 7; Act 5 of 1882, ss. 1, 2.

(*r*) Law 22 of 1863, s. 2.

(*s*) Laws of O. R. C. (1901), 651, s. 2.

(*t*) S. 1.

notarial act or otherwise, if duly executed in accordance with the laws of the country where it is entered into and valid there, may be registered in the Orange Free State, and if it is so registered and a duplicate original or a notarially attested copy has been filed, it will be effectual in the Colony as against creditors as if it had been duly made within the Colony (*a*).

Ceylon.—After the passing of the Ordinance No. 15 of 1876, ante-nuptial contracts became unnecessary. If, however, persons wish to adopt community of property by special agreement, this should be effected by ante-nuptial contract, and as regards the execution of such a contract the Roman-Dutch law rules as set out above prevail (*a*).

The same law applies to ante-nuptial contracts entered into previously to June 29th, 1877.

British Guiana.—Since the passing of Ordinance No. 12 of 1904 an ante-nuptial contract has become unnecessary. As regards those entered into previously to that date, the Roman-Dutch law rules above mentioned prevail.

II. **Ante-nuptial Contracts.—Contents.—South Africa.**—It may be stated generally that, as regards the contents of ante-nuptial contracts, their revocation and interpretation, the Roman-Dutch law rules as set out above are followed (*b*). Stipulations opposed to nature, reason, and morality, or prohibited by law, are not admitted (*c*). The special alterations which are allowed to be made in the general legal consequences of the marriage fall under the following heads :—

1. There may be a limitation of the marital power by agreement that the wife shall have the free and uncontrolled administration and right of alienation of her own property. It is generally deduced from this that the whole marital power may be expressly or impliedly excluded by ante-nuptial contract, and the married woman may be placed in the same position as if no marriage

(*a*) S. 2; and see No. 23 of 1899, Laws, p. 885.

(*a*) Pereira, Laws of Ceylon, ii. 91—95.

(*b*) De Bruyn, Opinions of Grotius, pp. 141—153; Morice, English and Roman-Dutch Law, 2nd ed.; Maasdorp, Inst. of Cape Law, i. 53—74; Wessels, History of Roman-Dutch Law, 461 *et seq.*; Roos-Reitz, Principles of Roman-Dutch Law, pp. 16—17.

(*c*) Maasdorp, Inst. of Cape Law, i. 51 *et seq.*; Nathan, Common Law of South Africa, i. pars. 430—434.

had been solemnised at all (*d*). But the authorities do not warrant this view, and it militates against the maxim that no stipulations can be made by ante-nuptial contract which would vary the essential conditions of a marriage. The right of free administration of her own property (combined with the exclusion of community of property and of profit and loss) gives the wife the right to do everything necessary for the proper administration of her property without her husband's assistance; *inter alia* to appear in Court by herself "for that object" and "in that capacity" (*e*). The decisions in the Courts of Cape Colony on this point should be regarded as subject to this limitation (*f*). Accordingly it has continued to be the practice in South Africa that the wife who is married out of community, should be sued herself, though "assisted so far as necessary by her husband," and a copy of the summons must be served on the husband as well (*g*). The wife who has reserved the free administration of her own property to herself can legally contract with her husband and with other persons as far as the administration of her goods is concerned. The opinion is held that this contractual power of the wife includes the power to alienate all her property to third parties without the assistance of her husband, as well as the right to create incumbrances upon it (*h*). If by ante-nuptial contract the wife has

(*d*) Maasdorp, *loc. cit.*, i. 54; Roos-Reitz, Principles of Roman-Dutch Law, p. 16.

(*e*) Regtsgel. Obs., iv. Obs. 7; v. d. Linden, Koopmanshdbk., p. 19; Jud. Praktyk, i. 8, 2; Van Eeden *v.* Kirstein (1880), Kotzé, 184. Kotzé, J., who quotes these words of v. d. Linden's Jud. Praktyk, does not sufficiently emphasise in the translation, that such right is only limited, and that it does not warrant the saying, that a married woman may—if she has limited the marital power of her husband—*always* appear in Court by herself; De Bruyn, Opinions of Grotius, pp. 146, 147; Nathan, Common Law of South Africa, i. par. 425.

(*f*) Boyes *v.* Verzigman (1879), 9 Buch. 229; Ruperti *v.* Ruperti's Trustees (1885), 4 S. C. R. 22; Mostert's Trustees *v.* Mostert (1885), 4 S. C. R. 35; Union Bank *v.* Spence (1886), 4 S. C. R. 339.

(*g*) De Bruyn, Opinions of Grotius, p. 146; Van Zyl, Practice of S. A., 2nd ed., p. 4. The assistance is confined to the husband's signing the power of attorney with his wife to institute or defend an action; see Union Bank *v.* Spence (1886), 4 S. C. R. 339. To the contrary: Maasdorp, Inst. of Cape Law, i. 54; and see Roos-Reitz, Principles of Roman-Dutch Law, pp. 14, 15.

(*h*) Maasdorp, Inst. of Cape Law, i. 54. Tennant in his Notary's Manual, p. 240, is of opinion that the power is limited, and maintains that the wife should have the free administration of her property with the consent of her husband. In that case she would be

reserved to herself the free administration of her own property she is entitled to give her husband a general power of attorney to alienate her property on her behalf, and the husband will then have full power to make any alienation. Without such power of attorney any alienation by the husband without the co-operation of his wife is absolutely invalid, and the property can be recovered (reclaimed) by the wife (*i*).

2. There may be exclusion of community of property either with or without community of profit and loss, and exclusion of the power of alienation on the part of the husband, without taking away his power of administration. In such case the wife's property is not liable for any debts incurred by her husband, not even those incurred by him during the marriage (*k*). But it must appear clearly what the wife's property includes, either from the inventory attached to the marriage settlement or *aliunde*. If the husband confers some donation on the wife before the marriage, but continues to administer and control the property given, such property is considered to remain common property (*l*). The wife's property, however, remains liable for household debts (necessaries) (*m*), in the same way as she retains the right to pledge her husband's credit for necessaries (*n*). The wife has a tacit legal hypothec over her husband's property, and will rank before any of the husband's creditors who become creditors during the marriage. She is postponed to creditors who have obtained a conventional special mortgage of immovable property, or a legal mortgage against the husband before marriage (*o*). In the Transvaal this tacit hypothec has been abolished, together with most tacit hypothecs, by Proclamation No. 28 of 1902.

on the footing of a married woman who carries on the business of a public merchant with the consent of her husband.

(*i*) De Bruyn, Opinions of Grotius, pp. 146, 147; Maasdorp, Inst. of Cape Law, i. 54, 55; Morkel *v.* Holm (1882), 2 S. C. R. 57.

(*k*) In re E. L. Chiappini (1856), 2 Buch. 143, 150; Maasdorp, Inst. of Cape Law, i. 55, 56.

(*l*) Steyn *v.* Trustee of Steyn (1874), 4 Buch. 16; Aschen's Executrix *v.* Blythe (1886), 4 S. C. R. 136.

(*m*) Maasdorp, Inst. of Cape Law, i. 55, 56; De Bruyn, Opinions of Grotius, p. 150; Smith *v.* Dewdney Bros., 4 E. D. C. 21; Crowly *v.* Domony (1869), 2 Buch. 205.

(*n*) Du Preez *v.* Cohen (1904), T. S. 157.

(*o*) Ruperti's Trustees *v.* Ruperti (1885), 4 S. C. R. 22; Aschen's Executrix *v.* Blythe (1886), 4 S. C. R. 136.

3. There may be a similar stipulation that the administration of the wife's property shall be left in the hands of the husband on condition that her property shall be kept safe by him, or that she shall have an election upon the dissolution of the marriage whether to have her property returned to her or to take a share in the profit and loss made during the marriage. In this case the wife is able to become a surety for her husband if she has renounced the benefits (*p*). Subject to the Proclamation above mentioned, the wife has a tacit hypothec over her husband's goods, but she will lose this preferential right if she has stipulated that besides the safeguarding of her property she shall be entitled to half the profits made during the marriage (*q*). She will also lose this preferential right if it be stipulated that the husband shall keep her property in repair, and she shall not be entitled to claim on account of such expenditure after the dissolution of the marriage. She will retain her hypothec if it has been stipulated that her husband shall keep her property safe, but that she shall be entitled to the income derived therefrom during the marriage (*r*).

4. There may be an exclusion of community of goods and of profit and loss without any further stipulations regarding administration or alienation. The husband will then be entitled to alienate his wife's property, and she will not have a tacit legal hypothec (*q*). Third parties may be parties to the ante-nuptial contract and any stipulations entered into by them will be binding upon them, and either specific performance can be sued for or compensation in case of default (*s*).

Settlements.—The provisions of s. 6 of the Perpetual Edict of Charles V., dated October 4th, 1540, were repealed in the Cape Colony by Act 21 of 1875 (*t*), and in the Orange Free State by Law No. 23 of 1899 (*a*). As long as these provisions were in force in those Colonies, and so far as they are still in force in the Transvaal and Natal, they have been extended by several decisions to all marriage settlements, and not only to those of merchants (*b*).

(*p*) Nourse *v.* Steyn, Wife of Griffiths (1847), 1 Menz. 23.

(*q*) In re E. L. Chiappini (1856), 2 Buch. 151.

(*r*) Anderson *v.* Meyer and Others (1836), 1 Menz. 204.

(*s*) Pillans *v.* Porter's Executors (1888), 5 S. C. R. 420; Maasdorp, Inst. of Cape Law, i. 65.

(*t*) S. 1.

(*a*) S. 4.

(*b*) Maasdorp, Inst. of Cape Law, i. 66; De Bruyn, Opinions of Grotius, pp. 150—152.

The two Acts above mentioned at the same time set out different provisions for marriage settlements in their respective Colonies (*c*).

To a large extent the form of English marriage settlements is followed, though the position of trustees and the dual ownership of trust property is unknown to Roman-Dutch law. Statutory provisions do not exist on this point.

Ceylon (*d*) **and British Guiana.**—Although the repeal of the Roman-Dutch legal marriage *régime* has made ante-nuptial contracts unnecessary for the purpose of separating the husband and wife's property during marriage, the Acts which effected such repeal have not rendered ante-nuptial contracts entirely superfluous.

Their contents, however, will vary like those set out in the preceding pages in accordance with the variations effected in the legal *régime*. The provisions of the 6th section of the Perpetual Edict of October 4th, 1540, relating to marriage settlements have been repealed (*e*). In most cases the provisions of English marriage settlements will be followed. To them the same remark applies as has been made with regard to similar settlements executed in South Africa.

There are no statutory provisions on this point. With regard to ante-nuptial contracts entered into by persons married in Ceylon, previously to June 29th, 1877, and in British Guiana before the commencement of Ordinance 12 of 1904, the Roman-Dutch law rules continue to be applicable.

Separatio Bonorum.—South Africa.—The Roman-Dutch law rules apply. Instead of *separatio bonorum* the wife can apply for an interdict restraining the husband from alienating the property of the marriage. Such interdict is most frequently applied for in suits for divorce or *separatio a mensa et toro*.

If, after such decree, the husband parts with any of the property belonging to the wife, she can reclaim it with a *rei vindicatio*, even after dissolution of the marriage, as prescription does not run against her during the existence of the marriage (*f*).

(*c*) Maasdorp, *loc. cit.*, i. 67 *et seq.*; Cape Statutes, ii. 1378; Laws of O. R. C. (1901), 885.

(*d*) Pereira, Laws of Ceylon, ii. 91—95.

(*e*) Ceylon, Ord. 15 of 1876, s. 23; see British Guiana, Ord. 12 of 1904.

(*f*) Maasdorp, Inst. of Cape Law, 2nd ed., i. 42; Nathan, Common Law of South Africa, i. 394, on p. 228; Brande *v.* Brande, 9 C. T. R. 666; C. L. J., xvii. (1900), 64.

Ceylon.—With regard to marriages solemnised previously to June 29th, 1877, the Roman-Dutch law rules apply (*g*).

British Guiana.—The same rules apply to marriages solemnised before the commencement of Ordinance No. 12 of 1904.

Renunciation of the Community.—South Africa.—The Roman-Dutch law rules apply (*h*).

Ceylon.—As regards marriages solemnised previously to June 29th, 1877, the Roman-Dutch law rules apply (*i*).

British Guiana.—Since the Ordinance No. 12 of 1904, these measures of protection against the husband have lost their importance, except for marriages solemnised before the commencement of that Ordinance.

(*g*) Pereira, Laws of Ceylon, ii. 93.
(*h*) Maasdorp, Inst. of Cape Law, 2nd ed., i. 42.
(*i*) Pereira, Laws of Ceylon, ii. 130, 131.

CHAPTER X.

EFFECT OF MARRIAGE ON THE PROPERTY OF THE HUSBAND AND WIFE IN FRANCE, BELGIUM, QUEBEC, ST. LUCIA, MAURITIUS, SEYCHELLES, AND CHANNEL ISLANDS.

Introductory.

Law of France: Prior to the Code Civil.—A community of property, *une communauté des biens*, between the husband and wife, formed a part of the customary law of France (*a*). It had prevailed there from so remote a period that it is doubtful when it was first introduced and from what source it was derived. According to some of the *coutumes* it was the necessary legal effect of the marriage, when there had been no ante-nuptial contract excluding it. According to others, it did not take place unless the parties themselves adopted it by their ante-nuptial contract. In the *coutume* of Normandy it was not only declared not to exist, but it was not permitted to be introduced into a nuptial contract.

In those provinces that were governed, not by their own *coutumes*, but by the civil law, *le droit écrit*, it had no existence, unless by the contract of the parties.

There prevailed an important distinction, even amongst those *coutumes*, which established the community. Thus, according to the *coutumes* of Anjou, Maine, Chartres, and Brittany, the community would not take place unless the husband and wife survived the celebration of the marriage a year and a day, a rule found also in the old law of Scotland (*b*). If either died before that period had elapsed the community was deemed never to have had existence. But if they survived that period, the community had relation to and was deemed to have commenced from the moment of the celebration of the marriage.

On the other hand, according to the *coutumes* of Paris, Orleans,

(*a*) As to the history of the law of married women's property in France prior to the Code Civil, see Viollet, Précis de l'Hist. du Droit Fran.; Fuzier-Herman, Rép. tit. Contrat de Mariage; tit. Communauté Conjugale, ss. 1 *et seq.*

(*b*) Stair, Inst., i. 4, 19.

Poitou, Berry, and other provinces, the community commenced from the moment of the celebration of the marriage, and its effect was not defeated by the shortness of the period the husband and wife may have survived their marriage.

In consequence of the adoption of the civil law by some of the provinces of France, whilst others were governed by their own particular *coutumes*, the property and the rights of the husband and wife in relation to it were regulated by two different systems of law, one, *le régime de la communauté*, and the other *le régime dotal*.

Under the Code Civil.—The Legal Community.—The Code Civil when it abolished these *coutumes*, retained *le régime de la communauté*, and made it the common or general law of France. It would have been its only law if those provinces which followed the civil law had not required that *le régime dotal* should also be retained (*c*).

The Code, in the rules which it has established, has selected for *le régime de la communauté* whatever was most valuable in the *coutumes*, and for *le régime dotal*, the most suitable provisions of the civil law.

Le régime de la communauté, as it is established by the Code Civil, is declared to be the common or universal law (*le droit commun*) of France. It prevails in every case in which the parties have not, by special stipulation or contract, derogated from or modified it (*d*).

The Code adopts, as a fundamental principle, that the law does not regulate the conjugal society in respect of the property of the husband and wife, except when they themselves have made no special stipulation respecting it. It leaves them, therefore, at liberty to make such agreements on their marriage as they may deem most conducive to their interests, provided they do not contravene the few restrictions to which it has subjected them (*e*).

The law of **Belgium** is similar (*f*).

What Modifications of it by Convention are Prohibited.—These restrictions prohibit (i.) conventions contrary to morality and public

(*c*) Toullier, Le Droit Civil, liv. 3, tit. 5, du Contrat de Mariage, &c., n. 7; Fuzier-Herman, Rép. tit. Contrat de Mariage, ss. 37—45, and authorities there cited; Code, art. 1391, and see *infra*, p. 478, n. (*b*), the clause added to this article by the law of July 10th, 1850.

(*d*) Art. 1393. The community does not constitute a *personne morale* distinct from that of the spouses, Soubrenie *v.* Lavieille (1896), Sirey, 1900, i., 511. But see Enregistrement *v.* Durand (1901), Sirey, 1903, ii. 285.

(*e*) Art. 1387.

(*f*) According to art. 76, s. 10, of the

order (*g*); (ii.) conventions contrary to the rights resulting from the *puissance maritale*, or to the husband as head of the family, or to the *puissance paternelle* (*h*); (iii.) conventions designed to change the legal order of succession (*i*); (iv.) stipulations in general terms that the conjugal society shall be regulated by one of the customs, laws, or local ordinances, which formerly governed the different parts of the French territory, and which the Code abrogates (*k*); (v.) stipulations contrary to other prohibitive dispositions of the Code (*g*).

Parties may select Régime of Community or Dotal Régime.—It permits them, however, to declare in general terms that they intend to be married either *sous le régime de la communauté* or *sous le régime dotal* (*a*).

If, however, the act of marriage shows that the spouses married without contract, the wife will be deemed, as regards third parties, capable of contracting in accordance with the provisions of the common law, unless in the act which contains the engagement on her part she has declared that she has made a marriage contract (*b*).

If the spouses adopt *le régime de la communauté* their rights are governed by the rules which the Code has established for that *régime*, in the same manner as if they had made no declaration (*a*). If they marry *sous le régime dotal* they become subject to the regulations adopted by the Code in relation to the latter *régime* (*a*).

The simple stipulation that the wife settles property upon herself, or that it is settled upon her *en dot*, is not sufficient to subject such property to *le régime dotal*, if the marriage contract itself does not contain an express declaration in this respect (*c*). Neither have the spouses placed themselves under that *régime* by the simple declaration of the husband and wife that they are married without *communauté*, or that they shall be separated as to their property (*d*).

Coutume of Paris.—The *coutume* of Paris was originally extended to Lower Canada and St. Lucia (*e*).

Belgian Civil Code, the marriage act should mention the name of the notary who has made the marriage settlement. If no such mention is made, the clauses which are derogatory to common law will not be valid as against third parties who have made some agreement with the husband or wife in ignorance of their marriage settlement. A marriage settlement is void if not made *prior* to the marriage.

(*g*) Art. 1387.

(*h*) Art. 1388.

(*i*) Art. 1389.

(*k*) Art. 1390.

(*a*) Art. 1391.

(*b*) Clause added to art. 1391 by Law of July 10th, 1850.

(*c*) Art. 1392.

(*d*) Art. 1392.

(*e*) Quebec, Edit de création du conseil superieur de Quebec, Avril,

Law of Lower Canada and St. Lucia.—The law of Lower Canada was codified by the Civil Code which came into force on August 1st, 1866.

St. Lucia, too, has now got its own Civil Code, which became law on October 20th, 1879. As regards the stipulations which may be made on marriage, it is provided by arts. 1177, 1178, and 1179, that: (1) All kinds of agreements may be lawfully made in contracts of marriage, even those which in any other act *inter vivos* would be void, such as the renunciation of successions which have not yet devolved, the gift of future property, the appointment of an heir, and other dispositions in contemplation of death; (2) all covenants contrary to public order or to good morals, or forbidden by any law, are, however, excepted from the above rule; (3) thus the consorts cannot derogate from the rights incident to the authority of the husband over the persons of the wife and the children, or belonging to the husband as the head of the conjugal association, nor from the rights conferred upon the consorts by the articles of the Code respecting paternal authority, minority, tutorship, and emancipation; (4) if no covenants have been made, or if the contrary have not been stipulated, the consorts are presumed to have intended to have subjected themselves to the general laws and customs of the country, and particularly to the legal community of property and to the legal dower in favour of the wife and of the children to be born of their marriage. From the moment of the celebration of marriage these presumed agreements become irrevocably the law between the parties, and can no longer be revoked or altered. Community of property, which the consorts are free to exclude by stipulation, may be altered or modified at pleasure by the contract of marriage, and is called in such case conventional community. Legal dower, which the parties are likewise at liberty to exclude, may also be altered or modified at pleasure, by the contract of marriage, and is called in such case conventional dower. Generally the law respecting the effect of marriage in St. Lucia is the same as that of the Province of Quebec.

Law of Mauritius and Seychelles.—The Code Civil prevails in Mauritius and Seychelles (*f*).

1663, Edits et Ordonnances (1803), vol. i. 23; Droit du Consul, &c., Mai, 1664, art. 33: *ibid.* 371; St. Lucia, Arrêt, November 5th, 1681; Laws of St. Lucia (1889), 1.

(*f*) In Seychelles, which was, by art. 8 of the Treaty of Paris (May 30th, 1814), formally ceded, as a then

In this chapter the provisions of the Code Civil and the Codes of Lower Canada and St. Lucia with regard to the community and the proprietary rights of husband and wife are dealt with together.

Channel Islands.—The Coutume of Normandy is the basis of the law of the Channel Islands, which is considered separately.

The arrangement of this chapter falls under the following heads:

I. The *régime* of community, with its divisions of (a) the *actif*, or property of the community, including movables and immovables; (b) the *passif*, or debts of the community, with the respective liabilities of the spouses, and the wife's power to renounce the community; (c) the administration of the community; (d) the dissolution of the community by death, separation, divorce, &c., and the earnings of married women; (e) the acceptance or renunciation of the community after its dissolution; (f) liquidation and partition of the community.

II. Dower (or *douaire*), with its divisions of (a) legal or customary dower, (b) conventional dower or *prefix*, in force in Quebec and St. Lucia.

III. The contractual *régime* of *dot*, in force in France.

IV. Donations between spouses.

V. Marriage contracts, which may either adopt a modified community, or exclude community, or provide for separation of property or other limited forms of community.

VI. The Coutume of Normandy and the law in the Channel Islands.

SECTION I.

The Régime of Community.

General Considerations applicable to Legal and Conventional Community.—Jurists, in treating of the community under the *coutume*, and the Codes above named, distinguished between that which is regulated solely by the disposition of the law and that which is regulated by the agreement of the parties. The former is called

dependency of Mauritius, to the British Crown, the laws in force at the date of such cession, including the Code Civil, were maintained; and the provisions of that Code with regard to the property of married women are still law in the Colony. See Burge, vol. i., p. 208, as to the present position of Seychelles: Laws of Seychelles Revised, i., p. vi., n. 1. See Proclamation of 1815 (Mauritius Government Gazette, April 29th, 1815).

communauté legale and the latter *communauté conventionnelle*. It has been observed that the former receives its appellation, not because the *communauté* is necessarily induced by the law "vi ipsius consuetudinis (legis) immediatè et per se," but because it is founded on a tacit or presumed contract of the parties, who, as they have made no express contract, are considered to have chosen that which the law has made for them (*g*).

Capacity to Marry necessary.—The community, whether it be legal or conventional, cannot exist under either system of jurisprudence, except between those who are capable of contracting a valid marriage (*h*). It may, in the case of a putative marriage, exist in favour of the party who is in good faith (*i*).

Position of Foreigners.—The *communauté legale*, as well as *conventionnelle*, may also exist between strangers domiciled in France although they had not been naturalized (*j*). The law of Belgium is the same.

In the Province of Quebec it may be regarded as settled that the matrimonial rights of the consorts are fixed by the law of the matrimonial domicil, that is by their domicil at the time of the marriage. These rights are not affected by a subsequent change of domicil. Consequently parties married in England after January 1st, 1883, the date of the commencement of the English Married Women's Property Act, 1882 (*k*), or in Scotland after July 18th, 1881, the date of the commencement of the Married Women's Property (Scotland) Act, 1881 (*l*), or married elsewhere under a law which does not recognise legal community, will not be rendered subject to the law of community by afterwards acquiring a domicil in the Province of Quebec (*m*).

Commencement of Community.—By the Code Civil, which, in the

(*g*) Pothier, Traité de la Communauté, art. prælim., s. 10; Toullier, liv. 3, tit. 5, c. 2, s. 87; Code Civil, art. 1393; Civil Code, L.C., art. 1268.

(*h*) See Fuzier-Herman, Rép. tit. Contrat de Mariage, ss. 240, 314, *et seq.*

(*i*) Pothier, Tr. de la Comm. 1, c. 1, s. 20; Toullier, liv. 3, tit. 5, s. 90; Aubry et Rau, v., s. 506, n. 3; Guillouard, Contrat de Mar., i., s. 347. Code Civil, arts. 201, 202; Civil Code, L.C., arts. 163, 164. See Cathcart *v.* Union Building Society (1864), 15 L. C. R. 467; Gregory *v.* Dyer (1841), 15 L. C. J. 223.

(*j*) Pothier, *ibid.*, part 1, c. 2, s. 21; Toullier, *ibid.*, s. 91.

(*k*) 45 & 46 Vict. c. 75.

(*l*) 44 & 45 Vict. c. 21.

(*m*) Rogers *v.* Rogers (1848), 3 L. C. J. 64; Astill *v.* Hallée (1877), 4 Q. L. R. 120. See De Nicols *v.* Curlier, [1900] A. C. 21 (H. L.); Lafleur, Conflict of

celebration of marriage, treats it as a civil contract, the community, whether *legale* or *conventionnelle*, commences from the day of the marriage, contracted before the civil officer, and the parties are not permitted to stipulate that it shall commence at any other period (*n*).

The law of Quebec is the same, having regard to the difference that there is no civil marriage in that country.

Effect of Community on Property of Spouses.—In order to ascertain the scope and effect of the community under the Codes of France and of Lower Canada on the property of the husband and wife, their liability for the debts of each other, and their respective rights to administer and dispose of the property which is either subject to the community or excluded from it, the course of inquiry about to be pursued will be similar to that which was adopted in treating of the *communio bonorum* and *communio quæstuum* of the Roman-Dutch law (*o*).

In St. Lucia the effect of community is treated in the Code under the heading of "The Assets and Liabilities of Community" (*p*). Generally speaking, the assets of the community consist (1) of movable property possessed by the consorts at the date of the marriage or subsequently acquired; (2) of immovables acquired during the marriage. As regards immovable property and movable property, certain forms of property are specified in various articles of the Civil Code to be immovable, and by one of the sections of the article dealing with interpretation all property not specified in any of the articles referred to above is movable (*q*).

L'actif et le Passif of the Community.—In the language of jurists, as well as in the Code Civil, the subjects of the community compose it actively and passively. The property which forms a part of, and augments and enriches it, is said to be *l'actif de la communauté*; the debts and charges which are also the subjects of it, but diminish it, are said to compose *le passif* of the community.

L'actif of the Community.—That which composes it *en actif*, or, in other words, the property of which it is composed, is the first subject of inquiry.

Laws in the Province of Quebec, p. 163. It is otherwise as to dower, *infra*, p. 169. Civil Code, L.C., art. 1442.

(*n*) Code Civil, art. 1399; Civil Code, L.C., art. 1269.

(*o*) *Supra*, Chapter IX., pp. 396 *et seq.*; and see Chapter VI., pp. 283, 291 *et seq.*

(*p*) Ss. 1192 *et seq.*

(*q*) S. 1 (72).

Code Civil.—The Code Civil uses the following language: "La communauté se compose activement, 1°, de tout le mobilier que les époux possédaient au jour de la célébration du mariage, ensemble de tout le mobilier qui leur échoit pendant le mariage à titre de succession ou même de donation (*r*), si le donateur n'a exprimé le contraire; 2°, de tous les fruits, revenus, intérêts, et arrérages, de quelque nature qu'ils soient, échus ou perçus pendant le mariage, et provenant des biens qui appartenaient aux époux lors de sa célébration, ou de ceux qui leur sont échus pendant le mariage, à quelque titre que ce soit; 3°, de tous les immeubles qui sont acquis pendant le mariage" (*s*).

Civil Code of Lower Canada.—By the Civil Code of Lower Canada, "The assets of the community consist (1) of all the movable property which the consorts possess on the day when the marriage is solemnised, and also of all the movable property which they acquire during marriage, or which falls to them, during that period, by succession or by gift, if the donor or testator have not otherwise provided; (2) of all the fruits, revenues, interests, and arrears, of whatsoever nature they may be, which fall due or are received during the marriage, and arise from the property which belonged to the consorts at the time of their marriage, or from property which has accrued to them during marriage, by any title whatever; (3) of all the immovables they acquire during the marriage" (*t*).

Immovables belonging to either consort before marriage, or acquired during the marriage, "by succession or an equivalent title," do not fall into the community. They are called "*propres*" (*u*). Immovables acquired during the marriage otherwise than "by succession or an equivalent title" are called "joint acquests of the community" (*v*) or "*conquêts*."

The *biens meubles*, or personal property which compose the community, are corporeal (*les êtres physiques*) *quæ tangi possunt*, and incorporeal (*des êtres moraux*) *quæ in jure consistunt.*

Biens Meubles Corporels.—*Biens meubles corporels* are those *quæ loco moveri possunt;* or, in the language of the Code Civil, "qui peuvent

(*r*) Or by *titre onérenx*. See authorities collected in Fuzier-Herman, Rép. tit. Communauté Conjugale, ss. 61—64.

(*s*) Art. 1401.

(*t*) Civil Code, L.C., art. 1272.

(*u*) Art. 1275.

(*v*) Art. 1273.

se transporter d'un lieu à un autre, soit qu'ils se meuvent par eux-mêmes, comme les animaux; soit qu'ils ne puissent changer de place que par l'effet d'une force étrangère, comme les choses inanimées" (*w*).

Test of "Movable" or "Immovable."—Those things which would correspond with this definition, and if considered *per se*, are movable, may become immovable on account of their destination; whilst, on the other hand, things which so long as they are attached to and form part of immovable property are immovable, will, when separated from it, become movable. Again, although they may be detached from the immovable property, yet if they are preserved for the purpose of being again placed there, they will retain their quality of immovable (*x*). Neither the bulk nor value of the thing, but its connection with, and its being part of, or its permanent separation from, immovable property, form the criterion for classing it under the one species or the other (*y*).

Trees.—Fruit.—Crops.—Trees growing, and the fruits hanging on those trees, or any other crops on the ground, partake of the quality of the land, and are therefore real property (*z*). But young trees transplanted into a nursery ground, and kept there for the purpose of being sold, or the fruits or crops which have been gathered, are movable articles (*a*), whilst those articles which are kept on the farm for the purpose of, and as necessary to its cultivation, and not for sale, are real property in France, but apparently are movables by the law of Quebec (*b*). Animals, however, on the farm, although employed for the purposes of the farm, were under the *coutume* deemed personal property (*c*). But the Code Civil (*d*) declares them to be real property.

The law of Quebec regards them as personal. The Civil Code

(*w*) Art. 528. Civil Code, L.C., art. 384.

(*x*) Civil Code, L.C. 386. It is doubtful whether the materials of a building which has been entirely demolished, but which the owner intends to rebuild, retain their character of immovables. See Mignault, Droit Civil Canadien, vol. ii., p. 436.

(*y*) Pothier, Traité de la Com., ss. 27 *et seq.*; Toullier, liv. 3, tit. 5, c. 2, s. 94.

(*z*) Civil Code, L.C., art. 378.

(*a*) Pothier, *ibid.*, s. 34; Fuzier-Herman, *ad loc. cit.*, ss. 200 *et seq.*

(*b*) Cf. Civil Code, L.C., art. 379, with Civil Code, art. 524; and see Wyatt's Heirs *v.* Kennebec R. C. (1880), 6 Q. L. R. 213; Mignault, *op. cit.*, vol. ii., p. 414; Pothier, Traité de la Com., s. 40.

(*c*) *Ibid.*, s. 43.

(*d*) Art. 524.

of Lower Canada provides: "Movable things which a proprietor has placed on his real property for a permanency, or which he has incorporated therewith, are immovable by their destination so long as they remain there.

"Thus, within these restrictions, the following and other like objects are immovable: 1. Presses, boilers, stills, vats and tuns; 2. All utensils necessary for working forges, paper-mills and other manufactories; manure, and the straw and other substances intended for manure, are likewise immovable by destination" (*e*).

It has been held that in order to make movables immovable by destination the person incorporating them must be proprietor both of the movables and of the immovables. Consequently machinery sold subject to the condition that the property was not to pass until all instalments of the price had been paid could not so become immovable until the property had passed (*f*).

The enumeration is not limitative. The articles named are illustrations. So it has been held that the rolling stock of a railway is immovable by destination (*g*).

Articles in Dwellings, &c.—Articles attached for a permanency in a dwelling-house, or other building, by being fastened to it with nails, embedded in plaster, or which cannot be detached from it without breakage or without destroying or deteriorating that part of the property to which they are attached (*h*), or without which the part of the building in which they have been placed would be incomplete, are deemed part of the building, and therefore real property, if they have been put there by the owner of the house; but if they were put there by a tenant for life, or years, there is no ground for presuming that they were intended to remain there beyond his continuance or interest in the house. They are, in the latter case, personal (*i*). Articles which were attached to, and made part of the house, although they should be removed, will, if they are destined to be replaced there, continue to be part of it, and retain their quality of immovable; but if they had not previously formed part of the building, they will not, on account of

(*e*) Art. 379.

(*f*) La Banque d'Hochelaga *v.* Waterous Engine Works Co. (1897), 27 Can. S. C. R. 406.

(*g*) Wallbridge *v.* Farwell (1889), 18 Can. S. C. R. 1; Grand Trunk Railway *v.* Eastern Townships Bank (1865), 10 L. C. J. 11; Rhode Island Locomotive Works *v.* S. E. Railway Co. (1886), 31 L. C. J. 86.

(*h*) Civil Code, L.C., art. 380.

(*i*) Pothier, *ibid.*, ss. 47 *et seq.*

their destination alone, be immovables attached to it (*j*). The materials of a house which has fallen down, or been burnt, if they are preserved for the purpose of being used in rebuilding it, retain, according to the constitution of the *coutume*, the quality of the building, and are therefore immovable property; but if such intention has been abandoned, they are personal (*k*). The Civil Code of Lower Canada provides: "Things forming part of a building, wall or fence, and which are only temporarily separated from it, do not cease to be immovable so long as they are destined to be placed back again" (*l*). It is difficult to apply these words to the materials of a building which no longer exists (*m*). According to the rule adopted by the Code Civil and the Civil Code of Lower Canada, the materials arising from the demolition of an edifice, and those collected for the construction of a new one, are movable until they are employed by the artificer in building (*n*).

These are some of the leading distinctions between movable and immovable corporeal property. Their further consideration does not come within the province of this work (*o*).

Incorporeal Property, when Personal and Real.—The quality of incorporeal property, as personal or real, is determined by the quality of the property in, or to which, a right exists, or which is demandable or receivable by virtue of the contract or obligation, or which it is the object of the action to recover. If it be personal, the right, contract, obligation, or action will be personal. If it be real, the right, &c., will also be real (*p*).

When the debt or demand is a sum of money, or other movable property, it is movable. On the other hand, the demand, if it be of an inheritance, or some other immovable, against the person who is under an obligation to give it, is an immovable or real right (*p*). "Actio ad mobile consequendum est mobilis, ad immobile consequendum immobilis." In this sense is to be understood the rule, "Qui actionem habet ad rem reciperandam, ipsam rem habere videtur" (*q*). Thus, the vendor's demand against the purchaser of

(*j*) Civil Code, L.C., art. 386.
(*k*) Pothier, *ubi cit. supra*, s. 62.
(*l*) Civil Code, L.C., art. 380.
(*m*) See Mignault, Droit Civil Canadien, ii., p. 436.
(*n*) Art. 532; C.C. of L.C., art. 386.
(*o*) See Burge, vol. iv.
(*p*) Civil Code, L.C., art. 381; Pothier, Tr. de la Com., ss. 69 *et seq.*
(*q*) Dig. lib. 50, tit. de Reg. Juris, L. 17, l. 15; Civil Code, L.C., arts. 387, 381.

an estate for the purchase-money is a personal right; that of the purchaser against the vendor for the delivery of an estate is a real right.

Rights in Real or Immovable Property.—Rights in real or immovable property, as servitudes, rights of emphyteusis, &c., and in successions, partake of the quality and are deemed part of the property itself. They are therefore real rights, and are not admitted into the community (*r*).

Tenant's Lease.—The right of a tenant, in respect of the estate which he had taken on lease before the marriage, is movable, and, therefore, forms part of the community. The wife, or her heirs, may, on accepting the community, compel the lessor to leave them in the enjoyment of it, until the expiration of the term. The subject of the demand is not the estate, but its rents and profits (*s*).

Claims for Movables and Immovables.—An action may have for its object to recover movables and immovables. It is movable as to the one and immovable as to the other part of the demand (*t*).

Claims for Movables or Immovables.—When the creditor is entitled to demand one of two things, of which one is a movable and the other an immovable, and the debtor has the option of selecting the alternative, the quality of the creditor's right is suspended until the delivery takes place. If an immovable be delivered it will be excluded from the community; if, on the contrary, a movable be delivered it will form part of the community. If the creditor has a right only to one thing, but the debtor has the liberty of delivering another thing in its place, the quality of the right will be determined, not by that of the thing delivered by the debtor, but by that of the thing due to the creditor (*u*).

Debt Secured by Mortgage on Immovable Property.—A debt, notwithstanding it be secured by a mortgage on immovable property, is personal; for, although the mortgage gives the creditor *jus in re*, a right in immovable property, yet it is only accessory to, and therefore follows, the quality of the principal demand, which is personal, according to the rule, *accessorium sequitur principale* (*a*).

(*r*) See note (*p*), p. 486.

(*s*) Pothier, Traité de la Com., s. 71; Toullier, liv. 3, tit. 5, c. 2, s. 105.

(*t*) Pothier, *ibid.*, s. 73; Toullier, *ibid.*, s. 96; Baudry-Lacan., iii., s. 45 (1).

(*u*) Pothier, *ibid.*, ss. 74, 75; Toullier, *ibid.*, s. 163; Baudry-Lacan., *ad loc. cit.*; Larombière, Obligations, ed. 1885, on art. 1189, n. 12, on art. 1196, n. 3; and see Civil Code, L.C., arts. 1093 *et seq.*

(*a*) Pothier, *ibid.*, s. 76.

Quality of Debt alone to be Considered.—In determining whether incorporeal property be personal or real, regard is had to the quality only of the debt, not to the cause in which the debt originated. A sum of money which was due to one of the conjoints at the time of their marriage will be part of the community, notwithstanding it was the price of real property, which that conjoint had disposed of before the marriage. Lebrun had maintained a contrary opinion, and contended that the debt represented in some measure the estate, and that as the latter, if it had not been disposed of, would have been excluded from the community, so also ought the debt to be excluded (*b*). The correctness of his opinion has been controverted by his commentator, as well as by Renusson (*c*), Pothier (*d*), and Toullier (*e*), and their authority is confirmed by the *arrêt* to which they refer (*f*).

Rentes Constituées à Prix d'Argent.—*Les rentes constituées à prix d'argent* are perpetual annuities, constituted by the payment of a certain sum of money, and redeemable, at the will of the grantor, on his repayment to the grantee of the sum which he had received; but the grantee himself has no right to compel such redemption.

The *coutume* of Paris has in express terms declared these rents to be immovable, "Rentes constituées à prix d'argent, sont reputées immeubles jusqu'à ce qu'elles soient rachetées" (*g*).

Rentes Viagères.—It has been doubted whether *les rentes viagères*, that is, annuities granted for the life or lives of one or more persons, on the payment of a certain sum of money, without any right of redemption by the grantor, are to be considered immovable, under the *coutumes* of Paris, and other places, which declare perpetual rents immovable. The affirmative is maintained by Pothier and other authors, and is sanctioned by the authority of an *arrêt* of the Parliament of Paris, of August 4th, 1780 (*h*).

The arrears of such rents, which accrued before the marriage,

(*b*) Lebrun, Tr. de la Com., liv. 1, c. 5, s. 1, dist. 1, n. 16.

(*c*) Traité de Com., part 1, c. 3, n. 15.

(*d*) Pothier, Traité de la Com., s. 77, liv. 3, tit. 5, c. 2.

(*e*) Du Régime en Com., s. 95; Code Civil, arts. 526, 529. See also Fuzier-Herman, Rép., tit. Communauté Conjugale, ss. 72, 75; see *ibid.*, s. 76, as to the case of an immovable sold between the marriage contract and the marriage.

(*f*) See Pothier, *ad loc. cit.*, s. 77.

(*g*) Duplessis, art. 94, Tr. de Dr. Incorp., liv. 2, pp. 32, 33.

(*h*) Pothier, Traité de la Com., s. 90; Merlin, Rép., tit. Rente Viagère, s. 10.

do not retain the quality of immovable, but form part of the community (*i*).

The Civil Code of Lower Canada has changed the old law as to the legal character of these rents.

It provides: "Constituted rents and all other perpetual or life-rents are also movable by determination of law; saving those resulting from emphyteusis, which are immovable" (*a*).

The Code Civil has declared those rents to be movable property. "Sont aussi meubles par la détermination de la loi, les rentes perpétuelles ou viagères, soit sur l'état, soit sur des particuliers" (*b*).

A *rente viagère* is excluded from the community if it has been created under a condition of inalienability, for in that case its passing into the community would involve a partial alienation (*c*).

Reversibility.—A *rente viagère* constituted in favour of the spouses by means of money belonging to the community and without a condition of reversibility in favour of the survivor passes to the community (*d*).

The effect of a clause of reversibility has given rise to controversy. The prevalent view, however, is that such a clause is valid, but that the surviving spouse owes a recompense to the community for the advantage derived from it (*e*).

Offices.—Offices, which were formerly the subjects of sale and transmission, and rights of presentation, were under the *coutume* immovable (*f*). Such sales having been suppressed, this species of property is not recognised by the Code or by the law of Quebec. But in France by the law of April 28th, 1816, certain ministerial officers are empowered to present, for approbation, their successors, provided the latter possess the legal qualifications for their office. The effect of this law is to render the presentations to those offices the subjects of sale and transmission (*g*). These are deemed

(*i*) Pothier, Traité de la Com., s. 90; Arrêt, August 4th, 1729; Denisart, tit. Communauté, n. 84.

(*a*) Art. 388.

(*b*) Art. 529.

(*c*) Fuzier-Herman, Rép., *ad loc. cit.*, s. 99.

(*d*) Pothier, Constitution de Rente, s. 242; Troplong, Du Contr. de Mar., i., s. 407; Guillouard, i., s. 375; Aubry et Rau, v., pp. 283, 284, s. 507, and n. 9; Laurent, D. C. F., xxi., p. 258, s. 218.

(*e*) Lapanne *v.* Lapanne (1864), C. Paris, Sirey, 1865, ii. 4; Barberet *v.* Barberet (1881), C. Lyon, Sirey, 1884, ii. 146; and cf. Leyraud *v.* Meunier (1851), Dalloz, 1852, i. 25; Enregistrement *v.* Pellerin (1873), Sirey, 1873, i. 339.

(*f*) Art. 95.

(*g*) Burge, 1st ed., i., 343, citing

personal, because they are considered subjects of property only in respect of the sums of money for which the presentations are sold (*h*).

The community includes (so far as the venal value of the office is concerned, the title itself is *propre*) a ministerial office held by the husband at the time of the marriage, or acquired by him in the course of it (*i*).

Fruits, Natural and Civil.—Fruits, the natural production of the soil, although they are produced from property which is excluded from the community, and those which are termed *civiles*, as interest, arrears of rent, &c., due or received during the marriage, are, under the Codes, part of the community (*j*).

Literary, Dramatic, and Industrial Property.—The literary property of authors is personal property and a subject of the community (*k*).

By virtue of a law of July 14th, 1866 (*l*), when an author was married under the *régime* of community the surviving spouse has, as a *commun en biens*, a moiety of the full property in the copyright, and the enjoyment of the other moiety under a special successional right created by the enactment. Unpublished manuscripts, found among the papers of the author on the dissolution of the community, do not belong to the community (*m*). The property in dramas, paintings, sculpture, drawings, engravings, musical compositions and inventions belong to the community, on the same principle and subject to the same conditions (*n*).

Exceptions to Rule by which Movables of Conjoint fall under Community.—Under the Codes there are certain exceptions to the general rule, by which the movables of either conjoint form part of the community.

Products of Separate Real Property, which are not Fructus.—Those produced from the separate real property of one of the conjoints,

Arrêt, June 20th, 1820; Sirey, tom. 20, part 1, p. 43.

(*h*) Toullier, liv. 3, tit. 5, c. 2, s. 112.

(*i*) Dupare *v.* Naude (1853), Sirey, 1853, i. 168; La Lyonnaise Cie. *v.* Reyel (1880), Sirey, 1881, i. 49; Fuzier-Herman, Rép., tit. Communauté Conjugale, ss. 190–199.

(*j*) Cout. art. 92; Code Civil, art. 1401; Fuzier-Herman, *ad loc. cit.*, ss. 200 *et seq.*; Civil Code, L.C., art. 1272.

(*k*) Toullier, *ibid.*, s. 116; Aubry et Rau, v., p. 284 and n. 11; Guillouard, i., s. 382. See authorities summarised in Fuzier-Herman, *ad loc. cit.*, s. 175 (1880), Sirey, 1881, i. 25, *per contra*.

(*l*) Lois Annot. 1866, p. 53.

(*m*) Fuzier-Herman, *ad loc. cit.*, ss. 178, 180.

(*n*) *Ibid.*, s. 181; Guillouard, i., s. 382.

but which are not *fructus*, do not enter into the community. Thus, if the husband, after the marriage, should fell such trees, standing on the exclusive property of the wife, as had not been planted there for the purpose of producing an annual or periodical return, and, therefore, are not fruits, neither the trees nor their value will form part of the community, but remain the exclusive property of the wife, who may, on the dissolution of the community, recover them, or the price, from the estate of her deceased husband. But trees of the same description, if they had been felled before the marriage, would have formed part of the community (*o*).

Fellings.—Products of Quarries and Mines.—The products of quarries and mines, opened before the marriage, were regarded as the fruits of the property, and part of the community, but they were excluded from the community if they had been opened *pendant le mariage* (*p*).

The Codes of France and of Lower Canada adopt a similar rule as regards both fellings (*coupes de bois*) and the products of mines and quarries, but reserve a recompense or indemnity to the conjoint, to whom it may be due, where fellings, which might have been made during a community, have not been made, or the mines and quarries have only been opened during the marriage (*q*). The recompense consists, in the latter case, of the net produce of the mines or quarries which has been used in the community, but in which the latter has no property, and, therefore, its amount is to be restored to the owner of the estate on which they had been opened. Indemnity may be due to the other conjoint. He may have incurred very considerable expense in preparing to work the mines, and just as he was about to commence, or shortly afterwards, the other conjoint dies, and her heirs renounce the community. In such a case, the Code entitles the husband to indemnity for *les depenses utiles*, which he had incurred (*r*).

(*o*) Pothier, Traité de la Com., s. 96; Code, art. 1403; and cf. arts. 590—594; Guillouard, Contrat de Mariage, 3rd ed., i., ss. 410—412; Laurent, xxi., s. 254; Fuzier-Herman, *ad loc. cit.*, ss. 232—241. Cf. C. C. of L.C., arts. 455, 1274.

(*p*) Pothier, *ibid.*, s. 97; C. C. of L.C., art. 1274.

(*q*) Art. 1403, and cf. art. 589; C. C. of L.C., art. 1274. The two Codes differ slightly in expression, but the meaning is the same. See Comm. Rep., ii., p. 206; Mignault, Droit Civil Canadien, vi., p. 162; Toullier, liv. 3, tit. 5, c. 2, s. 128; Troplong, Du Contr. de Mar., i., ss. 560 *et seq.*; Aubry et Rau, 4th ed., vol. v., s. 507, p. 291; Guillouard, i., s. 560.

(*r*) Toullier, liv. 3, tit. 5, c. 2, s. 128. As to the construction of art. 1403,

Treasure.—Treasure, which is found on the separate property of one of the conjoints by its owner, and not by a stranger, furnishes another example of this exception. Under the *coutume* it would have been divided into three parts, one of which would belong to the owner, *jure soli*, the other to the person who found it, and the other to *le Seigneur haut justicier*. In such a case, the two of these parts which might belong to the conjoint in the two latter characters, would be part of the community, but the third, which belonged to him *jure soli*, would be immovable, and excluded from it (*s*).

Under the Codes of France and of Lower Canada, if treasure be found by the owner of the estate the whole belongs to him *jure soli* (*t*), and therefore, in one view, the whole is excluded from the community (*u*). According to another, it is a movable acquest, although not a fruit, and falls according to the general rule into the community (*x*). In a third view half of the treasure belongs to the spouse on whose property it is found, *jure soli*, the other half falls under the community *jure inventionis* (*y*). The second view is supported by Baudry-Lacantinerie. When treasure is found by a third person the moiety which he retains is part of the community (*a*).

Substituted Movables.—Movables, substituted during the community for some property, exclusively belonging to either conjoint, and not included in the community, are excluded from it. Thus, the price of an estate, the exclusive property of one of the conjoints, sold during the community, although it remains a movable of that conjoint, is, as regards the community, immovable, and excluded from it. This exception is adopted by the Codes (*b*). So completely is the price considered the substitution of the property that every question respecting its actual value is excluded (*b*).

see also Guillouard, i., ss. 408, 409; Aubry et Rau, v., p. 291, s. 507; Dornier *v.* Dornier (1863), C. Besançon, Dalloz, 1863, ii. 49; Mélines *v.* Mélines (1881), Sirey, 1882, i. 79; Rouillat *v.* Rouillat (1866), C. Lyon, Sirey, 1867, ii. 6.

(*s*) Pothier, *ibid.*, s. 98.

(*t*) Code Civil, arts. 598, 716; C. C. of L.C., arts. 586, 161.

(*u*) Pothier, *ibid.*, 98; Aubry et Rau., v., s. 507, n. 28; Toullier, *ibid.*, ss. 129 *et seq.*

(*x*) Bugnet sur Pothier, vii., p. 93 [n. 2 or n. 93]; Laurent, xxi., s. 228; Baudry-Lacantinerie, Précis de Droit Civil, ii., n. 15; Baudry-Lacantinerie, Courtois et Surville, Contrat de Mariage, 2nd ed., i., n. 285; Merlin, Rep. tit. Communauté de biens, ss. 2, 4; Demolombe, xiii., s. 44.

(*y*) Fuzier-Herman, Rép., tit. Communauté Conjugale, s. 186, citing the authorities.

(*a*) Toullier, liv. 3, tit. 5, c. 2, p. 129.

(*b*) Pothier, *ibid.*, ss. 99, 100. Code Civil, arts. 1433, 1436; Aubry et Rau,

Indemnity Paid by Insurance Company.—The indemnity paid by an insurance company for the loss by fire of an immovable *propre* of one spouse remains *propre* (*c*), even if the premiums were paid out of the money of the community (*d*).

Money Due pour Retour.—A sum of money, which, upon the division of a succession consisting only of immovable property, may be due to one of the conjoints *pour retour*, to make his share equal to the shares of his co-heirs, is an immovable, because it is substituted for his right in that which was immovable (*e*).

But when the succession consists of movables and immovables, and the former may so greatly exceed the latter, that the conjoint, as his lot or share, receives nothing but movable property, the share of such conjoint will be movable property (*f*). The principle on which this rule proceeds is thus recognised by the French Code: "Chaque cohéritier est censé avoir succédé seul et immédiatement à tous les effets compris dans son lot, ou à lui échus sur licitation, et n'avoir jamais eu la propriété des autres effets de la succession" (*g*).

Minors.—Old French Law.—The old *arrêts* of France established another exception in the case of minors. On the marriage of a minor, *de suo*, whose estate consisted solely of movables, one-third only of those movables were allowed to form part of the community (*h*). This latter exception is not retained under the Codes of France and Lower Canada (*i*).

Money, Given or Bequeathed.—Money or other movables which have been given or bequeathed to either conjoint, before, or *durant le mariage*, did not compose part of the community if the donor, or

v., p. 288, s. 507, n. 23; Guillouard, i., s. 395; C. C. of L.C., arts. 1303, 1307.

(*c*) Pascaud *v.* Gendreau (1857), C. Bordeaux, Sirey, 1857, ii. 534.

(*d*) Baudry - Lacantinerie, *ubi cit. supra*, iii., s. 795, b; Guillouard, i., s. 399. *Aliter*, if the immovable were a *conquêt* of the community (1856), C. Nancy, Sirey, 1856, ii. 617.

(*e*) Pothier, Traité de la Com., s. 100; Toullier, liv. 3, tit. 5, c. 2, ss. 118, 119; Cass. December 11th, 1850, D. P. 51, i. 287.

(*f*) Burge, 1st ed., i., 346; Pothier, *ibid.*, ss. 100, 101; Toullier, *ibid.*; Denisart, tit. Commun.

(*g*) Art. 883. And see C. C. of L.C., art. 746; (1847), C. Bordeaux, Sirey, 1847, ii. 414.

(*h*) On this subject, see Fuzier-Herman, Rép. tit. Contrat de Mariage, s. 373; Pothier, *ubi cit. supra*, n. 103.

(*i*) Louet, Lettre M., n. 20; Pothier, *ibid.*, s. 103; Toullier, *ibid.*, s. 117; Code Civil, art. 1398; and see Fuzier-Herman, Code Civ. Ann., under art. 1398; C. C. of L.C., art. 1267.

testator, had given them under a condition express or clearly implied (*j*), that they should be the separate property of the donee or legatee. "Unicuique licet quem voluerit modum liberalitati suæ apponere" (*k*).

The Codes of France and Lower Canada have adopted the same distinction (*l*).

The Code Civil admits "tous les immeubles qui sont acquis pendant le mariage" (*m*), and expressly excludes "Les immeubles que les époux possèdent au jour de la célébration du mariage, ou qui leur échoient pendant son cours à titre de succession" (*n*), or donation, unless the donation contains an express clause to the contrary (*o*).

The Code of Lower Canada is identical except that it excludes immovables which fall to the spouses by succession or an equivalent title (*p*).

But this is merely a difference of language. Under "succession" the French law includes gifts and legacies (*q*). Indeed the word "succession" in the French Code has a more extended meaning than the words "succession or an equivalent title" in the Code of Lower Canada. For the latter Code explains these words thus: "Gifts by contract of marriage, those which are in contemplation of death included, gifts during marriage and legacies, made by ascendants of one of the consorts, either to the consort entitled to inherit from them or to the other, are deemed, as regards immovables, unless there is an express declaration to the contrary, to be made to the consort entitled to inherit, and are his private property, as being acquired under a title equivalent to succession."

The same rule applies even when the gift or the legacy, in its terms, is made to both consorts jointly. All gifts and legacies thus made to the consorts jointly, or to one of them, by others than ascendants, come under the contrary rule, and fall into the community unless they have been expressly included (*r*).

(*j*) (1879), Sirey, 1880, i. 337; *contra*, Laurent, xxi., p. 318, s. 276.

(*k*) Pothier, *ibid.*, s. 102.

(*l*) Code Civil, art. 1401; Troplong, Du Contr. de Mar., i., s. 442; Aubry et Rau, v., p. 287, n. 20; Guillouard, i., s. 400. C. C. of L.C., art. 1272.

(*m*) Art. 1491; Troplong, i., s. 491; Aubry et Rau, v., p. 293; Guillouard, i., s. 421.

(*n*) Art. 1404.

(*o*) Art. 1405.

(*p*) Art. 1275.

(*q*) See Baudry-Lacantinerie, Courtois et Surville, *op. cit.* i., n. 318.

(*r*) Art. 1276.

Whereas, under the French Code, gifts of immovables do not fall into the community, whether the donor be an ascendant of one of the consorts or not, unless it is so provided by the donor (*s*).

Upon this point the law of Quebec has retained the rule of the Coutume de Paris, while the French law has departed from it (*t*). An important practical consequence of the difference is that in Quebec a legacy of an immovable by an ascendant of one of the consorts, in favour of the two consorts jointly, lapses if the consort through whom the relationship exists predeceases the testator (*u*); whereas if the legacy had been by a stranger, and if one of the consorts had predeceased the testator, his or her share would pass by accretion to the survivor (*x*).

By art. 1195 of the Civil Code of St. Lucia: "The immovables which the consorts possess on the day when the marriage is solemnised, or which fall to them during the continuance of the marriage by succession or an equivalent title, do not enter into the community."

Biens immeubles (immovable or real property), as the subjects of succession, were, in respect of their quality, distinguished under the *coutumes* as *propres* and *acquêts*.

Propres.—Generally.—The term *propres* was applied to such immovables as devolved on the party by the title of succession, either in the direct, or collateral line, or by gift or bequest, from the person to whom the donee or legatee would succeed in the direct line. It corresponds with the terms *avita*, *antiqua*, *patrimonialia*, which are to be found in other Codes.

Acquêts.—Generally.—*Biens acquêts* are those which the party acquires by his industry, skill, or by purchase, according to the ordinary signification of that term, or by gift from a person to whom he could succeed only in the collateral line.

The terms *propres* and *conquêts*, or *acquêts*, are still in common use in the Province of Quebec.

The further consideration of this distinction does not fall within the province of this work (*y*).

In Relation to the Community.—Propres.—Conquêts.—Acquêts.—In

(*s*) Code Civil, art. 1405.

(*t*) See Com. Rep., ii., p. 207.

(*u*) Dubois *v.* Boucher (1883), 3 Dor. Q. B. 241; see St. Ann's Mutual Building Society *v.* Watson (1882), M. L. R. 4 Q. B. 328.

(*x*) Civil Code, L.C., art. 868; see Dupuy *v.* Surprenant (1860), 4 L. C. J. 128; Mignault, vol. 6, p. 156.

(*y*) See Burge, vol. iv.

relation to the community, the term *propres* is used in contradistinction to that of *conquêts*, or *acquêts*. The former is applied to property which is excluded from the community; the latter is applied to property which is the subject of the community. The *biens propres* include not only those which are *propres en matière de succession*, but those which belonged to either conjoint before the marriage, or had been constituted *propres* by the stipulation of the parties, or by the terms in which they had been given, or bequeathed to either of the conjoints.

The Code Civil does not, in regard to successions, retain the distinction between *biens propres* and *biens acquêts*. It seems, indeed, to have avoided the use of this term, even to designate the *biens* excluded from the community, for it describes them as *biens* which *n'entrent point en communauté*.

The Code of Lower Canada also makes no difference as to succession between *propres* and *acquêts*. But it does not avoid the term *propres* as convenient to express property excluded from the community (*z*). The English version translates this "private property."

The terms *acquêts* and *conquêts* are of the same import, in respect of the nature of the property, and might be indiscriminately used to distinguish that which is admitted into the community from that which is excluded. But the term *conquêt* is more correctly applied to property acquired *en commun*, or *le produit d'une collaboration commune*. Both terms are used indiscriminately in the Code Civil (*a*).

The Code of Lower Canada in the French version speaks of *conquêts*. In the English version it is "joint acquests" (*b*).

Property presumed to be Acquêt.—It was a maxim under the several *coutumes*, except that of Normandy (*c*), that all property was presumed to be *acquêt* unless it was proved to be *propre*. The burden of that proof was incumbent on the party who alleged that the property was *propre*. "In dubio, prædia non præsumuntur antiqua, sed de novo conquestu" (*d*).

The Code Civil has adopted the same presumption. "Tout

(*z*) Art. 1276.
(*a*) Arts. 1401, 1408.
(*b*) Arts. 1273, 1279.
(*c*) Art. 46, du Regl. de 1666.
(*d*) Burge, 1st ed., i., 348, citing Dumoulin, sur la Cout. de Paris, s. 13, tit. 1, gl. 6, n. 3; Merlin, Rép. tit. Propre, s. 19, n. 1.

immeuble est réputé acquêt de communauté, s'il n'est prouvé que l'un des époux en avait la propriété ou possession légale antérieurement au mariage, ou qu'il lui est échu depuis à titre de succession ou donation" (*e*).

The law of Quebec is the same (*f*).

The *coutume* of Normandy, adopting a contrary presumption, considered all property to be *propre* which was not proved to be *acquêt* (*g*), and this presumption was followed by another, namely, that it should be deemed to be *propre ex parte paternâ*, unless it was proved to have been derived *ex parte maternâ* (*h*).

Rents and Offices.—Under the *coutume* of Paris, whatever would be *propre en matière de succession*, is *propre* of the community. Rents and offices, which are declared by a *coutume* to be immovable, are *biens propres*, as subjects of succession, in the same manner as other real property. But, in order to be *propre*, when they devolve on the conjoint, they must have been *propre* in his ancestor. If rents were movables, according to the law of the ancestor's domicil, and, consequently, were not possessed by him as *propres*, the conjoint, although domiciled under a *coutume* which regards them as immovable, will not succeed to them as immovable; and they will, therefore, be *acquêts faits pendant le mariage*, and not excluded from the community (*i*).

In Quebec all rents are movable except those resulting from emphyteusis (*k*).

In order that property should be *propre* in the person of the heir who succeeds to it, it is necessary that it should be possessed as an immovable by the person to whom he succeeds; but it is not necessary that it should have been possessed by the latter as *propre*, for it is a maxim that property which was an *acquêt* of the deceased becomes the *propre* of his heir when it devolves on him (*i*).

In Quebec there is now no distinction between a *propre* and an *acquêt* as regards succession.

Immovable Property Devolving on Conjoint during Marriage by way of Succession.—Immovable property, corporeal or incorporeal, which devolves on the conjoints *pendant le cours du mariage* by the title

(*e*) Art. 1402.
(*f*) Art. 1273.
(*g*) Burge, 1st ed., i. 349; Art. 102, du Regl. de 1666.
(*h*) Art. 103, du Regl. de 1666.
(*i*) Pothier, Traité de la Com., ss. 107, 111.
(*k*) C. C. of L.C., art. 388.

of succession, are, under the Codes of France and of Lower Canada, excluded from the community (*l*).

The possession of the immovable by the ancestor, at the time of his death, is sufficient to exclude it from the community, and proof that he was the owner of it is not necessary (*m*).

Property Relinquished to Conjoint.—Property relinquished by the father, mother, or other ancestor to the conjoint, either to satisfy a debt which the former owes to the latter, or on condition that he pays other debts of the donor, is not a *conquêt*, either under the *coutume*, or Code. Such a transaction is considered a family arrangement and not a sale, and the community is reimbursed any sums drawn from it in payment of such debts (*n*).

"L'immeuble abandonné ou cédé par père, mère, ou autre ascendant, à l'un des deux époux, soit pour le remplir de ce qu'il lui doit, soit à la charge de payer les dettes du donateur à des étrangers, n'entre point en communauté, sauf récompense, ou indemnité " (*o*).

The law of Quebec is the same (*p*).

Under the Code of St. Lucia, as regards immovables abandoned or ceded to one of the consorts by any ascendant of the consort, either in satisfaction of debts or subject to the payment of the debts due by the donor to strangers, these do not fall into the community (*q*).

The share of the succession which the co-heir obtains by judgment, licitation, or private adjustment with his co-heir, is *propre*, and excluded from the community; for the share, no less than the entire inheritance, is acquired *jure familiæ et titulo successionis* (*r*).

(*l*) Cout., art. 220; Pothier, Traité de la Com., s. 166; Code Civil, art. 1404. If the marriage contract contains a condition of community, an immovable acquired by one spouse subsequently to such contract, but before the celebration of the marriage, will enter into the community, unless the acquisition has been made in execution of some article of marriage, in which case it is regulated according to the agreement: art. 1404; C. C. of L.C., art. 1275, *infra*, p. 505; Toullier, liv. 3, tit. 5, c. 2, s. 134.

(*m*) Pothier, *ibid.*, s. 113.

(*n*) Pothier, *ibid.*, s. 139; Code Civil, art. 1406; Toullier, liv. 3, tit. 5, c. 2, s. 143.

(*o*) Art. 1406; Fuzier-Herman, Rép. tit. Communauté Conjugale, arts. 422—434.

(*p*) C. C. of L.C., art. 1277.

(*q*) Art. 1197.

(*r*) C. C. of L.C., art. 1279; Toullier, *ibid.*, s. 156; Pothier, *ibid.*, s. 140.

Immovables of which One Spouse is Co-proprietor par indivis.—"L'acquisition faite pendant le mariage, à titre de licitation ou autrement, de portion d'un immeuble dont l'un des époux était propriétaire par indivis, ne forme point un *conquêt*, sauf à indemniser la communauté de la somme qu'elle a fournie pour cette acquisition" (*s*).

The same effect is produced by any other act which operates as a severance of the joint interest of the co-heirs. A sale to the husband by his co-heir of the undivided share of the latter in a succession is regarded not as an actual sale but as a severance of the joint interest. The whole becomes *propre*, and the community is reimbursed the sum taken from it in making the purchase (*t*).

This article only receives its application when the effect of the acquisition is to bring the indivision to an end (*u*).

It seems, according to the opinion of Pothier, that a purchase by the husband, even in his own name, of the share of his wife's co-heir, or in his own name and that of his wife, is deemed to have been made by him on her account, and thus the whole estate becomes *propre*, subject to the reimbursement to the community of the price of the share purchased (*x*).

The Code Civil declares that where the husband shall become alone and in his own proper name a purchaser, or highest bidder, for a portion or the entirety of an immovable belonging in co-parcenary to his wife, the latter at the dissolution of the community has the election either to abandon the object to the community, which thereupon becomes a debtor to the wife for the price of the portion which belonged to her, or to withdraw the immovable, reimbursing to the community the price of its acquisition (*y*).

The Code of Lower Canada has an identical provision (*z*).

Generally the provisions of the Civil Code of St. Lucia are the same as those of Quebec (*a*).

(*s*) Code Civil, art. 1408; Fuzier-Herman, *ad loc. cit.*, ss. 598, 600.

(*t*) C. C. of L.C., art. 1279; Pothier, Traité de la Com., s. 151.

(*u*) (1888) Riom, Sirey, 1891, 2, 85; Dalloz, 1890, 2, 324.

(*x*) Pothier, *ibid.*, ss. 151, 152, 153.

(*y*) Art. 1408; Fuzier-Herman, Rép. tit. Communauté Conjugale, ss. 598, 644. This article does not apply to cases where the spouses are married under a *régime* other than that of community, *e.g.*, the *régime sans communauté*: Enregistrement *v.* Prunet (1894), Trib. Toulouse, Sirey, 1896, 2, 53

(*z*) Art. 1279.

(*a*) See art. 1199.

Donations inter vivos.—The *coutume* and the law of Quebec exclude immovables which are the subject of donations *inter vivos*, or of legacies made *pendant le mariage*, in favour of a conjoint who is heir in the direct line to the donor or testator, or, although made by a stranger, if they be expressly given as *propres de la communauté* (*b*).

It is, however, competent for the ancestor to express in the donation that it shall be part of the community (*c*).

Property, which by the marriage contract is given to either of the conjoints, is the *propre* of that conjoint, and excluded from the community; and this rule prevails when it is made in favour of both the conjoints, for each will have a moiety as *propre*. Even although it should be expressed in the contract that the donation was made *aux futurs époux*, yet if one of them was the descendant it will be considered that the whole property is *propre*, and that he had used the expression *aux futurs époux* with reference to their enjoyment, and not to their title in it (*d*). But this presumption is carried further; for if the donation made by the wife's father is expressed to be in favour of the marriage *aux futurs époux* without any mention of the wife, yet it will be presumed to have been made in favour of the wife alone, and that the husband was a party to it, not in his own individual character but in his quality as husband, by which he was enabled to accept what might be given to the wife, *in dotem* (*e*).

If a donation of immovable property by the father to his daughter and son-in-law expressed that the property comprised in it is to belong to each in moieties, it is considered that the daughter's moiety only will be *propre*, but that of the son-in-law will be *conquêt*, and form part of the community (*f*).

It will be perceived that, under the *coutume* and the law of Quebec, a gift of immovable property during the marriage to one of the conjoints is an *acquêt*, unless it is expressed by the donor to be *propre* to the donee or is made by an ascendant (*g*), but that

(*b*) Cout., art. 246; C. C. of L.C., art. 1276.

(*c*) *Ibid.*; Pothier, Traité de la Com., s. 172.

(*d*) C. C. of L.C., art. 1276; see St. Ann's Mutual Building Society *v.* Watson (1882), M. L. R., 4 Q. B. 328; Pothier, *ibid.*, s. 170; Toullier, liv. 3, c. 5, tit. 2, s. 136.

(*e*) Pothier, *ibid.*, s. 170; Toullier, liv. 3, c. 5, tit. 2, ss. 137, 139, 140.

(*f*) Pothier, *ibid.*, s. 173; C. C. of L.C., art. 1276.

(*g*) Cout., art. 246.

under the Code Civil it is *propre*, unless it be expressed by the donor that it shall be part of the community (*h*).

Property must be Acquired during the Marriage.—The *coutume* requires that the *conquêts* should be *faits durant et constant le mariage*. The Codes of France and of Lower Canada exclude from the community immovables which the conjoint possessed on the day of the marriage. Property which is acquired *durant le mariage* will be excluded if the right, title, or cause by which it was acquired had its existence before the marriage. Estates, therefore, which revert to their former owner, *jure retractus*, or in consequence of a former sale having been rescinded, or which were purchased before, but possession not delivered until after the marriage, or to which there was an inchoate, imperfect, or contingent right before the marriage, are *propres de la communauté*, and excluded. The various instances illustrating this rule, which were cited in the preceding chapter on the Roman-Dutch law (*i*), are applicable to the community under the *coutume* and the Codes.

Ratification after Marriage of previous Sale.—The ratification after the marriage of a previous sale would, under the *coutume*, render the property *propre* in all those cases in which the sale itself was not an absolute nullity. The sale of an estate belonging to a minor, or to a person whose agent was not duly authorised to sell, admits of a ratification rendering it valid *ab initio*. On the other hand, the sale by a married woman of her estate does not admit of such a ratification, and therefore, if she again convey it to the former purchaser on her becoming a widow, the latter act is not a confirmation or ratification, but a new sale.

In determining whether a compromise (*transactio*) respecting a property gives it the quality of *propre*, the commentators on the *coutume* adopt distinctions similar to those which are stated in the preceding chapter on Roman-Dutch law (*k*).

Under the Codes Possession on the Day of the Marriage is the Test whether an Immovable is Propre.—Neither these, nor the distinctions to which the ratification of voidable sales was subject under the *coutume*, can arise under the Codes of France (and Belgium) and of Lower Canada which have established a new principle, and made possession by the conjoint on the day of

(*h*) Art. 1405.
(*i*) Chapter IX., pp. 399, 407, 409—415.
(*k*) *Ante*, p. 413.

the marriage the test for determining whether the immovable be *propre* (*l*).

Property, notwithstanding it has been acquired *pendant le mariage*, will be *propre* in regard to the community, and excluded from it, when it has been acquired in the place and in substitution of that which was *propre*. This exception is founded on the doctrine of subrogation.

The most simple species of subrogation is the exchange, *pendant le mariage*, of an estate which was the *propre* of one of the conjoints. The estate received in exchange is *propre*, and excluded from the community. It takes place in respect of the entire property notwithstanding the estate received might greatly exceed in value that which was given in exchange, and the community is, in such case, repaid the sum which might have been supplied from it in payment of the difference (*a*).

Immovables Received a Titre d'échange.—When the conjoint receives in exchange an estate of greater value than that which he had given and a sum of money was paid as an equivalent for the difference, it was the opinion of Pothier and other jurists, that the estate received ought, to the extent of the sum paid out of the community to be deemed an *acquêt* (*a*).

There is no ground for this distinction under the Code Civil, which has established, as a general rule, that "l'immeuble acquis pendant le mariage à titre d'échange contre l'immeuble appartenant à l'un des deux époux n'entre point en communauté, et est subrogé au lieu et place de celui qui a été aliéné; sauf la récompense s'il y a soulte" (*b*).

The law of Quebec is the same (*c*).

Art. 1198 of the St. Lucia Code contains a similar provision as to immovables acquired during marriage in exchange for others that belonged to one of the consorts, which are substituted for the immovables thus alienated.

Purchase of Immovable by means of Movables.—The subrogation is not confined to the exchange of one immovable for another immov-

(*l*) Arts. 1402, 1404; C. C. of Low. Can., art. 1275.

(*a*) Pothier, Traité de la Com., s. 197; Argent., art. 418, gl. 2, n. 3; Lebrun, liv. 3, c. 2, s. 1; Dupless., pp. 339, 340.

(*b*) Art. 1407; Fuzier-Herman, *ad loc. cit.*, ss. 435 *et seq.*; Cod. Civ. Ann. under art. 1407.

(*c*) Art. 1278.

able. Thus, if the purchase, *pendant le mariage*, of an immovable, be accompanied with a declaration that it is made by means of movables which were *propres* of the community, and belonged exclusively to the purchaser, the immovable thus purchased will also be *propre*. If, however, the property purchased greatly exceed the amount of the money which was *propre*, the property will be an *acquêt* as to the excess; but when the difference is inconsiderable, the conjoint who purchases will be a debtor to the community for the difference, and the entire property will be excluded from the community (*d*).

If the estate which the husband acquires *pendant le mariage* be in the stead of that which was the *propre* of the wife, not only must it be expressed to have been so acquired, but she must consent, either at the time of the purchase, or at any time subsequently, before the dissolution of the community, that such substitution shall take place (*e*).

Price of Immovable Propre Sold during the Marriage.—The price received for an immovable, the *propre* of one of the conjoints sold *pendant le mariage*, will so far retain the character of *propre*, that if it be outstanding at the dissolution of the community, it will belong exclusively to the conjoint, and if it has been employed in the community it must be first deducted (*e*).

This rule is laid down in art. 1433 of the Code (*f*).

The law of Quebec is the same (*g*).

By the law of St. Lucia, where an immovable or other object belonging exclusively to one of the consorts is sold and the price of it is paid into the community, such consort has a right to compensation (*h*).

Fructus Naturales not gathered during the Community.—It has been already stated that the *fructus naturales*, *industriales*, and *civiles*, received or accrued during the community form part of it.

(*d*) Pothier, Traité de la Com., s. 197; C. C. of L.C., art. 1357. See Mignault, Droit Civil Can., vol. 6, p. 239.

(*e*) C. C., art. 1435; C. C. of L.C., art. 1306; Pothier, *ibid.*, s. 199.

(*f*) The community must in all cases indemnify the patrimony of the spouse to the detriment of which it has made a profit contrary to the provisions of the Code: Fuzier-Herman, Code Civ. Ann., under art. 1433, n. 2; and see n. 1 and authorities there cited, as to the theory of recompense between the community and the patrimonies of the respective spouses.

(*g*) C. C. of L.C., art. 1303.

(*h*) Art. 1221.

Those which have not been gathered during the community belong, not to the community, but to the conjoint who is the owner of the estate on which they are still standing or hanging. Such is the law established by the *coutume*. "Les fruits des heritages propres, pendans par les racines au tems du trépas de l'un des conjoints par mariage, appartiennent à celui auquel advient ledit heritage, à la charge de payer la moitié des labours et semences" (*i*).

The Code Civil also treats such fruits, until they are separated from the soil on which they are growing, as part of the soil. They are, therefore, immovable, and excluded from the community (*j*).

The law of Quebec is the same (*k*).

The *coutume* requires that the owner of the estate, who receives, on the dissolution of the community, for his own exclusive benefit, the crops, &c., on the ground, should reimburse the community the expense incurred in producing them. In that case he only pays, in effect, a moiety. If it be incurred on the wife's estate and she renounces the community, she must pay to the heir of the husband the whole expense (*l*).

If it be the husband's estate on which it has been incurred, and the wife or her heirs renounce the community, there is not recompense due by his heirs to the wife or her heirs (*l*).

Fructus Civiles.—Of the *fructus civiles*, those only fall into the community which accrue during its continuance. Those which accrued before the marriage become part of the community, not as fruits, but as movables. Those only which do not accrue until after the dissolution of the community belong to the owner of the estate which has produced them. "Fructus civiles tunc nasci intelliguntur, quum incipiunt deberi."

The different species of *fructus civiles* gave rise to distinctions respecting the period at which they might be considered to have accrued.

Rents of Country Estates.—Rents of estates in the country, which are payable in kind, are not due until the crops have been gathered. If the dissolution of the community take place before the harvest, the whole rent belongs to the owner of the estate; if it take place after the harvest, the whole belongs to the community. If it take

(*i*) Dupless., art. 231, liv. 2, c. 4, p. 440.

(*j*) Art. 585.

(*k*) Art. 450.

(*l*) Pothier, Traité de la Com., ss. 212, 13.

place in the midst of the harvest, the community will have a part of it, in proportion to the quantity of the crops gathered (*m*).

If a gross annual sum is paid, as a rent for an estate, producing different kinds of crops, and the community is terminated after one kind has been gathered, but before another kind has been gathered, an estimate is made of the value which the crop gathered bears to the whole, and a proportion of the rent according to that estimate is paid to the community.

Rents of Houses in Towns.—Rents of houses in towns are payable *de die in diem*, and, therefore, all arrears, up to the day of the dissolution, fall into the community, and the owner of the house is entitled to all the rent which subsequently accrues (*n*).

The Code adopts the same rule in relation to civil fruits (*o*) except that it makes no distinction between rents of farms and rents of houses.

The law of Quebec is the same (*p*).

Estate Purchased between Contract of Marriage and Marriage.—In the interval between the contract of marriage stipulating for the community, and the actual celebration of the marriage, one of the conjoints might purchase an estate. The jurists were divided in opinion as to the effect of such a purchase. By some it was considered that the estate ought to be deemed subject to the community, whilst others considered that it must remain *propre*, but an indemnity be made to the community for the price which had been paid (*q*).

Under the Code Civil this question cannot arise, for it declares that the estate purchased shall be deemed an *acquêt* of the community.

"Néanmoins, si l'un des époux avait acquis un immeuble depuis le contrat de mariage, contenant stipulation de communauté, et avant la célébration du mariage, l'immeuble acquis dans cet intervalle entrera dans la communauté, à moins que l'acquisition n'ait été faite en exécution de quelque clause du mariage, auquel cas elle serait réglée suivant la convention" (*r*).

The law of Quebec is to the same effect. The Civil Code (*s*) provides that if after the contract of marriage in which community is

(*m*) Pothier, art. 450, s. 219.

(*n*) Pothier, Traité de la Com., ss. 219, 220.

(*o*) Art. 586.

(*p*) C. C. of L.C., art. 451.

(*q*) Lebrun, Traité de la Com., liv. 1, c. 4, n. 8, 9; Duparc-Poullain, Princ. du Droit, tom. 5, p. 83.

(*r*) Art. 1404.

(*s*) C. C. of L.C., art. 1275; see p. 498, *ante*.

stipulated and before the marriage is solemnized one of the consorts purchase an immovable, the immovable purchased falls into the community; unless the purchase has been made in execution of some clause of the contract, in which case the destination of the immovable is according to the agreement.

Community en Passif.—The property of which the community consists is charged with all the movable or personal debts which the conjoints had respectively contracted before or during their marriage, or which were due by the successions which had devolved on them. These debts constitute the community *en passif*.

This liability results from a principle of the law of France which makes the personal debt of an individual a charge on his entire movable estate: and as by the marriage the whole of that movable estate passes into the community, the debts also pass with it.

The *coutume* of Paris accordingly treated this community of debts as the necessary consequence of the community of property (*t*).

Debts of which Passif of Community Composed.—The Code Civil adopts the same rule. "La communauté se compose passivement, 1°, de toutes les dettes mobilières dont les époux étaient grevés au jour de la célébration de leur mariage, ou dont se trouvent chargées les successions qui leur échoient durant le mariage, sauf la récompense pour celles relatives aux immeubles propres à l'un ou a l'autre époux; 2°, des dettes, tant en capitaux qu'arrérages ou intérêts, contractées par le mari pendant la communauté, ou par la femme du consentement du mari, sauf la récompense dans les cas où elle a lieu (*u*); 3°, des arrérages et intérêts seulement des rentes ou dettes passives qui sont personnelles aux deux époux" (*x*); 4°, des réparations usufructuaires des immeubles qui n'entrent point en

(*t*) Burge, 1st ed., i. 358; Dupless., art. 221, liv. 1, c. 5, s. 1, pp. 402, 403, 415, 421, et liv. 2, des Actions, c. 1, s. 1, p. 599.

(*u*) This article only creates a presumption which will be rebutted if it is shown that the debts were contracted in the husband's own interest: Marchais *c.* Dumée (1900), C. Bourges, Sirey, 1901, 2, 39; Marchais *c.* Faillier (1902), Sirey, 1903, 1, 117.

(*x*) Art. 1409. See Fuzier-Herman, Cod. Civ. Ann., under art. 1409; Rép. tit. Communauté Conjugale, ss. 751 *et seq.* The debt must result from an authentic act anterior to the marriage, or having received a date certain before that period (art. 1410); if the amount is under 150 francs the validity and authority of the debt may be proved by witnesses. Art. 1341. Cf. Deletraz *c.* Lachenal (1892), C. of Civ. Just. Geneva, Sirey, 1892, iv., 40.

communauté; 5°, des aliments des époux, de l'education et entretien des enfants, et de toute autre charge du mariage.

The law of Belgium is the same.

The law of Quebec is the same (*y*).

The liabilities of the community are similarly defined in art. 1200 of the St. Lucia Civil Code.

Debt must be Movable.—The debt with which the community is chargeable must be movable, that is, it must be money or some other movable due by or demandable from the conjoint. Damages for the non-delivery of a specific thing would be deemed a movable debt. The community is charged with a debt for which the conjoint is liable *in solido* with others, or which is secured by mortgage. The whole of a debt may be immovable, but a part of it may be also movable. Thus the succession which has devolved on the conjoint is liable for all the ancestor's debts, but if the conjoint has only a certain share, for instance a third, he is personally liable only to the extent of that third, and to that extent only is the community charged. It is to be reimbursed the amount of its funds which have been applied in discharging the residue of those debts (*z*).

Debt Contracted by Husband as Surety.—The community is liable for a debt contracted by the husband, as surety for a person who becomes insolvent, and even for a fine or costs which have been awarded against him (*z*). It is not chargeable with a debt contracted by the husband for his own exclusive advantage and which cannot benefit the community, as by discharging his own (*propre*) estate from a servitude (*a*). A sum engaged to be given *in dotem* to the child of a former marriage, or to endow personally a child of the marriage (*b*) is not chargeable against the community, because it is contracted solely for his own benefit (*c*).

Warranty by Husband against Eviction.—If the husband, on a sale by him of the wife's (*propre*) estate without her consent, gives to the purchaser a warranty against eviction, the debt which he has thus incurred was, according to the opinion of Pothier, in his treatise on the *contrat de vente* (*d*), a charge on the community. In his treatise on the community, he retracted that opinion, but his

(*y*) C. C. of L.C., art. 1280.

(*z*) Cf. Pothier, Traité de la Com., s. 249; C. C. of L.C., arts. 1294, 1295.

(*a*) C. C. of L.C., art. 1304.

(*b*) Cod. Civ., art. 1469; C. C. of L.C., art. 1356.

(*c*) Pothier, *ibid.*, s. 251; Code Civ., art. 1422.

(*d*) Pothier, Contr. de Vente, s. 179.

former opinion is considered by Toullier to be more consistent with the power which the *coutume* gives the husband over the property in community (*e*).

The question is still keenly controverted. Pothier's original view is supported by some of the most recent writers. It assumes that the purchaser was in good faith, *i.e.*, did not know that the husband was selling what did not belong to him (*f*).

The law of Quebec does not differ from that of France, and there have been no decisions upon the point (*g*).

Debts Contracted by Wife.—The community is charged with debts contracted by the wife, with the husband's sanction, for the affairs of the community, or in the trade which he permits her to carry on (*h*); but if she has contracted them without his sanction, but with the authority of the law, they are chargeable only so far as they are advantageous to the community (*i*). Debts from which the community cannot derive any advantage, a fine or damages which may have been awarded against her, cannot be enforced against her estate until the dissolution of the community (*j*).

Immovable Debts.—The community is not chargeable with the immovable debts of either conjoint, *e.g.*, the amount due by the conjoint for the price of an estate purchased by him before, and of which he was possessed at the time of the marriage, the non-delivery to the purchaser of an estate sold by the conjoint before the marriage, the demand for the delivery of timber which at the time of the sale and after the marriage was standing (*k*).

(*e*) Tr. de la Com., s. 253; Toullier, liv. 3, tit. 5, c. 2, s. 226.

(*f*) Baudry-Lacantinerie, Courtois et Surville, Contrat de Mariage, 2nd ed., i., n. 751; and for a note of the opposing views, Fuzier-Herman, Répertoire, tit. Communauté Conjugale, Nos. 1369 *et seq.*

(*g*) The editor (Professor F. P. Walton) is inclined to agree with Mr. Mignault, that the wife is not bound by the alienation in fraud of her rights, and may revindicate the property in spite of the warranty. She must, however, restore half of the price. For the price fell into the community, and if she got back the property without restoring her share of the price, she would be enriching herself unjustly. It may be said that such a case can hardly occur. The purchaser knows, or ought to know, that the property is the wife's, and is bound to know the law that the husband cannot alienate such property without the wife's consent. See Mignault, Droit Civil Canadien, vi., p. 224.

(*h*) *Supra*, pp. 302, 308, 313; C. C. of L.C., arts. 177, 179, 1296.

(*i*) C. C. of L.C., art. 1296.

(*j*) C. C. of L.C., art. 1294; Pothier, Traité de la Com., s. 254.

(*k*) *Ibid.*, s. 239.

In Quebec this rule stands good as to immovable debts of the wife. As to those of the husband it means only that, if the community pays, the wife is entitled to recompense as to her half.

But the husband can be sued for any debt for which he is personally liable; and during the community, of which he has the administration, he can be made to pay out of its funds (*l*).

Sums Due in respect of Rents.—The principal sums due in respect of rents immovable under the *coutume* are themselves immovable.

But they are now movable by the law of Quebec (*m*).

Debts due by a succession, composed of immovables only, which falls to one of the consorts during marriage, are not, by the law of St. Lucia (*n*), chargeable to the community. This rule is subject to some qualification. Generally the liabilities of the community are the same as in Quebec.

The arrears due in respect of those rents are movable, with which the community is chargeable (*o*).

Succession consisting of Movables en Actif.—When a succession devolves on one of the conjoints consisting wholly of movables, *en actif*, the community receives the whole of the property, and therefore is charged with all the debts owing by the succession (*p*). If it consists wholly of immovables, then the community, since it receives no part of the property, is chargeable with none of the debts (*q*).

But the Codes of France and of Quebec provide: "Nevertheless if such succession have fallen to the husband, the creditors have a right to be paid, either out of his private property or even out of that of the community, saving in the second case, the compensation due to the wife or her heirs" (*r*). This is because during the marriage the husband has almost complete control over the community. In questions with third parties the law makes no distinction between the private property (*propres*) of the husband and the property of the community. As he can dispose of both,

(*l*) Mignault, *op. cit.*, vi., p. 178. See Civil Code, L.C., art. 1283, al. 2.

(*m*) C. C. of L.C., art. 388.

(*n*) C. C. of St. Lucia, art. 1202.

(*o*) Pothier, Traité de la Com., s. 247.

(*p*) C. C. of L.C., art. 1282.

(*q*) Pothier, *ibid.*; Code Civil, art. 1412. The right of the creditors to have recourse for payment against the immovables of the succession is saved: *ibid.*; and see arts. 1413 *et seq.*

(*r*) Code Civil, art. 1412; Civil Code, L.C., art. 1283. See Baudry-Lacantinerie, Courtois et Surville, Contrat de Mariage, 2nd ed., i., n. 556.

so he must pay his debts out of both, subject, if he pays out of the community, to the wife's claim to compensation (*s*). If it consist partly of movables and partly of immovables, it was considered by Pothier, that the debts with which the community was chargeable should be in proportion to the value which the movable property bears to the whole succession. Thus, if the value of the movables was one-third, and that of the immovables two-thirds of the whole succession, one-third only of the debts should be borne by the community, and the other two-thirds by the conjoint, on whom the succession devolved (*t*).

The Code has adopted the opinion of Pothier (*u*).

Proportion Regulated by Inventory.—This proportion is to be regulated by the inventory, which the husband must make, whether he be acting in his own right in consequence of the succession having devolved on him, or on behalf of his wife as having the direction of her interests, if the succession has devolved on her (*u*).

Other Modes of Proof.—In default of the inventory, and in all cases where the wife is prejudiced by such default, she, or her heirs, on the dissolution of the community, may sue for compensation as of right, and she may establish the nature and value of the movables not inventoried, by proof, consisting of titles, or private documents, or the examination of witnesses, and, in case of necessity, even of common rumour (*v*).

The husband, however, is not allowed to adduce such proof (*v*).

The Code of Lower Canada is silent on this point, but the law is the same. It is a privilege granted to the wife and her heirs only (*w*).

Saving of Creditors' Right of Recourse.—This regulation does not prevent the creditors of a succession, partly movable and partly immovable, from suing for payment out of the property of the community, whether the succession has devolved on the husband or on the wife, when the latter has accepted it with the consent of her husband, the right of compensation to the respective parties being reserved (*x*).

(*s*) See note (*y*) on p. 509.

(*t*) Pothier, Traité de la Com., s. 264.

(*u*) Art. 1414; C. C. of L.C., art. 1285. See Fuzier-Herman, Rép., tit. Communauté Conjugale, ss. 868 *et seq.*

(*v*) Art. 1415. See Fuzier-Herman, *ad loc. cit.*, ss. 892 *et seq.*, as to the interpretation of this article; C. C. of L.C., art. 1286.

(*w*) Com. Rep., 2, p. 211.

(*x*) Art. 1416; C. C. of L.C., art. 1287.

The same rule applies where the succession has been accepted by the wife, under the authority of the law only; and nevertheless the movables thereof have been confounded with those of the community, without a previous inventory (*y*).

Liability for Wife's Ante-Nuptial Debts.—During the continuance of the community not only the property of the husband, together with that of the wife comprised in the community, but the husband himself is personally liable for the debts contracted by the wife before the marriage.

The wife's creditors who have obtained a judgment against her before the marriage cannot, however, execute it against the husband until he has had an opportunity of making payment (*z*).

When a succession wholly movable has devolved on the conjoints *pendant le mariage*, the creditors may, in respect of movable debts, enforce their demands against the property of the community. If the succession which has devolved on the husband be wholly immovable, the creditors may resort either to the immovable property itself or to that which is the *propre* of the husband, or to the property in community, with indemnity, in the latter case, to the wife or her heirs (*a*).

When a succession, wholly immovable, has devolved on the wife, which she has accepted with the consent of her husband, the creditors of the succession may enforce payment of their demands, not only against the immovable property itself, but also against all the property which belongs to her. They have, however, no recourse against the property of the community. If the succession has been accepted by her only under the authority of the law on her husband's refusal, they cannot resort to the property in community; and if the immovable, the subject of the succession, be insufficient, they can only obtain payment out of the wife's reversionary property in her other separate estate (*b*). Thus they can only sell the wife's *propres* under an execution, subject to the usufruct of the husband during the community (*c*).

(*y*) See note (*x*) on p. 510.

(*z*) Pothier, Traité de la Com., s. 242. See Code of Civil Procedure, L.C., art. 605.

(*a*) Pothier, *ibid.*, s. 727; Code Civil, arts. 1411, 1412; C. C. of L.C., art. 1283.

(*b*) Pothier, *ibid.*, s. 257; Code Civil, arts. 1413, 1417; Baudry-Lacantinerie, Courtois-Surville, Contrat de Mariage, 2nd ed., i., n. 546.

(*c*) See Civil Code, art. 1413; C. C. of L.C., art. 1284; Baudry-Lacantinerie, Courtois-Surville, *ubi cit. supra*, n. 596; Huc, 9, n. 149.

Even this last-named limited right is not given by the law of Quebec. The Code of Lower Canada provides: "The creditors, in case the property of the succession proves insufficient, have no recourse upon her other property until the dissolution of the community" (*d*).

Liability of Husband after Termination of Community.—After the termination of the community, the husband continues liable for the whole of the debts contracted by himself before the marriage, and for those which during the community were contracted by himself (*e*). It is maintained by some writers that the same rule applies to debts contracted during the community by the wife with the husband's authorization.

But others argue that such a debt is a personal debt of the wife and that the husband is not bound personally, but only as head of the community.

Consequently his liability after the dissolution of the community is limited to one-half. But if the wife renounces the community, or if the share falling to her or her heirs is insufficient to pay the debt, the husband is liable subsidiarily for the balance (*f*).

And this solution has been adopted by the law of Quebec (*g*).

In respect of the movable debts contracted by the wife before her marriage the creditors can proceed against him, or his heirs, for the moiety only of those debts; but if her estate is insufficient to satisfy that moiety, they may resort to the husband's estate for the difference (*h*).

This is expressly declared by the Civil Code of Lower Canada (*i*). It was a maxim of the law of France, that *qui épouse la femme, épouse les dettes*. The Code Civil does not authorise the creditors to resort to the husband's estate in case that of the wife be insufficient to pay the moiety of her debts (*j*).

Liability of Wife after Termination of Community.—After the termination of the community the wife is liable to creditors for

(*d*) Art. 1284.

(*e*) Civil Code, art. 1484; C. C. of L.C., art. 1371.

(*f*) Pothier, Traité de la Com., s. 730; Baudry-Lacantinerie, Courtois-Surville, *op. cit.*, vol. 2, n. 1199 and n. 1239.

(*g*) Civil Code, L.C., art. 1372; Mignault, Droit Civil Canadien, vi., p. 334.

(*h*) Pothier, *ibid.*, s. 730.

(*i*) Art. 1372.

(*j*) Toullier, liv. 3, tit. 5, c. 2, ss. 240 *et seq.*; Baudry-Lacantinerie, Courtois-Surville, *op. cit.*, n. 1199.

the whole of the debts due by her at the time of the marriage, but as the community is charged with them, she is entitled to recover one moiety of them from the estate of the husband. She is also liable to them for such part of the debts owing by a succession she had accepted under the authority of the Court, and not with the consent of her husband, as the succession itself was insufficient to satisfy (*k*).

The wife, who has paid more than a moiety of a debt of the community, cannot recover from the creditor the excess, unless the acquittance state that the payment was only for her moiety (*l*).

Renunciation of the Community.—In order to protect the wife against the consequences of an abuse by the husband of his extensive power over the property in community, the *coutume*, and the Codes of France and Lower Canada, permit her to renounce the community. As she may, however, have accepted it under a misapprehension of the amount of the debts with which it was charged, the liability of herself, or her heirs, as against the creditors, as well as against the husband, is by both systems of jurisprudence limited to the amount of the profit which she, or her heirs, might have derived from it, provided she has made a good and faithful inventory.

A wife may, under the Civil Code of St. Lucia (*m*), renounce the community, and the wife who so renounces is freed from all contribution to the debts of the community, both as regards her husband and as regards creditors, even those towards whom she bound herself jointly and severally with her husband. She remains liable for debts which have become a charge upon the community through her, but has in such case her recourse against her husband.

Under the Code Civil.—The language of the Code is: "La femme n'est tenue des dettes de la communauté, soit à l'égard du mari, soit à l'égard des créanciers, que jusqu'à concurrence de son émolument." This also applies to Belgium (*n*).

The law of Quebec is the same (*o*).

(*k*) Code Civil, arts. 1486, 1417; C. C. of L.C., arts. 1373, 1288; Pothier, Traité de la Com., s. 731.

(*l*) Code Civil, art. 1488; C. C. of L.C., art. 1375; Pothier, *ibid.*, s. 736.

(*m*) Arts. 1256 *et seq.*

(*n*) Art. 1483; Fuzier-Herman, Rép., tit. Communauté Conjugale, ss. 2271 *et seq.* The wife, who fails to make the inventory within the legal period of limitation, is deprived of the benefit of this article and is liable for the debts of the community, *ultra vires emolumenti;* Chiclet *v.* Ponceot (1883), C. Besançon, Sirey, 1884, ii. 45.

(*o*) C. C. of L.C., art. 1370.

The wife, even though she accepts the community, is not liable by the law of St. Lucia, for its debts, either toward her husband or toward creditors, beyond the amount of the benefit she derives from it; provided she has made a correct and faithful inventory and has rendered an account both of what is contained in the inventory and of what has fallen to her in the partition (*p*).

The Inventory.—This privilege can only be enjoyed by the wife, or her heirs, provided that on the dissolution of the community, by the death of either conjoint, a just and true inventory be made, and there be no fraud or default on the part of herself, or her heirs. According to the *coutume*, "Pourvû toutefois qu'après le décès de l'un des conjoints, soit fait loyal inventaire, et qu'il n'y ait faute ni fraude de la part de la femme, ou de ses heritiers" (*q*). And according to the Code Civil: "Pourvu qu'il y ait eu bon et fidèle inventaire, et en rendant compte tant du contenu de cet inventaire que de ce qui lui est échu par le partage." This also applies to Belgium (*r*).

The law of Quebec is the same (*s*).

The inventory is absolutely necessary, as between the wife, or her heirs, and the creditors, but not so as between her heirs and the husband. As against him, the amount received by the wife's heirs as their share of the community is established by the partition between them and the husband of the property of which it consisted, and he is not permitted to dispute the amount fixed by an act to which he was a party (*t*).

The inventory ought to resemble that which the wife is required to make, when, on the death of her husband, she renounces the community (*t*).

There must be a just and true account rendered by her, to the creditors by whom she is sued, of all the property of the community which she has received as her share on the partition. She is to be debited with the value affixed to the movables according to the inventory, and she is not at liberty to deliver them in specie, after having used them. She is to be debited with the value at which the immovable property was estimated at the time of the partition, if

(*p*) Art. 1286.

(*q*) Art. 228.

(*r*) Art. 1483 of the French and Belgian Codes; Fuzier-Herman, *ubi supra*, ss. 2278 *et seq.*

(*s*) Art. 1370.

(*t*) Pothier, Tr. de la Com., ss. 560, 742, 745.

she retains it; or, if she restores it, she is chargeable with its deteriorations, if occasioned by her act. She is debited with the *fructus* received by her, so far as they exceed in value the interest on sums paid by her in discharging the debts of the community. She is to be allowed all such debts as she may have paid to the creditors, as well as her share of the expense of the inventory, partition, and account (*u*). Her liability to the creditors is limited to the balance which may be due from her after these debits and credits (*v*).

The preceding observations are equally applicable, when the heirs of the wife who has predeceased her husband are sued by the creditors (*w*).

Position of Hypothecary Creditors. — Creditors who have an hypothec, or lien, on immovable property, which, on the partition, has fallen to the wife, or her heirs, as her or their share, may proceed against, and recover from her, or them, in respect of that immovable, their whole debt; but she is entitled to be repaid a moiety of such debt by the other conjoint. She may resist the demand of the hypothecary creditor by showing that she has paid another creditor whose hypothec was prior, and that she is entitled to stand in the place of such prior creditor (*x*). If such payment exhaust the value of the immovable, the creditor has no further claim against her (*x*).

Administration of the Property in Community. — Under the Coutume.—Under the *coutume*, the husband has the exclusive administration of the property in community and an absolute power of alienating it.

"Le mari est seigneur des meubles et conquêts immeubles par lui faits durant et constant le mariage de lui et de la femme, en telle manière, qu'il les peut vendre, aliéner, ou hypothèquer, et en faire et disposer par donation, ou autre disposition faite entre vifs à son plaisir et volonté, sans le consentement de sa dite femme, à personne capable, et sans fraude" (*y*).

The law of **Quebec** is the same (*z*).

(*u*) Civil Code, art. 1482; C. C. of L.C., art. 1369.

(*v*) Pothier, Traité de la Com., ss. 747 *et seq.*; Code Civil, art. 1483; Toullier, liv. 3, tit. 5, c. 2, ss. 282 *et seq.*

(*w*) Pothier, *ibid.*, s. 741; Code Civil, art. 1491; C. C. of L.C., art. 1378.

(*x*) Pothier, *ibid.*, ss. 751, 755; Code Civil, art. 1489; C. C. of L.C., art. 1376.

(*y*) Art. 225.

(*z*) C. C. of L.C., art. 1292.

By art. 1211. and the following articles, of the Code of St. Lucia, the husband has the same power of administration. He may sell, alienate, or hypothecate the property, without the concurrence of the wife. The husband may in his own name bring actions relating to the movables of his wife and to the possession of her immovables.

Powers of Alienation, &c.—He is authorised to sell, alienate, hypothecate, or charge the property of the community with all the debts which he contracts, although it could not be pretended that they had any relation to the concerns of the community. He may burden it with services. He is not accountable for such of the property as he may have lost or deteriorated by acts of commission or omission (*a*).

Movable and Possessory Actions.—As a necessary consequence of the power thus vested in him, the *coutume* also transfers to the husband all the movable and possessory actions, notwithstanding they may be derived from the wife, and exclusively regard her separate immovable property. He can sue and be sued in such actions without making her a party (*b*).

On all these points the law of Quebec is the same (*c*).

Actions of this description, which, whilst she was sole, had been instituted by or against the wife, cannot be so continued after the marriage, but they must be prosecuted against the husband, although it is competent, and it is the interest of the wife's creditor, to join her as a defendant to the action, in order that he may acquire an hypothec on her property (*d*).

In Quebec a wife not separated from bed and board is sufficiently summoned by service made upon her husband (*e*).

Testamentary Dispositions.—Donations.—As the husband, on the dissolution of the community, is entitled to one moiety only of the property, he cannot make a testamentary disposition of more than a moiety. The donation, or other disposition, which he may make, must, in the terms of the *coutume* and by the law of Quebec, be *entre vifs* (*f*). If he has bequeathed a specific thing, included in

(*a*) Pothier, Traité de la Com., ss. 468 *et seq.*

(*b*) Cout., art. 233; Pothier, *ibid.*, s. 473.

(*c*) C. C. of L.C., art. 1298.

(*d*) Pothier, *ibid.*, s. 473.

(*e*) Code of Civ. Proc., art. 133.

(*f*) Pothier, *ibid.*, s. 475; C. C. of L.C., arts. 1292, 1293. One consort cannot, in St. Lucia, to the prejudice of the other, bequeath more than the share of such consort in the community: C. C., art. 1212.

the community, it must depend upon the language of the will, whether he intends to dispose of the whole, or only of his moiety (*g*). If it purport to be a disposition of the *whole*, although the whole cannot be bequeathed to the prejudice of the wife, yet the husband's heirs will be bound to make it good to the legatee (*g*). By the law of Quebec the presumption is that he intended to bequeath only his moiety (*h*).

By the law of Quebec it is provided that if the thing bequeathed have fallen into the share of the testator and be found in his succession the legatee has a right to the whole of it (*i*). And by that law the same rules apply to a bequest of a *corps certain* belonging to the community (*j*).

In St. Lucia the bequest of an object belonging to the community is subject to the rules which apply to the bequest of a thing of which the testator is only part owner (*k*).

Under the Code Civil.—The Code has, with some slight modification, conferred a similar power on the husband. "Le mari administre seul les biens de la communauté. Il peut les vendre, aliéner, et hypothèquer sans le concours de la femme" (*l*).

"Le mari a l'administration de tous les biens personnels de la femme (*m*). Il peut exercer seul toutes les actions mobilières et possessoires qui appartiennent à la femme" (*n*).

Interdiction of Donations by Husband.—The *coutume* and the law of Quebec sustain only such donations by the husband as are made *à personne capable, et sans fraude*.

The donation is fraudulent and void if it tends to benefit the husband at the expense of the share of the wife, or her heirs, in the community. It is presumed also to be fraudulent, either on account of its magnitude, or from its having been made during the last

(*g*) Pothier, Traité de la Com., s. 476; Comm. Rep., ii., p. 211; and Pothier, *ibid.*, s. 478.

(*h*) C. C. of Low. Can., art. 882.

(*i*) *Ibid.*, art. 1293.

(*j*) C. C. of L.C., art. 1293; Comm. Rep. ii., p. 211.

(*k*) C. C. of St. Lucia, art. 1212.

(*l*) Art. 1421; Fuzier-Herman, Rép., tit. Communauté Conjugale, ss. 1140 *et seq.* This power of administration is one of public order, and cannot be renounced by the husband or excluded by stipulation: *ibid.*, 1141—1142.

(*m*) Art. 1428; Morando *v.* Trolliet (1894), C. Civ. Just. Geneva, S., 1894, iv., 31.

(*n*) Rights of action for wrongs done to the wife during the marriage come under this clause; the wife cannot bring such actions, even with her husband's authorisation: Matthys *v.* Hoste (1890), C. Ghent, Sirey. 1891, iv., 29.

illness of the wife; or, according to the opinion of Lebrun, if the husband reserve to himself the usufruct of the property. Pothier dissented from that opinion (*o*), but the Code has expressly adopted it (*o*).

The law of Quebec follows the view of Pothier, leaving the Court to decide in the particular case whether a donation reserving the usufruct is fraudulent or not (*p*). It has been held that the wife can only get the donation rescinded by first obtaining a judgment of separation of property (*q*).

The donation, although void against the wife, or her heirs, is valid against the donor, and his heirs, from whom the donee may recover the property itself, or its value, if it has on the partition fallen to the wife as her share (*r*).

The restriction does not prevent the husband from making a donation to the children of himself and his wife; and a donation, which would otherwise be void, is valid, if the wife concurs in it (*r*).

The Code Civil prohibits the husband from disposing *entre vifs*, by gratuitous title, of the immovables of the community, or of the whole movable estate, or a certain portion of it (*une quotité*), except for the establishment of the common children of himself and his wife. But this prohibition is illusory, because by a subsequent provision he may dispose of movable effects by gratuitous and particular title, for the benefit of any persons, provided he do not reserve to himself the usufruct (*s*).

Husband's Power of Testamentary Disposition.—He cannot by testament bequeath more than his share in the community (*t*).

If he has given by testament any article of the community, the donee cannot claim it *in specie*, unless such article has, upon the partition, fallen to the lot of the heirs of the husband; if it has fallen to the lot of the wife, the legatee has his recompense for the total value of the article given, out of the portion belonging to the heirs of the husband in the community, and out of his *biens propres* (*u*).

(*o*) Pothier, Traité de la Com., ss. 480 *et seq.*; Code Civil, art. 1422.

(*p*) Comm. Rep., ii., p. 211.

(*q*) Bernier *v.* Proulx (1889), 15 Q. L. R. 333; Bernier *v.* Gendron (1891), 17 Q. L. R. 377.

(*r*) Pothier, *ibid.*, s. 496; C. C. of L.C., art. 1309.

(*s*) Code Civil, art. 1422; Pothier, Traité de la Com., s. 475. But such donations are also prohibited, if excessive: Grenier *v.* Méral (1896), C. Agen., Sirey, 1899, ii., 73; and note by M. Wahl.

(*t*) Code Civil, art. 1423.

(*u*) Pothier, *ibid.*, s. 479; Code Civil, art. 1423.

In Belgium, although the husband has, so to speak, exclusive rights over his wife's fortune under the *règime légal de la communauté*, the law on "*l'èpargne de la femme*" allows the wife to deposit in her own name and to obtain payment of certain sums at the *caisse d'èpargne* without her husband's authority.

Position of Wife.—No Power of Administration or Alienation.—The wife cannot, of her own authority, exercise any power of administration or alienation over the property in community. It has been justly observed, with regard to her right in the property in community, that she is not *propriè socia, sed speratur fore*. She has *une simple espérance* to share in such property as may be found at the dissolution of the community undisposed of by the husband (*x*).

How far Liable for Debts.—The wife becomes, by operation of law, a party to the debts contracted by her husband, and liable to the extent of her interest in the property of the community, without any actual concurrence on her part, and by the effect alone of the marital power. If she become, in fact, a party to the debt, having been authorised by her husband to concur in it, she incurs a liability in respect not only of that interest, but also personally, and in respect of all her separate property (*y*).

Husband's Power over Wife's Separate Property.—The *coutume* and the law of Quebec vest in the husband the sole administration and management of the wife's separate property (her *biens propres*), as well as of the property in community. But he cannot, without her consent, dispose of the immovables which belong to her (*z*).

The Code gives him a similar power (*z*).

By art. 1216 of the Civil Code of St. Lucia the husband has the administration of all the private property of his wife. He cannot without her consent dispose of the immovables which belong to her. He has a power of leasing for nine years as in Quebec (*a*).

Titles of Honour.—By virtue of the marital power the husband acquired titles of honour, and exercised the honorary rights of seignory, performed the feudal services annexed or incident to the wife's property, and presented to those offices the appointment of

(*x*) Pothier, Traité de la Com., s. 497; Code Civil, arts. 1426, 1427; Toullier, liv. 3, tit. 5, c. 2, s. 239.

(*y*) Pothier, Traité de la Com., s. 731; Code Civil, art. 1419; Toullier, liv. 3, tit. 5, c. 2, s. 233.

(*z*) Cout., art. 233; Pothier, Tr. de la Puiss., ss. 81 *et seq.*; Code Civil, art. 1428; Toullier, *ibid.*, ss. 381 *et seq.*; C. C. of L.C., art. 1298.

(*a*) Art. 1217.

which was incident to the property (*b*). But these rights no longer exist.

Rents or Profits of Separate Property.—He also received for himself, or the community, the rents or profits of her separate property. He could grant leases of it, for a term not exceeding nine years, if it were rural, or six years, if it were situated in Paris, provided such leases were made without fraud (*c*). The Code of Lower Canada provides: "Leases of the wife's property made by her husband alone cannot exceed nine years; she is not bound after the dissolution of the community to maintain those which have been made for a longer term" (*d*).

The Code Civil has adopted a similar provision, allowing him to grant leases for nine years, without making the distinction existing under the *coutume* in respect of property situated in Paris (*e*).

Leases.—The lease must be made *sans fraude*. It is presumed to be fraudulent if it be made during the wife's last illness, or if it be made by anticipation, that is, at a time when there are many years remaining before the existing lease expires (*f*).

By the Code of Lower Canada "leases of property of the wife for nine years or for a shorter term, which have been made or renewed by the husband alone more than a year in advance of the expiration of the pending lease do not bind the wife unless they come into operation before the dissolution of the community" (*g*).

According to the Code (*h*), leases made or renewed by the husband for nine years or less, or more than three years before the expiration of the existing lease, if it regards rural property, or more than two years before the same period, if it relates to houses, are void, unless their enjoyment has commenced before the dissolution of the community.

Consent of Wife necessary to Disposition of her Property by Husband.—The husband has not the power of making any disposition of the wife's separate property without her consent. The *coutume* expressly withholds it from him. "Le mari ne peut vendre, échanger, faire partage ou licitation, charger, obliger, ni hypotequer le propre

(*b*) Pothier, Tr. de la Puiss., ss. 87 *et seq.*

(*c*) Cout., art. 227.

(*d*) Art. 1299.

(*e*) Code Civil, art. 1429; Fuzier-Herman, Rép. tit. Communauté Conjugale, ss. 1407 *et seq.*

(*f*) Pothier, *ibid.*, s. 94.

(*g*) Art. 1300.

(*h*) Code Civil, art. 1430.

heritage de sa femme, sans le consentement de sadite femme, et icelle par lui autorisée a cette fin " (*i*).

The Code contains a similar prohibition. " Il ne peut aliéner (*j*) les immeubles (*k*) personnels de sa femme sans son consentement" (*l*).

The law of Quebec is the same (*m*).

But by leaving him in the sole management of her estate he has it in his power to prejudice her interests in it. He may by his neglect allow prescription to run against her, or in other ways culpably neglect his duties as administrator. Under the *coutume* and Code she is entitled to be indemnified from her husband's property for the loss she has sustained (*n*).

The law of Quebec is the same (*m*).

Upon the sale of the separate estate belonging to her or her husband during the coverture, they are respectively entitled to be reimbursed its price out of the community (*o*).

Dissolution of the Community.—The community is dissolved by the death of either of the conjoints, by separation, either *de biens*, or *de corps* (*p*), by declaration that the conjoint is an absentee in the legal sense (*q*), and in France by divorce.

Séparation de Biens.—The separation *de biens* may be obtained by the wife, if it appears that her separate property, or dowry, is in danger of being dissipated by the husband, or, that in consequence of his conduct, there may not remain sufficient estate to satisfy her claims (*r*).

The wife alone has the right of demanding a separation *de biens* (*s*).

(*i*) 1 Duplessis, art. 226, p. 346.

(*j*) This term includes not only acts of alienation, properly so called, but all acts of disposition passing the limits of simple administration : Dalloz, Suppt., tit. Contrat de Mariage, s. 478.

(*k*) As to movables, see Dalloz, Rép., tit. Contrat de Mariage, ss. 2693 *et seq.*; Suppt., *eodem verbo*, ss. 479, 993.

(*l*) Art. 1428.

(*m*) Art. 1298.

(*n*) Pothier, Traité de la Puiss., s. 85 ; Code Civil, art. 1428.

(*o*) Cout., art. 232 ; Code Civil, art. 1433 ; C. C. of L.C., art. 1303.

(*p*) Pothier, Tr. de la Com., s. 510 ; Code Civil, art. 1441. It is not dissolved by the husband's committal to an asylum under the law of June 30th, 1838 ; in that case legal proceedings affecting the community ought to be directed against the husband as represented by a special mandatory: Guignard *v.* Bonnet (1886), Sirey, 1890, i., 322.

(*q*) Code Civil, art. 124 ; C. C. of L.C., arts. 1310, 109.

(*r*) Pothier, Traité de la Com., s. 510 ; Code Civil, arts. 1443, 1563 ; C. C. of L.C., art. 1311 ; Fuzier-Herman, Code Civ. Ann., under arts. 1443, 1563; Toullier, liv. 3, tit. 5, c. 2, s. 3, s. 20 ; Cochin, tom. 5, p. 142 ; Case of the Marquis du Pont du Châlet ; Burge, 1st ed., i., 371.

(*s*) Pothier, *ibid.*, s. 513 ; Code Civil, art. 1443.

The Code of Lower Canada provides that her creditors cannot demand it even with her consent (*t*).

Generally speaking, the law in St. Lucia as to separation is the same as in Quebec. By art. 1233 the separation can be demanded only by the wife herself; her creditors cannot demand it, even with her consent.

Séparation de Corps involves Séparation de Biens.—The *séparation de corps* carries with it *séparation de biens* (*u*). The separated wife regains her full civil capacity and need not be authorised either by the husband or justice (*u*).

Judicial Sentence necessary for Séparation de Biens.—It can only take effect by means of a judicial sentence which has been *bonâ fide* executed, and which has been publicly pronounced.

A voluntary separation is null (*x*).

The law of Quebec requires that the judgment shall be inscribed by the prothonotary upon a list kept for that purpose and posted in the office of the Court which rendered the judgment (*y*).

The French (and Belgian) Code requires, as essential to its validity, that before its execution, it should be made public by a notice upon a list appropriated to this purpose, in the principal hall of the Court of First Instance, and also, if the husband be a merchant, banker, or tradesman, in that of the Tribunal of Commerce, at the place of his domicil (*z*).

The judgment has relation, as to its effects, to the day of the demand by the wife (*z*).

Husband's Creditors may Contest Wife's Demand.—The Code Civil adopted a rule, which was established by the Parliaments of Dijon (*a*) and Rouen (*b*), that the creditors of the husband should be permitted to contest the wife's demand for a separation *de biens* (*c*).

The law of Quebec is the same (*d*).

Position of Wife's Creditors.—But the wife's creditors cannot with-

(*t*) Art. 1315.

(*u*) Art. 311, as defined by law of February 6th, 1893.

(*x*) Pothier, Tr. de la Com., ss. 514, 518, 523; Code Civil, arts. 1443, 1444; C. C. of L.C., arts. 1311, 1312.

(*y*) Code of Civ. Proc., art. 1097.

(*z*) Code Civil, art. 1445; C. C. of L.C., art. 1314; Pothier, *ibid.*, s. 521.

(*a*) Arrêt, March 20th, 1650.

(*b*) *Ibid.*, August 30th, 1555; Merlin, Rép., tit. Separation, ss. 2, 3, art. 2.

(*c*) Art. 1447; Code de Proc. Civ., art. 871.

(*d*) C. C. of L.C., art. 1316; Code of Civ. Proc., art. 1094.

out her consent demand such separation (*e*). In Quebec not even her consent enables them to do so (*e*).

Nevertheless, in case of bankruptcy, or embarrassment of the husband, they may avail themselves of the claims of the wife on her husband's estate, to the amount of the debts which she owes them (*e*) (*f*).

The wife, separated either in body and goods, or in goods only, regains the uncontrolled government thereof, and she may dispose of her movables and alienate them. She cannot alienate her immovables without the consent of her husband, or without being thereto authorised by the Court, on his refusal (*g*).

Earnings of Married Women — French Law (*h*).—Until 1907 a married woman could not, except where she held separate estate, manage her own property, and had never the full disposal of her realty, even if she had bought it with the earnings of her own work. These points have been materially altered by a Law of July 13th, 1907, which is not incorporated with the Code Civil, but is quite contrary to the spirit of the Code in regard to the capacity of married women. The provisions of this law are in substance as follows: Under any system of contract of marriage, and in spite of any clause in the contract to the contrary, a woman has, over the earnings from her personal work and the savings therefrom, the same control as that allowed by art. 1449 of the Civil Code to the wife, *séparée de biens*. With this money she can acquire personalty or realty, and she has absolute control over and free disposition of the former without any interference on the part of her husband. All that she has to do is to testify that she is carrying on a trade or profession apart from her husband. The above-mentioned dispositions do not apply to earnings from work done jointly by the husband and wife (*i*). Art. 2 provides a means of restricting the wife's freedom in the event of abuse by her of her rights. If she squanders her money, or administers her property badly or imprudently, the husband may apply to the Court to have

(*e*) C. C. of L.C., art. 1315.

(*f*) Art. 1446; C. C. of L.C., art. 1315.

(*g*) Pothier, Traité de la Com., s. 522. But see Code Civil, art. 311, as defined by law of February 6th, 1893, and art. 1449; C. C. of L.C., art. 1318.

(*h*) Jour. Comp. Leg., viii., 260; Ann. de Lég. Fran., 1908, pp. 180—205.

(*i*) Art. 1.

her freedom curtailed; and the Judge may allow the husband to enter an opposition against any transactions between his wife and third parties. The wife's creditors may seize property which, by virtue of the Law of July 13th, 1907, comes under her sole control. This property may also be seized by creditors of the husband, provided they can prove that the debt was contracted in the interest of the household. On the other hand, the husband is not responsible for his wife's debts, except when these have been contracted in the interest of the household (*k*). In case of dispute, the wife may prove that such property arises from her earnings by any legal means, even by witnesses (*l*), but not by common report (*m*). If there is community, or association as regards *acquêts*, the reserved property will enter into the partition of the common fund. If the wife renounces the community she retains the reserved property as her sole and unattachable property, except for such debts as are mentioned in art. 3; and the same privilege belongs to her heirs in the direct line. Under all other *régimes* the reserved property is the *propre* of the wife (*n*). The wife has the right to sue in her own name, without authorisation of her husband, in all matters concerning the rights conferred on her by the new law (*o*). Either spouse may obtain from a justice of the peace an authorisation to attach the salaries or earnings of the other should he or she not contribute within his or her means to the requirements of the household (*p*). For this purpose the usual summons is not necessary, but a mere registered letter sent through the post by the registrar explaining the nature of the claim will suffice. The husband and wife must appear in person, unless they justify their absence (*q*). All the procedure that is necessary to attach sums in accordance with the two preceding articles is a notification of the judgment to the parties in whose hands such sums are attached (*r*).

Judgments delivered in accordance with arts. 2 and 7 of this law are provisionally executory, subject to the right of appeal. Even where the judgments have become final, they may be

(*k*) Art. 3.

(*l*) This is an exception to the general rule, enacted by art. 1341 of the Code, that proof by witnesses is not allowed in matters involving sums above 150 francs.

(*m*) Art. 4.

(*n*) Art. 5.

(*o*) Art. 6.

(*p*) Art. 7.

(*q*) Art. 8.

(*r*) Art. 9.

varied, if justified by the facts (*s*). The Law of July 13th, 1907, is retrospective (*t*).

Revival of the Community after Separation.—It is in the power of the parties, by their mutual consent, notwithstanding the sentence of separation has been executed (*u*), to revive the community. But this consent should be expressed by an act before notaries, and with a minute, a copy of which is required to be affixed, in the manner prescribed by art. 1445 (*a*).

In the case of separation of property the law of Quebec also requires a notarial act and an inscription on the list of separations posted in the office of the Court (*b*); but in the case of separation from bed and board the return of the wife into the house of the husband revives the community by operation of law (*c*).

In St. Lucia (*d*) the wife, when separated either from bed and board or as to property only, regains the uncontrolled administration of her property. She may dispose of and alienate her movable property. She cannot alienate her immovables without the consent of her husband or upon his refusal without judicial authorisation. The return of the wife legally effects re-establishment of the community as in Quebec.

In case of revival, the community is resumed, as from the day of marriage, and is to be considered, in all which relates to it, as if there had been no separation; but it is thus resumed, without prejudice to such acts of the wife, as it was competent for her, during the separation, to perform (*e*).

Acceptance or Renunciation of the Community.—The wife, on the dissolution of the community by the death of the husband, or by separation *de biens*, has the option of accepting or renouncing it. The same option belongs to her heirs, or universal successors, but not to the husband or his heirs (*f*).

(*s*) Art. 10.

(*t*) Art. 11.

(*u*) Code Civil, arts. 1449, 1451.

(*a*) Pothier, *ibid.*, ss. 523, 524; Code Civil, art. 1445.

(*b*) Art. 1320.

(*c*) *Ibid.*

(*d*) C. C. of St. Lucia, arts. 1236 *et seq.*

(*e*) Code Civil, arts. 1449, 1451. The wife, *séparée de corps*, now regains full civil capacity (art. 311, as defined by law of February 6th, 1893). Art. 1451, as to revival of community dissolved by judicial separation or *séparation de biens* (Cornat *v.* Cornat (1893), Sirey, 1894, i., 119), applies to all the matrimonial *régimes*.

(*f*) Pothier, *ibid.*, s. 531; Code Civil, art. 1453; Toullier, liv. 3, tit. 5, c. 2, ss. 4, 128, 129; C. C. of L.C., art. 1338.

In the Province of Quebec there is some doubt as to the effect of a judgment of separation on the ground of the wife's adultery. The Civil Code declares: "Unless by the judgment they are declared forfeited, which only takes place in the case of adultery, the separation gives the wife the right to claim the benefit *of all the gifts and advantages conferred on her by the marriage contract*" (*g*).

It has been held that these words do not cover the wife's share in the community. The community is a common stock to which both husband and wife have contributed (*h*). On the other hand, it is clear that by the old law the wife forfeited her share of the community (*i*). There is no evidence of intention to change the old law, and by the following article of the Code of Lower Canada the wife can demand partition of the property of the community "*unless by the judgment she has been declared to have forfeited this right.*" It is clear from the Commissioners' report that art. 208 in the official edition is erroneously printed (*k*).

It seems that refusal to cohabit with the husband without good cause for such refusal is an *injure grave* which would be a ground for separation. And a wife may be ordered to return to cohabitation, or failing obedience, to forfeit all the rights stipulated in her favour in the marriage contract (*l*).

But it would seem that she cannot in this case be declared to have forfeited her share of the community (*m*).

Having once accepted, or renounced, the option is at an end, and the wife cannot change her purpose unless she was in minority or there was fraud on the part of the husband's heirs (*n*).

Acceptance, how signified.—The acceptance of the community is either express, *aut verbis*, as by assuming, in some act, the character *de commune*, or implied, *aut facto*, as when she does some act, from

(*g*) Art. 208.

(*h*) L'Heureux *v.* Boivin (1881), 7 Q. L. R. 220; Drolet *v.* Lapierre (1889), 16 Q. L. R. 1. Cf. Planiol, Traité Elémentaire, 4th ed. iii., n. 767.

(*i*) Ancien Denizart, *v.* Adultère, No. 3.

(*k*) Art. 209; Com. Rep., Vol. I., p. 305. See Washer *v.* Hawkins (1882), 11 L. N. 266; Bisson *v.* Lamoureux (1867), 17 L. C. R. 140; Mignault, Droit Civil Canadien, ii., p. 45.

(*l*) Fisher *v.* Webster (1894), R. J. Q. 6 S. C. 25. See Tessier dit Laplante *v.* Guay (1903), R. J. Q. 23 S. C. 75.

(*m*) Civil Code of L.C., arts. 208, 211. Cf. Planiol, Traité Elémentaire de Droit Civil, 4th ed. Vol. I. n. 895.

(*n*) Pothier, Traité de la Com., ss. 531 *et seq.*; Code Civil, art. 1455; C. C. of L.C., art. 1340.

which it is inferred that she adopts that character, and which does not admit of being referred to any other character which she could adopt.

Acts, however, for the preservation of the effects of the community before she has finally decided on accepting or renouncing it, or ordering, or paying for, the funeral, will not be deemed an acceptance (*o*).

To what Period Acceptance Relates.—The acceptance has relation to the time of the dissolution of the community; and from that time the wife, or her heirs, are deemed proprietors, *par indivis*, of all the effects of the community, and of all the fruits, &c., which have since been received, and they are liable for the debts (*p*).

Renunciation under the Coutume.—The *coutume* gave to the wife and her heirs the power of renouncing the community, on complying with certain conditions (*q*).

Under the Codes.—The Codes of France (and Belgium) and of Lower Canada give them a similar power: "Après la dissolution de la communauté, la femme, ou ses héritiers et ayants-cause, ont la faculté de l'accepter ou d'y renoncer: toute convention contraire est nulle" (*r*).

"La femme qui s'est immiscée dans les biens de la communauté ne peut y renoncer.

"Les actes purement administratifs ou conservatoires n'emportent point immixtion" (*a*).

"La femme majeure qui a pris dans un acte la qualité de commune ne peut plus y renoncer ni se faire restituer contre cette qualité, quand même elle l'aurait prise avant d'avoir fait inventaire, s'il n'y a eu dol de la part des héritiers du mari" (*b*).

The wife could not, by any stipulation previous to the marriage, relinquish this right (*c*).

The *coutume* did not prescribe the time within which the renunciation must be made. She might renounce at any time,

(*o*) Pothier, Traité de la Com., 541; Code Civil, art. 1454; C. C. of L.C., art. 1339.

(*p*) Pothier, *ibid.*, s. 548.

(*q*) 1 Duplessis, art. 237, liv. 2, c. 3, p. 435.

(*r*) Code Civil, art. 1453; C. C. of L.C., art. 1338.

(*a*) Code Civil, art. 1454; C. C. of L.C., art. 1339.

(*b*) Code Civil, art. 1455; C. C. of L.C., art. 1340.

(*c*) Pothier, Traité de la Com. s. 551; Code Civil, art. 1453; C. C. of L.C., art. 1338; Toullier, tit. 5, c. 2, s. 4, n. 126.

unless she had accepted or been sued by creditors, and compelled to declare her intention.

The Ordinance of 1667 (*d*) gave to the widow forty days from the day of the husband's death, or from that of her first becoming aware of his death, if it happened when she was at a distance from him, to make an inventory of the effects in order that she may ascertain their value, and thirty days thereafter to deliberate whether she will accept or renounce (*e*).

By the law of Quebec she is allowed three months and forty days to make her renunciation. She may, according to circumstances, obtain from the Court an extension of these delays. But even if she have not renounced within these delays, prescribed or granted by the Court, she may still do so at any time, so long as she has not intermeddled, or acted as being in community, but she can be sued as being in community so long as she has not renounced, and she is liable for the costs incurred against her up to the time of such renunciation (*f*).

In St. Lucia (*g*), a wife of full age cannot renounce the community if she has dealt with its property unless there be fraud on the part of the heirs of the husband. If under age she cannot renounce or accept without the assistance of her curator and the authorisation of the Judge upon the advice of a family council. When so made the acceptance is irrevocable.

The *coutume* and the Codes of France and of Lower Canada do not admit of a renunciation after the wife has accepted.

The rule prescribed by the Ordinance of 1667 was peremptory, and no extension of time was granted.

Time for Renunciation on Dissolution of Community by Death.—But under the Code, when the dissolution takes place by death, the wife is not precluded from renouncing at any period, if she has abstained from intermeddling with the estate.

On Dissolution of the Community by Separation.—When the dissolution is by separation, if she has not within three months and forty days after the sentence pronounced, accepted the community, she is deemed to have renounced it, unless in the interval she obtains from the Court an extension of the time (*h*).

(*d*) Tit. 2, art. 5.
(*e*) Pothier, *ibid.*, s. 555.
(*f*) Civil Code of L.C., arts. 1344—1347.
(*g*) C. C. of St. Lucia, ss. 1257 *et seq.*
(*h*) Code Civil, art. 1463.

The Inventory.—The *coutume* and Code Civil require that a true and faithful inventory should be made by the wife, if the community be dissolved by the death of the husband; but not when it is dissolved by a separation *de biens;* or when the wife's heirs succeed on the death of the husband who had survived her (*i*). There must be an inventory, although there should be no effects. The Code has prescribed that it should be made either in the presence, or after due summons, of the heirs (*a*). It must be affirmed by her to be true (*a*).

By the law of Quebec a similar inventory is required. But the wife may in five cases renounce the community without making an inventory, viz., when the dissolution takes place during the lifetime of the husband; when the husband's heirs are in possession of all the property; when an inventory has been made at their instance or one has been made shortly before the death of the husband; when a general seizure and sale of the property of the community have been recently made; or when it has been established by an official return that none existed (*b*).

The Code of Lower Canada says: "The wife may, however, retain the wearing apparel and linen in use for her own person, exclusive of all other jewelry than her wedding presents" (*c*). The codifiers say: "Jewelry in certain cases is of great value, and ought, in justice, to remain in the community at the expense of which it has generally been purchased. It would, however, be unbecoming to take her engagement presents from her, and unjust to deprive her of those she may have received on the occasion of her wedding" (*d*).

Several Heirs.—Acceptance by Some: Renunciation by Others.—If the wife predecease, leaving several heirs, some of whom accept, and others renounce, the heir who accepts can only take his particular hereditary share in the moiety which belongs to the wife; the remainder is retained by the husband, who is liable to the heirs renouncing for such rights as the wife might have exercised in case of renunciation, but only to the extent of the hereditary

(*i*) Pothier, Traité de la Com., s. 568; Code Civil, arts. 1456 *et seq.*
(*a*) Code Civil, *ibid.*
(*b*) C. C. of L.C., arts. 1342, 1343; Pothier, Traité de la Com., ss. 561 *et seq.*
(*c*) Art. 1380.
(*d*) Com. Rep., ii., p. 229.

share of each heir who has thus renounced (*e*), claims to which the wife was entitled on her renouncing, but to the extent only of such heir's particular share of the party renouncing (*e*).

The law of Quebec is the same (*f*).

Relief against Renunciation or Acceptance.—The wife or her heirs might be relieved against an act of renunciation or acceptance, on the ground of fraud or minority (*g*).

The acceptance of the community (*h*), as well as the renunciation (*i*), might be impeached and set aside by the creditors who had been defrauded by either of those acts.

The Code Civil also gives them the right of setting aside the renunciation, and of accepting the community in their own right (*j*). Some writers maintain that they cannot impeach the wife's acceptance of it. But the better opinion is that they can do so. The Code has not thought it necessary to state this because it was only as to renunciation that any doubt ever existed (*k*). The law of Quebec is the same (*l*).

Retention by Wife, on Renunciation, of Articles of Apparel.—As the renunciation ought to be a surrender or abandonment of all the effects of the community, the wife was not permitted, under the *coutume*, to retain more than the most simple articles of apparel.

The Code, more consistently with the present state of society, permits her to retain linen and clothes for her own use (*m*).

And the expression *les linges et hardes à son usage* is generally interpreted to include jewels and ornaments given to the wife by her husband. It does not include bed linen or table linen (*n*). And by the Code of Lower Canada (*o*) she may retain the wearing apparel and linen in use for her own person, exclusive of all other jewelry than her wedding presents.

Right of Wife to Provision during Time for making Inventory and Deliberating.—The Code permits her, during the interval allowed her

(*e*) Pothier, *ibid.*, s. 579; Code Civil, art. 475; Toullier, liv. iii., tit. 5, c. 2, s. 4, s. 192.

(*f*) C. C. of L.C., art. 1362.

(*g*) Pothier, *ibid.*, ss. 552, 558.

(*h*) *Ibid*, s. 559.

(*i*) *Ibid.*, s. 533.

(*j*) Code Civil, art. 1461.

(*k*) Baudry-Lacantinerie, Courtois-Surville, Contrat de Mariage, 2nd ed., ii., n. 1019; Toullier, *ibid.*, s. 203.

(*l*) C. C. of L.C., art. 1351; Mignault, Droit Civil Canadien, vi., p. 309.

(*m*) Code Civil, art. 1492.

(*n*) Baudry-Lacantinerie, Précis de Droit Civil, iii., n. 245; Baudry-Lacantinerie, Courtois-Surville, Contrat de Mariage, 2nd ed., ii., n. 1251.

(*o*) Art. 1380.

for making the inventory and deliberating, to take, for the support of herself and her domestics, the provisions remaining in the house, and if there are none, to purchase them on the credit of the common stock, and to remain in the house without paying rent (*p*).

A similar indulgence was granted her by the *coutume* (*q*), and is so granted by the law of Quebec (*r*).

Continuation of Community.—By the conversion or concealment on the part of the widow, or her heirs, of any part of the property belonging to the community, they are chargeable as if they continued in the community, notwithstanding they may have renounced it (*s*).

The Code Civil does not adopt a continuation of community; but in addition, if there be children under age and no inventory made, it subjects the surviving married party to the loss of the enjoyment of their revenues, in addition to actions which may be brought against the party for the recovery of the property belonging to the community (*t*).

By the law of Quebec continuation of community formerly existed subject to the same conditions as those prescribed by the *Coutume de Paris*.

Continuation has, however, been abolished by a recent statute which came into effect on September 1st, 1897 (*u*).

The abolition does not affect communities dissolved before that date, as to which the old law is still in force (*v*).

(*p*) Code Civil, art. 1465.

(*q*) Pothier, Traité de la Com., ss. 570, 571.

(*r*) C. C. of L.C., art. 1352.

(*s*) Code Civil, arts. 1460, 1477. In order to establish a charge of diversion or *recel*, bad faith must be alleged and proved (Fuzier-Herman, Code Civ. Ann., under art. 1477), and such charges must be established by way of principal action at the time of the partition, and not under art. 944 (Code Civ. Proc.) as an incident at the time of the making of the inventory. The same rules have recently been laid down in Mauritius in a case under art. 9 (2) of the Successions Ordinance, 1890 (No. 2 of 1890), which enables the notary charged with the duty of making an inventory to refer to the Court for summary adjudication difficulties arising in the course of it which prevent him from closing the inventory: Talec *v.* Darga (1904), December, S. C. 1904; and cf. Maire *v.* Maire (1881), Trib. Auxerre, Sirey, 1881, ii., 94; Maréchal *v.* Maréchal (1881), C. Paris, Sirey, 1881, ii., 240; Trochel *v.* Louis (1897), Sirey, 1897, i., 328; Pothier, *ibid.*, s. 690; Toullier, liv. iii., tit. 5, c. 2, s. 4, n. 212; Merlin, Rép. tit. Récelé.

(*t*) Code Civil, art. 1442.

(*u*) 60 Vict. c. 52 (Quebec).

(*v*) 1 Edw. 7, c. 32. See King *v.* McHendry (1900), 30 Can. S. C. R. 450.

In place of the old continuation of community the Code of Lower Canada now provides: "After the dissolution of the community by death and in the absence of any will to the contrary, the surviving consort has the enjoyment of the property of the community coming to their children from the deceased consort; such enjoyment lasts as to each child until he is of the age of eighteen years, or until he is emancipated."

The surviving consort has this usufruct subject to providing for the food, maintenance, and education of the children, according to their fortune, and the enjoyment ceases in the event of a second marriage (*w*).

In St. Lucia, arts. 1241 to 1255 of the Civil Code inclusive deal with the subject of the continuation of the community. The Code speaks of compensation and replacements and *preciput*. By a clause of the interpretation article (*x*), *preciput* is that portion of the property of a community or of a predeceased consort which, in virtue of the marriage contract, is pretaken by or set aside for the surviving consort before the apportionment of the remainder. *Preciput* is further dealt with in arts. 1316 to 1319 inclusive.

Liquidation and Partition of the Community.—The community having been accepted by the wife or her heirs, liquidation and partition take place (*y*).

Partition of the Actif.—Rapport.—The married persons or their heirs bring into the mass of property existing at the time of the dissolution all that is due by them to the community for compensation or indemnity (*z*).

Remploi.—Recompense or Reprise.—In treating of the indemnity, recompense, or compensation to be made to the community, or to either of the conjoints, the term *remploi* is used to express the replacing or compensation by another property of the same kind, for the separate property of one of the conjoints, which has been

(*w*) Arts. 1323—1325.

(*x*) Art. 1 (66).

(*y*) Code Civil, art. 1467.

(*z*) Art. 1468; Cout., art. 229. The *rapport* is usually *fictif*. "Le rapport peut, en effet, avoir lieu fictivement, ce qui se fait, soit en ajoutant a la masse des biens de la communauté les créances que la communauté a contre l'un des conjoints et en la lui precomptant sur sa part dans la masse, soit en laissant prélever sur la masse par le conjoint, non débiteur, une somme egale à celle dont l'autre époux est débiteur envers la communauté": Fuzier-Herman, Code Civ. Ann., under art. 1468, n. 9.

sold or otherwise disposed of. When a property, not of the same kind but its value, is to be replaced, the terms *recompense*, *on reprise*, are used to express the indemnity, or recompense, and that it is to be taken out of the community before a partition is made.

The English version of the Code of Lower Canada speaks of "replacements," "indemnities," and "pretakings," or *reprises* (*a*).

Recompense, in what Cases Due.—The recompense or indemnity is due to the community by the conjoint who has enriched himself at the expense of the community. Instances in which it is due are, the payment of a debt which was exclusively payable by the conjoint; sums taken for the exclusive advantage of the separate estate of the conjoint; improvements which, from their nature and extent, are not chargeable on the community; *dos*, given to the child of a former marriage; or to a common child, but on terms which import a gift by the conjoint exclusively (*b*).

There is a recompense or indemnity due to the conjoint by the community when the latter has become enriched at his or her expense (*c*).

Prélèvements.—From the mass of property, each married person, or the heirs, deducts (*prélève*) his own separate property (*biens propres*), if it exists in specie, or that to which they are entitled in *remploi*, or as compensation; the price of immovables which have been alienated during the community, and of which no *remploi* has been made; and indemnities due to such party from the community (*d*).

Claims of Wife.—The claims of the wife, or her heirs, on these several accounts are to be satisfied, in the first instance, before those of the husband. This privilege is given to the wife in consideration of the exclusive administration vested in the husband, who ought to suffer if he has been the means of diminishing the community. It is to be satisfied in respect of property which no longer exists in kind: first, by means of the ready money; next, of the movable property; and subsidiarily, out of the immovables of the community; and in that case the choice of the immovables

(*a*) Arts. 1305, 1357—1359.

(*b*) As to the burden of proof in questions of recompense, see Vialles *v.* Vialles (1902), Sirey, 1903, i., 43; and nn. (1), (2); C. C. of L.C., arts. 1304, 1356, 1308, 1309.

(*c*) *Ibid.*, art. 1303.

(*d*) Pothier, Traité de la Com., ss. 585 *et seq.*; Code Civil, art. 1470; C. C. of L.C., art. 1357.

is yielded to the wife and to her heirs (*e*). If the property in community be not sufficient to satisfy her claims or those of her heirs, she is entitled to resort to her husband's separate estate (*f*).

Interest on Repayments, &c.—The repayments and indemnities due by the community to the conjoints, and by the conjoints to the community, carry interest from the day of the dissolution of the community (*g*).

Distribution of Residue.—After all the deductions of the two married parties from the mass have been completed, the residue is distributed in moieties between the parties, or their representatives (*h*).

Recourse of Creditors.—After the partition is completed, either of the parties who remains the creditor of the other is entitled to resort to the share of the property in the community which has fallen to the debtor, or to the separate property of the latter (*i*).

Interest on Debts.—The debts which are owing by the one conjoint to the other carry interest only from the day of demand in Court (*j*). By the law of Quebec they bear interest only according to the ordinary rules (*k*). *Préciput* in St. Lucia is equivalent to *prélèvements* (*l*).

SECTION II.

The System of Dower in Quebec and St. Lucia.

Douaire.—In those provinces of France which were governed by their own *coutumes*, the wife acquired an interest in the husband's real estate, which vested in possession on his death, in case she survived him. It was called *le douaire*. There was no provision in the civil law analogous to it. It was probably derived from the

(*e*) Pothier, *ibid.*; Code Civil, art. 1471; Fuzier-Herman, Code Civ. Ann., under art. 1471; Rép., tit. Communauté Conjugale, ss. 1925 *et seq.*; C. C. of L.C., art. 1358.

(*f*) Code Civil, art. 1472; C. C. of L.C., art. 1359.

(*g*) Code Civil, art. 1473; C. C. of L.C., art. 1360.

(*h*) Code Civil, art. 1474; C. C. of L.C., art. 1361. Even if the creditor spouse has renounced the community: Petit-Jean *v.* Prevost (1870), Sirey, 1870, i., 299; and cf. Duc d'Havre *v.* Deurbrouq (1835), Sirey, 1835, i., 283.

(*i*) Code Civil, art. 1478; Fuzier-Herman, Code Civ. Ann., under art. 1478; Rép., *ad loc. cit.*, ss. 1003 *et seq.*, 1601 *et seq.*; C. C. of L.C., art. 1365.

(*j*) Code Civil, art. 1479.

(*k*) C. C. of L.C., art. 1366.

(*l*) *Vide supra*, p. 532.

Germans, according to whose institutions, "dotem non uxor marito, sed uxori maritus offert" (*m*).

Abolished in France.—The *douaire coutumier* of the wife and children dealt with in this section was abolished in France at an early period of the Revolution, and finds no place in the Code Civil (*mm*).

Forms of.—The nature and extent of that interest were regulated either by the express contract of the parties, on their marriage, or, in the absence of such contract, by the *coutume*, or law. In the latter case, it was called *le douaire coutumier*, and in the former, *le douaire conventionnel*, or *prefix*.

In the English version of the Civil Code of Lower Canada these forms of dower are called "legal or customary" dower and "prefixed or conventional" dower respectively (*n*).

In St. Lucia (*o*) there are two kinds of dower, that of the wife and that of the children. These dowers are either legal or conventional Legal dower is a charge which the law, independently of any agreement, and from the mere act of marriage, attaches to the property of the husband, in favour of the wife as usufructuary and of the children as owners. Conventional dower is that which is agreed upon by the contract of marriage. It can only affect the property of the husband acquired before marriage. Conventional dower excludes legal dower.

I. Nature of Le Douaire Coutumier.—The nature of the *douaire*, under the *coutume* of Paris, was thus explained: "Doüaire coutumier est de la moitié des heritages que le mari tient et possede au jour des épousailles et benediction nuptiale; et de la moitié des heritages qui depuis la consommation dudit mariage, et pendant icelui, échéent et aviennent en ligne directe audit mari" (*p*).

The Code of Lower Canada does not use the phrase "direct lineal descent." It says "immovables which accrue to (the husband) from his father or mother or other ascendant" (*q*). But there was no intention to alter the old law, and there is no dower on immovables which accrue from collateral ascendants (*r*).

(*m*) Tacitus, de Morib. Germ., s. 18.

(*mm*) Art. 61 de la loi du 17 Nivôse, an 2; Art. 49 du Décret du 22 Ventôse de la même année, et l'art. 24 de celui du 9 Fructidor suivant; Burge, 1st ed., i., 291.

(*n*) Art. 1426.

(*o*) C. C. of St. Lucia, arts. 1339 *et seq.*

(*p*) Dupless., art. 248, c. 2, s. 1, p. 240; Burge, 1st ed., i., 381.

(*q*) Art. 1434.

(*r*) Comm. Rep., ii., p. 239; Pothier Douaire, s. 37.

The *coutume* gives to the wife the usufruct and to the children the ownership of one half of the immovables which belong to the husband at the time of the marriage and of one half of those which accrue to him during marriage by direct lineal descent.

The marriage must be such as would confer a title to the community.

Upon all these points the law of Quebec is the same (*s*).

The nuptial benediction is alone sufficient, and such is the import of the expression, *la consommation dudit mariage*. The wife has only this moiety for her life, and, on her death, it becomes the absolute property of the children (*a*).

By the law of Quebec the right accrues from the date of the celebration of the marriage if there is no marriage contract. But if there is a marriage contract in which it is stipulated that there shall be customary dower, the right accrues from the date of the contract (*b*).

Property Subject to Douaire.—The property which is subject to *douaire* consists only of that which is, or is reputed, immovable by the law. The husband must possess it as owner. It must be *propre de communauté*, that is, excluded from it. Such real estate as, by the contract of the parties, had been put into community, is not subject to the *douaire*, even if the wife should renounce the community (*c*).

The husband must, at the time of the marriage, have been possessed of the real estate, or there must have been, at that time vested in him, the right by which he subsequently acquired it. But if the subsequent acquisition can be referred to a new title the wife cannot claim the *douaire*. The rules laid down in a preceding section for determining whether property was a *conquêt* of the community are to be applied in determining whether it be *propre*, and excluded from it, and subject to the *douaire* (*c*).

If the husband, before the marriage, but after it had been stipulated by nuptial contract that the wife should be endowed *du douaire coutumier*, disposes of real estate, which he possessed at the time of the contract, the wife will be entitled to indemnity from the heirs for the value of the estate (*c*).

(*s*) C. C. of L.C., art. 1434.
(*a*) Cout., art. 249.
(*b*) C. C. of L.C., art. 1433.
(*c*) Pothier, Traité du Douaire, s. 27; C. C. of L.C., arts. 1435, 1433.

The immovable property must have descended on the husband in the direct descending line. It must have come to him, as the heir of his father, mother, or other ancestor, in the direct ascending line (*d*). But, notwithstanding it may have been thus acquired, yet if by the nuptial contract it was to be part of the community, it will not be subject to the *douaire*. Property which is *propre du communauté* may not always be subject to *douaire*, but it may be stated, as an universal rule, that if it be a subject of the community, it is not subject to the *douaire* (*e*).

The property must have descended during the marriage (*pendant icelui*). The wife is not, therefore, entitled to *douaire* of an estate which descends after his death. The estate to which he succeeds by substitution, if the author was a direct lineal ascending ancestor, will be subject to it, notwithstanding the person, who was interposed before the husband, was a stranger (*f*).

Douaire of Second Wife.—If there are children of a preceding marriage, and the husband again marries, the second wife's *douaire* is limited to that part of the husband's estate to which the *douaire* of the first marriage does not attach. Instead, therefore, of taking a moiety, her *douaire* would be one-fourth only of his estate ; for, it is a rule, that *douaire sur douaire n'a lieu*, nor is the second wife's interest enlarged, although the children of the former marriage should die before her husband (*g*).

The law of Quebec is the same, though the Code is rather obscurely expressed. It says : " The customary dower resulting from a second marriage, when there are children born of the first, consists in a half of the immovables, *not affected by the previous dower*, which belong to the husband at the time of the second marriage, or which accrue to him during such marriage from his father or mother or other ascendants. The rule is the same for all subsequent marriages which the husband may contract, when there are children of previous marriages " (*h*). This might be read as meaning that when an immovable is affected by dower on account of a first marriage, it will not be affected by dower on account of a second marriage. But this is not the intention. The article means that only the free half

(*d*) *Supra*, p. 535.

(*e*) Pothier, Traité du Douaire, s. 40; C. C. of L.C., art. 1435.

(*f*) Pothier, *ibid.*, s. 43.

(*g*) Cout., art. 253 ; Pothier, *ibid.*, ss. 46, 47.

(*h*) Art. 1436.

of the immovable will be available for the second dower. *E.g.*, the husband possesses a house when he first marries. It is affected by dower to the extent of one-half in favour of the wife and children. The wife dies, and he marries again. The one-half of the house which is free from dower is now affected to the extent of one-half in favour of the wife and children of the second marriage.

This leaves only one-fourth of the house free from dower. If the husband were to contract a third marriage, this one-fourth would be affected to the extent of one-half in favour of the dower of that marriage, leaving only one-eighth free. This was the system of the Coutume de Paris, and the codifiers of the law of Quebec expressly say that they intend art. 1436 to be an abridgment of arts. 253 and 254 of that *coutume* (*i*).

Upon the death of the husband the wife, so long as she enjoys the estate in common with the husband's heirs, must contribute in respect of her moiety to those charges for which usufructuary holders are liable (*j*).

She is not liable for any of the movable debts owing by him at the marriage; but only for real or immovable debts contracted by him before the marriage (*k*).

The *douaire* does not attach on estates held by the husband subject to a substitution which takes effect after his death, because it is not in his power to charge such an estate; but, if the author of the substitution were the father or mother of the husband, and there is no other property (*à defaut des biens libres*), the *douaire* would attach (*l*).

It attaches on property subrogated for that which was originally subject to the *douaire*, and accessions to it (*m*).

When the estate has ceased to exist, by the act or default of the husband, the wife is entitled to be indemnified out of his other property (*n*).

If his property in the estate terminates from a cause which preceded his marriage, she cannot claim her *douaire*. She can derive no title when the husband himself had no title. "Nemo potest plus juris in alium transferre quam ipse haberet" (*o*).

(*i*) Com. Rep., ii., p. 239.
(*j*) Pothier, Traité du Douaire, s. 53; C. C. of L.C., arts. 1458, 1471.
(*k*) Pothier, *ibid.*, s. 57.
(*l*) Pothier, *ibid.*, s. 61.
(*m*) *Ibid.*, s. 73.
(*n*) *Ibid.*, s. 77.
(*o*) *Ibid.*, s. 79.

Upon all these points the law of Quebec is the same.

An estate subject to *douaire*, if it be voluntarily sold by the husband, without the wife's consent, or if it be taken in execution, by creditors, whose demands are subsequent to the marriage, continues liable to her claim, into whatever hands it may have passed. It would be otherwise if the sale had been an act of necessity, for public purposes, in which case the sale would have been unimpeachable, and she would be entitled to her *douaire* from the price received for it (*p*).

So completely is the wife's title protected, that prescription begins to run only from the day of the husband's death (*q*).

Renunciation of Dower—Law of Quebec.—By the law of Quebec the mere consent of the wife to an alienation by the husband is not enough to affect her dower or that of the children. She must make an express renunciation of her dower either in the deed by which the husband alienates or hypothecates the immovable or by a subsequent deed (*r*).

But such a renunciation entirely discharges the dower both as to the wife and as to the children. It "has the effect of discharging the immovable affected by dower from any claim which the wife may have upon it under that title, and neither she nor her heirs can exercise against any other property of the husband any recourse to be indemnified or compensated for the right thus abandoned; notwithstanding the provisions of this title or any other provisions of this Code respecting the replacements, indemnities, or compensations which consorts or other parties owe to each other in cases of partition."

"As to the dower of the children, it can be exercised only upon immovables subject to the dower of their mother which have not been alienated or hypothecated by their father during the continuance of the marriage, with her renunciation made in the manner prescribed in art. 1444.

"Children who have attained the age of majority may, after the death of their mother, renounce their dower in all cases in which the latter could have done so herself, and in the same manner with the same effect" (*s*).

(*p*) Pothier, Traité de Douaire, s. 84; Rev. Stats. of Quebec, art. 5754 a.

(*q*) Cout., art. 117; Pothier, *ibid.*, s. 86; C. C. of L.C., art. 1449.

(*r*) C. C. of L.C., art. 1444.

(*s*) Arts. 1445, 1446.

These articles came into the law of the Province of Quebec by a statute always referred to as the Registry Ordinance (*t*).

The renunciation in favour of the third party is not in itself regarded as a gift by the wife to the husband or as being prohibited as a form of binding herself for her husband, but it will be narrowly examined, and will not stand if it was in reality a way of giving security for the husband. But a creditor in good faith is now protected (*u*).

The codifiers say of the wife's power to extinguish the right of the children, "that it is contrary to all principles of equity and sound legislation" (*x*).

The policy of the law of the Province of Quebec is to protect purchasers of immovables who are in good faith against charges which do not appear upon the register (*y*).

Accordingly a very important article has been inserted in the Civil Code of Lower Canada which formed no part of the *coutume*.

"The right to legal customary dower cannot be preserved otherwise than by the registration of the marriage certificate with a description of the immovables then subject to such dower."

"As regards immovables which may subsequently fall to the husband, and become subject to customary dower, the right to dower upon such immovables does not take effect until a declaration for that purpose has been registered, setting forth the date of the marriage, the names of the consorts, the description of the immovable, its liability for dower, and how it has become subject to it" (*z*).

II. **The Douaire Conventionnel, or Prefix.**—It is competent for the husband and wife by their nuptial contract to constitute a *douaire* essentially different from that which is established by the *coutume*.

This *douaire conventionnel*, or *préfix*, may exceed, or be less than, that given by the *coutume* (*a*).

Property which may be Subject to.—All, or only a part of the husband's property, or such part only as belonged to him at the time of the marriage, or such part only as may have belonged to him at the time of his death, may be made subject to the wife's *douaire*,

(*t*) 4 Vict. c. 30; Consol. Stat. L.C. c. 37, arts. 51—54.

(*u*) See art. 1301, and Erichsen *v.* Cuvillier (1880), 25 L. C. J. 80.

(*x*) Com. Rep., ii., p. 243.

(*y*) See Barsalou *v.* Royal Institution (1896), R. J. Q. 5 Q. B. 383.

(*z*) Art. 2116. See arts. 2133, 2147.

(*a*) Pothier, *ibid.*, ss. 123, 127.

or it may be made to consist of a particular estate, or of a certain sum of money. It may be stipulated that it shall cease if she enters into a second marriage (*a*).

Douaire a Grant in Perpetuum.—From the nature of the wife's interest, it is always deemed to have been granted only for her life, unless it be expressly granted to her *in perpetuum*.

Construction of Contracts relative to Douaire.—In the construction of contracts constituting *douaire*, the rule observed in respect of other contracts and testaments, namely, that the gift is deemed to be made *in perpetuum*, unless it be expressly restricted to the life of the grantee, or legatee, is not adopted (*b*).

Renunciation.—The wife having her *douaire* settled by contract, cannot renounce it, and claim a *douaire coutumier* (*c*).

The Code of Lower Canada provides "Conventional dower excludes customary; it is, however, lawful to stipulate that the wife and the children shall have the right to take either the one or the other at their option."

"The option made by the wife, after the opening of the dower, binds the children, who must remain satisfied with whichever dower she has chosen. If she die without having made the choice, the right of making it passes to the children. If there be no contract of marriage, or if in that which has been made, the parties have not explained their intentions on the subject, customary dower accrues by the sole operation of law. But it is lawful to stipulate that there shall be no dower, and such a stipulation binds the children as well as the mother" (*d*).

Vesting of Wife's Right.—The right of the wife is acquired by the marriage, but it does not vest in possession until the death of the husband. *Jamais mari ne paya douaire* is a maxim of the French law (*e*).

As the *coutume* did not restrict the wife's right to the event of her husband's natural death, there seems ground for considering, that, on his civil death, she would also have been entitled to it (*f*).

(*a*) See note (*a*), p. 540.

(*b*) Pothier, Traité du Douaire, s. 124; C. C. of L.C., art. 1437. See Lacerte *v.* Boisvert (1891), 17 Q. L. R. 110. But cf. Mignault, Droit Civ. Canad., vi., p. 419.

(*c*) Cout., art. 261.

(*d*) Arts. 1429—1431.

(*e*) Pothier, *ibid.*, s. 153.

(*f*) *Ibid.*, s. 155. Civil death was abolished in France by law of May 31st, 1854, and in Quebec by 6 Edw. VII., c. 38; see Burge, vol. ii., 260.

The wife must have survived the husband. In the Province of Quebec dower may be opened and become exigible by separation from bed and board, or separation of property only, if such effect result from the terms of the contract of marriage.

It may likewise be demanded in the case of the absence of the husband under the circumstances and conditions expressed in arts. 109 and 110 (*g*).

In Quebec, therefore, the old rule still holds good, *jamais mari ne paya douaire*, in other words, dower never becomes payable but by the natural death of the husband. But it is subject to two qualifications.

(1) The parties may stipulate that dower shall be payable after judgment of separation.

(2) The wife of a man who has disappeared and has not been heard of for five years, or his children, if the wife has predeceased, may claim dower.

They must, however, find security to return it if the absentee reappear.

Demi Douaire.—When the extravagance of the husband endangers the wife's claims, she is permitted to obtain, by sentence, not her entire *douaire*, but a certain allowance for her maintenance, and which has been called *demi douaire* (*h*).

She may obtain a judgment of separation of property which will leave the husband liable to contribute to her support if he is able to do so (*i*).

Rights of Wife on Death of Husband.—Under the *coutume* of Paris, although it was different in many other *coutumes*, the wife, on the death of her husband, is immediately seised, *pleno jure*, of her *douaire* (*k*).

She is entitled to all the *fructus naturales et civiles* from the day of his decease. She is not bound to make any demand of his heirs, and against them she is deemed to be in possession, so that she may sustain her petition or complaint.

This is also the law of Quebec (*l*).

Partition.—Upon the death of her husband, in order to terminate her tenancy in common with his heirs, and hold her *douaire* in severalty, the wife may institute an action of partition against them (*m*).

(*g*) C. C. of L.C., art. 1438.
(*h*) Pothier, Traité du Douaire, s. 157.
(*i*) C. C. of L.C., art. 1317.
(*k*) Pothier, *ibid.*, s. 159.
(*l*) C. C. of L.C., arts. 1441, 1453.
(*m*) Cout., art. 236.

The whole property subject to the claim is brought together and valued; it is divided into two shares, and the party by whom the first choice is made is decided by lot.

The expense of the valuation, and division, is borne by the widow, and the husband's heirs. If there was an inequality in the two shares, the larger share is, during the continuance of the *douaire*, charged with an annuity, equal to the difference (*n*).

The wife and the heirs of the husband must account and allow to each other the reimbursements, or indemnities, to which they are respectively entitled. Thus, if property could not have become subject to the *douaire* unless the husband had paid a certain sum of money, the widow must, during the continuance of the *douaire*, pay the interest on a moiety of that sum; and, on the other hand, if the husband has received money on the alienation of the property for public purposes, his heirs must pay to the widow the interest on a moiety of that sum (*n*).

The parties, on this, as on any other partition, are considered to have given each other a warranty against eviction. Thus, if the widow be evicted from any part of the moiety allotted to her, the heirs must pay, so long as the *douaire* continues, an annuity equal to the annual value of the part from which she was evicted (*o*).

The law of Quebec is the same upon all these points.

Partition is only necessary when the dower consists "in the enjoyment of a certain portion of the property of the husband" (*p*).

By "property" is here meant "immovables."

The Code provides: "If the dower of the wife consists in money or rents, the wife, in order to obtain payment of it from the heirs and representatives of her husband, has all the rights and actions which belong to the other creditors of the succession" (*q*).

When there are immovables subject to dower the heirs may demand a partition if the widow refuses it (*r*).

The widow may bring her action *confessoria servitutis usufructus* against the husband's heirs, or against those persons to whom he may have alienated the estates subject to her *douaire*. But the

(*n*) Pothier, Traité du Douaire, s. 176.

(*o*) *Ibid.*, ss. 186 *et seq.*

(*p*) C. C. of L.C., art. 1452.

(*q*) *Ibid.*, art. 1451.

(*r*) *Ibid.*, art. 1452. See Code Civ. Proc., arts. 1037 *et seq.*

action is sustainable against the latter only when there is not in the succession property sufficient to give the widow her part, and when the alienation has taken place without her consent (*s*).

But it should be observed, that, even although she has not consented to the sale, yet if she has accepted the community, and thus have become liable, with her husband, under his warranty, to the purchasers, for one moiety, she will, in respect of such moiety, be precluded from recovering it from the purchasers. *Quem de evictione tenet actio, eum agentem repellit exceptio* (*t*).

But by the law of Quebec nothing but express renunciation by the wife can affect her right to dower or that of the children (*u*).

The right of the widow to the *fructus civiles* and *naturales*, her duty as to the cultivation and preservation of the property, the debts or liabilities which she must discharge, and the reciprocal obligations of herself and her husband's heirs, resemble those of other usufructuaries (*x*). The law of Quebec is the same (*y*).

The *coutume* only requires her to give security to enjoy the property *en bon père de famille*, in the event of her again marrying (*z*).

The law of Quebec is the same. So long as the dowager remains a widow she enjoys the dower upon giving the security of her oath to restore it (*a*).

Extinction of Widow's Usufruct.—Both under the *coutume* and by the law of Quebec, the *usufruct* of the widow is subject to be extinguished by her death, by her acquiring the inheritance, by ceding the *usufruct* to the owner of the inheritance, and by the several other means of extinction to which *usufruct* is subject in other cases (*b*).

Forfeiture of Dower.—The wife forfeits her dower if she be convicted of adultery, or has committed fornication during the first year of her widowhood, or has refused to cohabit with her husband after being judicially summoned (*c*).

By the Civil Code of Lower Canada, "The wife may be deprived of her dower by reason of adultery or of desertion. In either case an action must have been instituted by the husband, and a subsequent

(*s*) Pothier, Traité du Douaire, s. 187.
(*t*) *Ibid.*, s. 192.
(*u*) C. C. of L.C., art. 1443, *supra*, p. 539.
(*x*) Pothier, *ibid.*, ss. 191 *et seq.*
(*y*) C. C. of L.C., arts. 1453, 1458—1460.
(*z*) Cout., art. 264.
(*a*) C. C. of L.C., art. 1454.
(*b*) C. C. of L.C., arts. 1462, 479.
(*c*) Pothier, *ibid.*, ss. 256—263.

reconciliation must not have taken place; the heirs, in such case, can only continue the action commenced, if it have not been abandoned" (*d*).

It would appear that a judgment of separation from bed and board obtained against the wife does not deprive her of her right to dower unless the ground of separation is adultery or desertion, for dower is not, in the sense of art. 211, "an advantage granted by the other party" to the marriage and therefore forfeited by separation. It is a legal right not given by the husband but by the law (*e*), and when in place of customary dower a conventional dower has been stipulated, this also is not a donation. It is not *liberalitas nullo jure cogente facta*. It is the payment of something which the wife agrees to accept in satisfaction of her claim to customary dower (*f*).

The forfeiture prescribed by the old law for the unchastity of the widow during the first year of her widowhood does not seem to have been retained by the law of Quebec. The old French law was applied in Quebec in one case before the Code (*g*). The codifiers did not indicate any intention to change the old law (*h*), but a penal provision like art. 1463 must be strictly construed, and the only grounds of forfeiture stated are adultery and desertion. It follows that we must regard the old law of forfeiture for the widow's misconduct as having been repealed by implication (*i*). The Civil Code of Lower Canada provides also that the wife, like any other usufructuary, may be declared to have forfeited her dower by abuse, such as committing waste on the property (*k*). The forfeiture enures to the benefit of the children.

If the wife have forfeited her claim to dower before it opens, the children take their dower when it opens by their father's death. If she have forfeited her claim after the opening of the dower, the children at once come in. The result is the same if she have renounced the dower after its opening (*l*).

Rights of Children.—Douaire Coutumier.—Under the *coutume*, the children of the marriage take the inheritance or ownership in that moiety of which the wife has the *usufruct* or life interest, whether

(*c*) C. C. of L.C., art. 1463.
(*d*) Art. 1427.
(*f*) Pothier, Douaire, s. 5; Civil Code, L.C., art. 1432.
(*g*) J. *c.* R. (1857), 7 L. C. R. 391.
(*h*) Com. Rep., ii., p. 249.
(*i*) Mignault, Droit Civil Canadien, vi., p. 454.
(*k*) Arts. 1464, 480.
(*l*) C. C. of L.C., art. 1465.

the *douaire* be *coutumier* or *conventionnel*. In whatever property, therefore, the wife had the usufruct as her *douaire*, the children are entitled to the inheritance as their *douaire*. They can take nothing in which the wife had not the previous usufruct in possession. They will, therefore, take no interest in an estate which descended after her death (*m*).

The law of Quebec is the same, but conventional dower may be modified at will by the contract of marriage (*n*).

The children are subject to no debts or charges which would not have affected the wife, and they are equally entitled to the same indemnities which could be claimed by her (*o*).

The Code of Lower Canada provides: "The dowered children are not bound to pay the debts which have been contracted by their father since the marriage: as to those which were contracted previously, they are only liable, hypothecarily, for them, with a recourse against the other property of their father" (*p*).

Douaire Conventionnel: Children.—The *douaire conventionnel* or *prefix* of the children is, like the *douaire coutumier*, the inheritance or absolute property in that which has been assigned as the *douaire* of the wife. "Le douaire constitué par le mari, ses parens, ou autres de par lui, est le propre heritage aux enfans issus dudit mariage, pour d'icelui joüir après le trépas de père et mère, incontinent que doüaire à lui" (*q*).

According to the construction given to the expression *est le propre heritage aux enfans*, they have the absolute ownership in that which has been assigned as the *douaire*, whatever may be the subject of it. Thus, if it consist of a sum of money, the wife receives the interest during her life, and the principal on her death belongs to the children (*r*).

The law of Quebec is the same, but it must always be remembered that conventional dower is capable of being modified in any way by the agreement which creates it (*s*).

The children must have survived their father in order to acquire a perfect title to their *douaire*. If they die in his lifetime they

(*m*) C. C. of L.C., art. 253.
(*n*) Art. 1437.
(*o*) Pothier, Traité du Douaire, s. 299.
(*p*) Art. 1469.
(*q*) Burge, 1st ed., i., 388; 1 Duplessis, art. 255, c. 4, s. 1, p. 250.
(*r*) Cout., art. 257; Pothier, *ibid*, ss. 313 *et seq*.
(*s*) C. C. of L.C., art. 1437.

have no interest therein which they can transmit to their heirs (*t*).

But by the law of Quebec the principle of representation applies: Grandchildren whose father or mother, being a child of the marriage, died before the opening of the dower, are entitled to the share of their parent (*u*).

As their title does not vest in possession until the death of their father they are bound to prove that fact (*v*).

Upon his death they have an interest transmissible to their heirs, and are, like the wife, seised *pleno jure* of their *douaire* (*x*).

The children may on the death of their father compel a partition by instituting their action of partition, to which the mother must be a party in respect of her usufructuary interest (*y*).

An hypothec is acquired in the case of the *douaire coutumier* from the day of the marriage, and of that which is *conventionnel* from the day of the contract (*z*).

But by the law of Quebec the hypothec affects only immovables described in a declaration which must be registered (*a*).

Conditions on which Children are entitled to the Douaire.—The children entitled to the *douaire* must be *issus du mariage;* but under this description are included children born before, but legitimated by the marriage, as well as posthumous children (*b*).

They must be also capable of succeeding; if, therefore, at the death of their father, they had lost their civil status, they cannot claim the *douaire* (*b*).

Upon the first point the law of Quebec is the same (*c*); upon the second it was so till civil death was abolished.

It is necessary that the child who claims *douaire* should renounce the succession: "Si les enfans venans dudit mariage ne se portent

(*t*) Pothier, Traité du Douaire, s. 327.

(*u*) Art. 1466.

(*v*) Pothier, *ibid.*, s. 332; C. C. of L.C., art. 1441.

(*y*) Pothier, *ibid.*, s. 335; C. C. of L.C., art. 1452.

(*z*) Pothier, *ibid.*, s. 343.

(*a*) C. C. of L.C., arts. 1447, 1448, 2116. See Perrault *v.* Caron (1891), 14 L. N. 129. In practice such registration is not common.

(*b*) Pothier, *ibid.*, ss. 345 *et seq.*

(*c*) C. C. of L.C., art. 1466; the Act of 1906 (6 Edw. VII, c. 38), which abolished civil death in Quebec, enacts that a person condemned to death or to perpetual personal punishment cannot take under a will except as an alimentary allowance. But, perhaps by oversight, it does not deprive such a person of the right to take on intestacy.

heritiers de leur père, et s'abstiennent de prendre sa succession, en ce cas ledit doüaire appartient ausdits enfans purement et simplement. Nul ne peut être heritier et doüairier ensemble, pour le regard du doüaire coutumier ou préfix" (*d*).

This rule is founded on the principle, that one of several heirs shall not derive an advantage from which the others are excluded, and on the incompatibility, if there be only one heir, of his uniting in himself the character of a creditor, in respect of his *douaire*, with that of a debtor, as heir.

This rule prevails, as between him and the co-heirs, even although they should have accepted the succession under the benefit of inventory; but as against the creditors, he may claim his *douaire* in preference to them (*e*).

The Code of Lower Canada provides: "A child who assumes the quality of heir to his father, even under benefit of inventory, can have no share in the dower" (*f*).

A child cannot claim his *douaire* and also retain a gift which has been made to him (*g*). Such gift, therefore, must be collated, and any declaration on the part of the parent exempting the child from collating it, will, as against the co-heirs and creditors, whose demands were prior to the donation, be nugatory and void (*h*).

The Code of Lower Canada provides: "In order to be entitled to dower the child is bound to return into the succession of his father all such benefits as he has received from him, in marriage or otherwise, or to take less in the dower" (*i*). It is not very clear whether the rule of the old law still holds good that a declaration exempting the child from returning or collating a gift will be refused effect. It would appear difficult to maintain that a marriage covenant might not provide that donations made to children were not to be subject to return. For art. 1437 says in express terms that conventional dower may be modified at will.

On the other hand, when the marriage covenant is silent, such a

(*d*) Burge, 1st ed., i., 389; 1 Duplessis, art. 251, c. 4, s. 1, p. 251, and arts. 250, 252.

(*e*) Pothier, Traité du Douaire, ss. 351 *et seq.*

(*f*) Art. 1467. See Perrier v. Palin (1897), R. J. Q. 14 S. C. 332.

(*g*) Burge, 1st ed., i., 389; Cout., art. 252.

(*h*) Pothier, *ibid.*, s. 355.

(*i*) Art. 1468.

declaration made in a subsequent gift by the parent might be null as involving an alteration in the marriage covenants (*k*).

Division of Douaire amongst Children.—The *douaire* is divided amongst the children, without any preference or privilege in favour of seniority of age (*l*).

If either of them renounces his part in the *douaire*, in order to take the succession, or if he renounced both, in order to retain donations, his share falls into the succession, and does not belong, *jure accrescendi*, to the other children (*m*).

The law of Quebec is the same (*n*).

SECTION III.

The Dotal *Régime* in France.

The Régime Dotal.—*Le régime dotal*, under which the Code Civil permits parties to marry, bears no resemblance to the *douaire coutumier*, but is founded on the leading principles of the civil law relative to the *dos*.

The dotal system has never existed in Canada. It is practically unknown in Mauritius.

The Dot.—*La dot* is defined by the Code Civil to be "le bien que la femme apporte au mari pour supporter les charges du mariage" (*p*).

Whatever the wife settles, or is given to her in the contract of marriage, is dotal, if there be no stipulation to the contrary (*q*).

Constitution of Dot.—The constitution or settlement of the *dot* may comprise all her present and future property (*r*), or a part of both, or either, or only her present property, or even an individual article (*a*).

If it be in general terms, *de tous les biens de la femme*, it will not include her future property (*b*). The *dot* must be fixed at the

(*k*) Art. 1265; Mignault, Droit Civ. Canad., vi., p. 462.

(*l*) Cout., art. 250; C. C. of L.C., art. 1466.

(*m*) Pothier, Traité du Douaire, s. 396; Burge, 1st ed., 390.

(*n*) C. C. of L.C., art. 1471.

(*p*) Code Civil, art. 1540. On the *dot* generally, see Fuzier-Herman, Code Civ. Ann., under arts. 1540 *et seq.*; Rép. tit. Dot.

(*q*) Code Civil, art. 1541.

(*r*) As to whether in the case of the constitution of *dot*, comprising future property, creditors of successions accruing to the wife, may seize, in spite of their dotal character, property coming to the wife from such successions, see Lacoste *v.* Fachan (1903), C. Pau, Sirey, 1903, ii., 48, and authorities collected in n. (2).

(*a*) Code Civil, art. 1542.

(*b*) *Ibid.*, art. 1542.

time of the marriage, and cannot afterwards be augmented or diminished (*c*).

When it has been settled by the father and mother jointly, without distinguishing their respective shares, it is deemed to have been settled by them in equal portions (*d*).

If it be settled by the father only, in respect both of paternal and maternal rights, the mother, though present at the contract, is not bound, and the father is alone liable for it (*d*).

If it be settled by the survivor of the father or mother in respect of paternal and maternal property, without specifying the portions, it shall be first taken from the rights of the intended spouse in the property of the deceased parent, and the residue out of the property of the parent making the settlement (*e*).

It is deemed to have been made from the property of the settlors if there be no stipulation to the contrary, notwithstanding the daughter may have property in her own right, of which they have the usufruct (*f*).

Interest on Dot.—Interest upon the *dot* is due from the day of marriage against those who have promised it, although a term be fixed for its payment, unless there be a stipulation to the contrary (*g*).

Management of Property assigned in Dot.—The management of the property assigned in *dot*, and the right of suing those who are debtors in respect of it or who detain it, of enjoying the fruits or interest thereof, and of receiving reimbursements of the capital, vest in the husband alone during the marriage. But an annual sum may, by the marriage contract, be made payable to the wife, on her own receipt, for her personal expenses (*h*).

The husband's right resembles that of a usufructuary, except that it is to be exercised not only in his own interest, but in that of his wife and the children of the marriage (*i*).

Security.—The husband is not bound to give security for the receipt of the *dot*, unless it be so provided by the contract of marriage (*j*).

(*c*) Code Civil, art. 1543. Cf. art. 1595, which lays down the principle that matrimonial conventions are immutable.

(*d*) *Ibid.*, art. 1544. Cf. arts. 1438, 1439; Burge, 1st ed., i., 392.

(*e*) Code Civil, art. 1545.

(*f*) *Ibid.*, art. 1546.

(*g*) *Ibid.*, art. 1548. Cf. art. 1440.

(*h*) *Ibid.*, art. 1549.

(*i*) Fuzier-Herman, Cod. Civ. Ann., under art. 1549, n. 1.

(*j*) Code Civil, art. 1550. This is a derogation from the general law as to

Valuation of Movables.—With respect to movables of which the *dot* may consist, if they are valued at a certain sum the husband becomes the proprietor of them and debtor for that sum, unless there be a declaration that such valuation does not amount to a sale (*k*).

Valuation of Immovables.—The converse takes place when an immovable is valued; the husband does *not* become the proprietor of it unless there be an express declaration that it was valued in order that the husband should become the proprietor of it at the amount of its valuation (*l*).

An immovable purchased by means of money assigned *in dotem*, or received in payment of a debt *in dotem*, does not become subject to the *dot*, unless it had been stipulated by the marriage contract that the money should be so invested (*m*).

Alienation of Immovable Prohibited.—Neither the husband alone, nor he and the wife jointly, can during the marriage alienate, or pledge an immovable, the subject of the *dot*, except in the particular cases hereinafter mentioned (*n*).

Exceptions.—Authorisation in Marriage Contract.—The alienation may be authorised by the marriage contract (*o*).

Marital or Judicial Authorisation.—With the authority of her husband, or with that of the Court upon his refusal, the wife may apply the dotal property to the establishment of her children by a former marriage; but if she act under the authority only of the Court, she must reserve the enjoyment to her husband (*p*); and with his authority she may bestow it for the establishment of their common children (*q*).

It may also be alienated with the permission of the Court, and by auction, after three public notices, in order to relieve the husband, or wife, from prison, or furnish subsistence for the family, or to pay the debts of the wife, or of those who have settled the dowry, when such debts have a certain date anterior to the contract of marriage; or to make substantial repairs indispensably required for the preservation of the estate in *dot*, or when it is held

usufructuaries; see arts. 601 and 1562.

(*k*) Code Civil, art. 1551.

(*l*) *Ibid.*, art. 1552.

(*m*) *Ibid.*, art. 1553.

(*n*) *Ibid.*, art. 1554.

(*o*) *Ibid.*, art. 1557.

(*p*) *Ibid.*, art. 1555.

(*q*) *Ibid.*, art. 1556.

in common with another, and is incapable of being divided. If the price obtained in either of these cases exceeds that which was actually required by the occasion, it is subject to the *dot*, and is to be invested for the benefit of the wife (*r*).

Exchange.—An immovable in *dot* may be exchanged, with the consent of the wife, for another immovable. The exchange must be proved to be advantageous, and can be effected only under the sanction of the Court, and that sanction is not to be given, if the property received be of an inferior value to that given in exchange by more than one-fifth. That which is received in exchange is subject to the *dot*, as well as any sum of money given *par retour*, which is to be invested for the benefit of the wife (*s*).

Revocation of Alienation.—An alienation by the wife, or by the husband, or by both jointly, of immovable property which is dotal may, after the dissolution of the marriage or after separation *de biens*, be revoked (*t*).

The husband himself may cause the alienation to be revoked, although he may be liable in damages to the purchaser, unless he had declared in the contract that the property sold was dotal (*t*).

Prescription of Immovables.—Immovables which are not by the contract of marriage declared alienable cannot be prescribed during the marriage, unless the prescription had commenced before the marriage, but they may be prescribed after separation *de biens* at whatever period the prescription may have begun (*u*).

Obligations of Husband.—The husband, having the administration and management of the dotal property and being in the receipt of its fruits, is chargeable with all the obligations incurred by an usufructuary, and responsible for all losses which have been occasioned by his negligence (*x*).

If the property be in peril, the wife may sue for separation of property, as in the case of community (*y*).

(*r*) Code Civil, art. 1558.

(*s*) *Ibid.*, art. 1559. See Ransac *v.* Faugeras (1900), Sirey, 1901, i., 65, and nn. (1)—(6).

(*t*) *Ibid.*, art. 1560. *Semble*, the right to claim the nullity of the sale of a dotal immovable belongs exclusively after the dissolution of the marriage to the wife and her heirs: Société Générale *v.* Quénard et Jacquemart (1901), C. Paris, Sirey, 1903, ii., 174.

(*u*) Code Civil, art. 1561.

(*x*) *Ibid.*, art. 1562. Cf. arts. 600 *et seq.*, 1382—1383, 1533, 1550, 1567, 1580, 2121, 2135.

(*y*) *Ibid.*, arts. 1443 and 1563.

Restitution of Dot.—The restitution of immovables and of movables not valued by the marriage contract or fixed at a just price, with a declaration that the valuation does not divest the wife of her property therein, is to be immediately made after the dissolution of the marriage (*z*).

If the dotal property consist of a sum of money or of movables which have been valued by the contract at a certain price, without declaration that the valuation does not render the husband proprietor thereof, the restitution cannot be exacted until a year after the dissolution (*a*).

With respect to movables of which the wife retains the property, and which have perished in their use or without the husband's fault, he is only bound to restore those which remain, and in the state in which they shall happen to be (*b*).

Neither is he responsible for obligations, annuities, or other debts which have become of no value, without any negligence being imputable to him, but he is entirely discharged on restoring the contracts (*c*).

If the marriage have continued ten years subsequently to the expiration of the term assigned for the payment of the *dot*, the wife, or her heirs, may demand restitution of it from the husband after the dissolution of the marriage, without being held to prove that he has received it, unless he is able to show diligence used by him in endeavouring to procure the payment (*d*).

Death of Wife.—When the marriage is dissolved by the death of the wife her heirs are entitled to the interest and fruits of the dotal property from the day of the dissolution (*e*).

Death of Husband.—If it be dissolved by the death of the husband the wife has the choice of demanding the interest of the *dot* during the year of mourning, or of causing alimony to be supplied during that period at the expense of her husband's succession; but in each case her lodging during such year, and her mourning weeds, must be supplied to her from the succession, and are not to be deducted from the interest due to her (*e*).

(*z*) Code Civil, art. 1564.
(*a*) *Ibid.*, art. 1565.
(*b*) *Ibid.*, art. 1566.
(*c*) *Ibid.*, art. 1567.
(*d*) *Ibid.*, art. 1569. The presumption enacted by this article does not apply to the *régime de communauté*: Borreau *c.* Borreau (1888), C. Dijon, Sirey, 1888, ii., 239.
(*e*) Code Civil, art. 1570.

Distribution.—On the dissolution of the marriage the fruits of the immovables in *dot* are distributed between the husband and the wife, or their heirs, in proportion to the time it has continued during the last year.

The year commences from the day on which the marriage was celebrated (*f*).

Hypothecary Creditors.—The wife or her heirs cannot claim against creditors by hypothec whose demands are prior in point of time, any privilege for the recovery of the dotal property (*g*).

The debts which appear by a certain date to have been incurred by the wife before the marriage are, if they have been paid by the husband, to be deducted from the dotal property.

Liability of Husband under Régime Dotal.—His liability under *le régime dotal* differs in respect of the principle on which it proceeds from that which he incurs under *le régime de la communauté*. Under the latter he is liable, because the debts pass into the community with the property which is burdened with them. Under *le régime dotal* he is liable only in respect of the dotal property which the wife brings. He is bound to pay all her debts; but never having been personally liable for them he is permitted, by delivering up the wife's property to her creditors, to discharge himself from further liability. If the *dot* consist of a certain sum of money, he is liable only to the amount of that sum; and if it consist of immovables, he is only relieved from his liability by pointing out other property equally chargeable with his debts (*h*).

Debts of Wife.—The debts contracted by the wife during the marriage, with the authority of the husband, are valid, and, although judgments against her cannot be executed during the coverture, on account of the inalienable character of dotal property, yet if the husband discharge them, after the dissolution of the marriage, he is entitled to be reimbursed out of the wife's property (*h*).

Expenses.—It seems that the husband is also entitled to deduct such expenses as have been incurred in the preservation of the dotal property (*i*).

(*f*) Code Civil, art. 1571.
(*g*) *Ibid.*, art. 1572.
(*h*) *Ibid.*, arts. 2172, 2170; Toullier, tit. 5, c. 3, du Rég. Dot. nn. 311, 346.
(*i*) *Ibid.*, s. 330.

The *coutume* did not recognise the distinction between dotal property and paraphernalia, or extradotal property; on the contrary, it was a maxim that all the property of the wife should be deemed dotal (*k*).

Paraphernalia of Wife.—The Code adopts a contrary rule and declares all the property of the wife, which has not been settled in *dot*, to be paraphernalia (*l*).

The management and enjoyment of her paraphernalia belongs to the wife. But she cannot alienate such property, nor become party to a suit in respect of it, without the authority of her husband, or upon his refusal, without the permission of the Court (*m*).

If the wife gives her procuration to her husband to manage her paraphernalia, on condition of accounting to her for the fruits, he is responsible to her, as any other agent would be (*n*). If the husband have enjoyed the paraphernalia of his wife, otherwise than as her agent, without any opposition on her part, he is only bound on the dissolution of the marriage, or on the first demand of the wife, to account for the existing fruits, and not for those which have been previously consumed (*o*). If he have enjoyed the paraphernalia against the express desire of the wife, he is accountable to her for all the fruits, as well those existing as those which have been consumed (*p*). The husband, who enjoys the paraphernalia, incurs all the obligations of an usufructuary (*q*).

SECTION IV.

Donations between Spouses.

Donations between Spouses.—Coutume of Paris.—The husband and wife are, by the *coutume* of Paris, declared incapable of deriving from each other, by donation, either *inter viros* or by testamentary disposition, or otherwise, any advantage, directly or indirectly, unless it be by such mutual or reciprocal donation as the law permits, and which will be presently stated.

"Homme et femme conjoints par mariage, constant icelui, ne peuvent avantager l'un l'autre par donation faite entre-vifs par testament ou ordonnance de derniere volonté, ne autrement,

(*k*) Pothier, Traité de la Puis., s. 81.
(*l*) Code Civil, art. 1574.
(*m*) *Ibid.*, art. 1576.
(*n*) *Ibid.*, art. 1577.
(*o*) *Ibid.*, art. 1578.
(*p*) *Ibid.*, art. 1579.
(*q*) *Ibid.*, art. 1580.

directement ne indirectement, en quelque maniere que ce soit, si non par don mutuel, tel que dessus" (*r*).

The prohibition in the *coutume* of Paris extends not merely to simple donations, but also to those which are mutual, unless they are made in strict conformity with the conditions under which they are permitted (*s*). From the general terms of this prohibition, it may be stated that every disposition or act, whatever be its form or character, or however it may be disguised by the introduction of a nominal donee, or disponee, if either conjoint derives an advantage from it, is null and void. An acknowledgment by the one, that he or she has received from the other more than the former did actually receive, or a release by the one of the other, from accounting in the character of executor, &c., is, therefore, void. The only exception which might be admitted, is that of one of the conjoints having appointed the other an executor, and having given him some movable, or sum of money, as a remuneration for his trouble in discharging the duties of the office, provided the bequest is not extravagant in amount, or disproportioned to the testator's fortune (*t*).

The incapacity, induced by this prohibition, continues, notwithstanding the separation of the husband and wife, unless that separation be the effect of a sentence declaring their marriage null (*u*).

No title can be acquired under such a donation.

The *coutume* of Paris expressly prohibited that which, according to the construction of the *coutume* of Normandy (*x*), might seem to have been included in the former prohibition (*y*). It did not allow one conjoint to give to a child of the other, when they have common children of their marriage, or when the donor has himself a child of a former marriage. "Ne peuvent lesdits conjoints donner aux enfans l'un de l'autre d'un premier mariage, au cas qu'ils, ou l'un d'eux, ayent enfans" (*z*).

By the law of Quebec the child would be presumed to be an interposed person and the gift intended to be for the benefit of the other consort (*a*). But the presumption may be rebutted.

(*r*) Cout. Paris, art. 282; Burge, 1st ed., i., 398.

(*s*) Cout. Paris, arts. 280, 281, 282; Pothier, Tr. des Don., s. 33.

(*t*) Pothier, Traité des Don., s. 19.

(*u*) Pothier, *ibid.*, s. 30.

(*x*) See p. 576.

(*y*) Art. 410; Merville, p. 111; see *post*, p. 576.

(*z*) Cout. Paris, art. 283; Burge, 1st ed., i., 399.

(*a*) C. C. of L.C., art. 774.

Mutual Donations.—The *coutume* of Paris permitted a mutual donation to be made, under certain restrictions. "Homme et femme conjoints par mariage, étant en santé, peuvent et leur loist, faire donation mutuelle l'un à l'autre également, de tous leurs biens, meubles et conquêts immeubles, faits durant et constant leur mariage, et qui sont trouvez à eux appartenir et être communs entre eux à l'heure du trépas du premier mourant desdits conjoints, pour en joüir par le survivant d'iceux conjoints, sa vie durant seulement, en baillant par lui caution suffisante de restituer lesdits biens après son trépas : pourvû qu'il n'y ait enfans, soit des deux conjoints, ou de l'un d'eux, lors du decés du premier mourant" (*b*).

Both the conjoints must be in health at the time the donation is made. The construction given by Duplessis to the expression *étant en santé*, in which Pothier concurs, is, that the donation is null, if it be made when the conjoint is labouring under a dangerous illness, although it may not have caused his death (*c*).

The conjoints must have been married under the community of goods.

The donation cannot be made if there be children, or if either conjoint has a child.

The property, the subject of this donation, must be movable or *conquêts faits durant le mariage*.

It is given to the survivor, and is enjoyed only for the life of such survivor, who must give sufficient security to restore it, and until the security has been given the donee is not entitled to the fruits (*d*).

There must be an equality in the value of the property. There must be no such disparity in health or age as to render the probability of survivorship in any way unequal. It must be irrevocable, and any reservation inconsistent with its irrevocability renders the donation void (*e*).

The *don mutuel* was required to be registered in four months from the day of the contract (*f*).

The gift being made to the survivor of the two conjoints, it takes effect on the death of the one who first dies. The donee is not seised of it, but must demand it from the heirs of the deceased (*g*).

The property which is the subject of the gift is charged with the

(*b*) Cout. Paris, art. 280.
(*c*) Pothier, Tr. des Don., s. 151.
(*d*) Cout. Paris, art. 285.
(*e*) Pothier, *ibid.*, s. 150 *et seq.*
(*f*) Cout. Paris, art. 284.
(*g*) *Ibid.*, art. 284.

expenses of the funeral of the deceased, and with the share or moiety of the debts which were due by the community, or by the conjoint to the community. If the gift does not consist of the entire share of the conjoint in the community, the liability of the survivor for the debts is proportioned to the amount of the gift (*h*).

Law of Quebec.—The Civil Code of Lower Canada provides: "After marriage, the marriage covenants contained in the contract cannot be altered (even by the donation of usufruct, which is abolished), nor can the consorts in any other manner confer benefits *inter vivos* upon each other, except in conformity with the provisions of the law under which a husband may, subject to certain conditions and restrictions, insure his life for his wife and children" (*i*).

All donations by the one consort to the other are absolutely null. That which has been transferred can be revendicated if it is an immovable, or if, being a corporeal movable, it is still in the possession of the donee.

If it is money which has been given, this has no earmark. The remedy of the donor or his heirs is a personal action for reimbursement. And the same is true when corporeal movables can no longer be traced (*k*).

Purchasers in good faith from the donee are protected if the thing is a corporeal movable and has been bought in a fair or market, or from a trader dealing in similar articles, or otherwise in a commercial way (*l*).

And so are purchasers of immovables or lenders upon hypothec, being free from negligence and relying upon the register, according to which the donee has an absolute title (*m*).

But the title must not be such as would have roused the suspicion of a prudent buyer.

Such cases occur when the transfer is made indirectly. *E.g.*, the husband sells to A., it being arranged that no price is to be paid, and that A. shall re-transfer to the wife (*n*).

The donation is null, although it may be cloaked in the guise

(*h*) Cout. Paris, art. 286; Pothier, Tr. des Don., ss. 220 *et seq.*; Burge, 1st ed., i., 401.

(*i*) C. C. of L.C., art. 1265; Rev. Stat. Que. 5809; Comm. Rep., ii., p. 400.

(*k*) Pothier, Donations entre Mari et Femme, s. 69; Déry *v.* Paradis (1900), R. J. Q. 10 K. B. 227.

(*l*) C. C. of L.C., art. 2268.

(*m*) Normandin *v.* Arnois (1883), 3 Dor. Q. B. 329; see Barsalou *v.* Royal Institution (1896), R. J. Q. 5 Q. B. 383.

(*n*) Normandin *v.* Arnois, *ut supra*.

of an onerous contract, or may be in favour of an interposed person (*o*).

Mere customary presents will not be treated as covered by the prohibition of art. 1265 unless they are of a value disproportionate to the fortune of the donor (*p*).

And it is settled by numerous cases that a wife can renounce in favour of a third party her legal hypothec for her claims against her husband (*q*).

It makes no difference whether her claim arises at common law or if it is in virtue of a marriage contract (*r*).

And she may, equally, renounce an express hypothec in her favour (*s*).

These decisions merely reaffirm the doctrine of the Roman law (*t*).

Code Civil: Donations.—The Code has adopted not the prohibitions of the *coutume*, but the rules of the civil law on the subject of donations between husband and wife.

The one conjoint may make a gift to the other of the whole of the property of which the law leaves him the power of disposing, but it is revocable at any time during the life of the donor, and the revocation may be made by the wife, without the authority of her husband or of a Court of justice (*u*).

Mutual Donations.—The Code does not allow the mutual and reciprocal donation to be made by one and the same act. It prevents, therefore, any question, when one only of the conjoints had revoked the donation, and the other had afterwards died (*x*). But it may be made on the same day by different acts (*y*).

(*o*) C. C. of L.C., art. 774; Normandin *v.* Arnois, *ut supra;* Carter *v.* McCaffrey (1892), R. J. Q. 1 Q. B. 97.

(*p*) Eddy *v.* Eddy (1898), R. J. Q. 7 Q. B. 300; see [1900] A. C. 299.

(*q*) Civil Code, L.C., art. 2029; Boudria *v.* McLean (1862), 6 L. C. J. 65; Lagorgendière *v.* Thibaudeau (1871), 2 Q. L. R. 163; Hamel *v.* Panet (1876), 3 Q. L. R. 173; L. R. 2 A. C. 121; Hogue *v.* Société de Construction Montarville (1879), 23 L. C. J. 276.

(*r*) Donnelly *v.* Cooper (1895), R. J. Q. 8 S. C. 488.

(*s*) Bank of Toronto *v.* Perkins (1881), 1 Dor. Q. B. 357.

(*t*) Cod., iv., 29. 11; cf. Dig. xvi., i., 8.

(*u*) Code Civil, art. 1096; Burge, 1st ed., i., 401.

(*x*) *Ibid.*, art. 1097. It should be noted that the prohibition in this article does not extend to donations in the marriage contract, nor to revocable donations *inter vivos* during the marriage by separate acts: Bourgain-Chesnaux *v.* Enregistrement (1893), Sirey, 1894, i., 47.

(*y*) Arrêt, July 22nd, 1807; Sirey, an. 1807, p. 368; Toullier, liv. 3, tit. 2, c. 9, n. 916.

Disguised Donations.—It prohibits donations disguised or made to intermediate persons (*z*). Donations by one of the conjoints to the children, or to one of the children of the other, the issue of a former marriage, are deemed to have been made to intermediate persons, as well as those made by the donor to a relation, to whom the other conjoint is presumptive heir on the day of the donation, although the latter may not have survived his relation the donee (*a*).

The question has been much discussed as to how far art. 1099 should apply. Both the authors and the Courts have upheld the contention that the donations mentioned were not radically null, but valid in so far as they did not exceed the *quotité disponible*.

A better system, viewed with greater favour by the Courts, strictly adheres to the text of the article and nullifies all donations made in contravention thereof (*b*).

Second Marriages.—Upon a second marriage the interests of the children of a former marriage are in danger of being affected by the new attachment which their parent has formed. The parent, on his second marriage, has, in some particulars which have been already noticed, been deprived of certain privileges which he would otherwise have enjoyed. Under the *coutume* he ceased, on such marriage, to be their guardian (*c*), and, under the Code Civil, the mother is deprived of the usufruct in their property (*d*).

Restrictions on Disposition of Property on Second Marriage.—But the protection of the children is still more effectually secured by the restrictions to which the parent is subject, in the disposition of his property on a second marriage. Those restrictions, which are borrowed from the civil law, were imposed by the Edict of Francis II., July, 1560, and the *Coutume* of Paris (*e*).

The Code Civil provides that "L'homme ou la femme qui, ayant des enfans d'un autre lit, contractera un second ou subséquent mariage, ne pourra donner à son nouvel époux qu'une part d'enfant

(*z*) Code Civil, art. 1099. The donations include donations *inter vivos* as well as testamentary gifts: see Anuzé *v.* Fosse-Fromentin (1898), Sirey, 1902, i., 231.

(*a*) Code Civil, art. 1100.

(*b*) Boisset *v.* Benoit (1881), Sirey, 85, i., 112; Demolombe, xxiii., p. 717, s. 614; Laurent, D. C. F., xv., pp. 453 *et seq.*, ss. 401 *et seq.*; Baud.-Lacantinerie, ii., s. 799.

(*c*) Cout. art. 268.

(*d*) Code Civil, art. 386.

(*e*) Cout. art. 279; Burge, 1st ed., i., 102.

légitime le moins prenant, et sans que, dans aucun cas, ces donations puissent excéder le quart des biens" (*f*).

The children of the second marriage have, equally with those of the first, the benefit of the reduction of any donation which has been made in contravention of this restriction. But that part of the Edict which required the reserve for the children of the former marriage is not admitted into the Code (*g*).

The Civil Code of Lower Canada provides: "The prohibitions and restrictions respecting gifts and benefits bestowed by future consorts in case of second marriages no longer exist" (*h*).

In St. Lucia the articles already cited (*i*), dealing with the continuation of the community, lay down the law which applies in the case of the re-marriage of the survivor.

SECTION V.

Marriage Contracts.

Marriage Contracts.—The parties may, subject to the restrictions which have already been noticed (*ii*), regulate by contract, on their marriage, their rights and interests in each other's property.

The commentators on the French law have enumerated the principal provisions of which *conventions matrimoniales* may consist. The Code has, with some few alterations, adopted them.

The Communauté Conventionnelle.—The parties may, by their matrimonial convention, modify the community established by the *coutume* or law. It is then called *la communauté conventionnelle*.

Selection of Community under another Coutume Prohibited.—Under the *coutume* the parties might select the community established by the *coutume* of another country, but such a selection is prohibited by the Code Civil (*j*).

This article was thought necessary in France, where the various *coutumes* had just been abolished by the Code.

In the Province of Quebec there was no danger of persons electing to be married under the old law, and therefore the Code contained no provision corresponding to art. 1390 of the French Code.

(*f*) Code Civil, arts. 1098, 1527.
(*g*) Merlin, Rép. tit. Noces Secondes, s. 7, art. i., 8.
(*h*) Art. 764.
(*i*) *Ante*, p. 532.
(*ii*) *Ante*, p. 478.
(*j*) Code Civil, art. 1390; Burge, 1st ed., i., 407.

The Code of Lower Canada provides: "The consorts may modify the legal community by all kinds of agreements not contrary to arts. 1258 and 1259" (*k*). That is, the agreement must not be contrary to good morals, or derogate from the authority of the husband as head of the family or the authority of the parents over the children.

In practice there are only two *régimes* which are frequent. The parties marry either under the system of separation of property or under the system of community. But marriage covenants containing one or other of the clauses enumerated in art. 1384 of the Quebec Code and in art. 1497 of the French Code still occur. And in other cases the marriage covenants are of a special character not falling under any of these enumerated heads.

The following are examples of the former class, which exclude the community:—

Marriage sans Communauté.—The parties may stipulate that there shall be no community between them (*l*). Under this agreement the wife has no interest in any part of the husband's property, movable or immovable, which he acquires during the marriage, and she is not liable for any of the debts contracted by him (*m*). The husband takes no property in her estate, movable or immovable, but he is entitled to its *fructus ad sustinenda onera matrimonii*, and on the dissolution of the marriage he must deliver to the wife or her heirs all the property which she brought at the marriage or during the coverture (*n*). Under this system the wife's revenues are not payable to her, but to the husband. But it may be agreed that she shall receive them in whole or in part for her support and personal wants (*o*).

Immovables so excluded from the community are not inalienable. But they cannot be alienated without the consent of the husband or upon his refusal without judicial authorisation (*p*).

Clause of Séparation de Biens.—Not only may the community be

(*k*) Code Civil, art. 1384.

(*l*) Burge, 1st ed., i., 407; Pothier, Tr. de la Com., s. 461; Code Civil, art. 1529; C. C. of L.C., arts. 1416—1421.

(*m*) Art. 1530.

(*n*) See art. 1531. Such property belongs to the wife even if there is no indication of the source of the money with which it was acquired, but the husband's heirs may prove that it was acquired with his money: Goulard *v.* Goulard (1897), Sirey, 1901, i., 491.

(*o*) Code Civil, art. 1534; Civil Code, L.C., art. 1420.

(*p*) Code Civil, art. 1535; Civil Code, L.C., art. 1421.

excluded, but it may be agreed that each shall separately enjoy his or her property. The wife under this clause retains the management of her estate movable and immovable and the free enjoyment of its income, but she cannot alienate it without the authority of her husband or that of the Court (*q*).

The system of separation of property between the consorts is becoming very common in the Province of Quebec.

In Mauritius this is the mode which prevails now almost in all cases.

In order to exclude community and its incidents, the conjoints must expressly declare their intention to be married either without community or with separation as to goods. The *non-communauté* is little known in Mauritius.

Under this system each of the conjoints contributes to the expenses of the married life according to the covenants contained in their marriage contract. If there be none on this head it was left, under the *coutume*, to the discretion of the Court to determine the proportion to be contributed by the wife, but the Code has fixed that amount at one-third of her income (*r*).

By the law of Quebec the old rule is retained. If the marriage covenants are silent and the parties cannot agree, "the Court determines the contributory portion of each consort according to their respective means and circumstances" (*s*).

The following are usual modifications of the legal community :—

La Communauté réduite aux Acquêts.—It may be stipulated that the community shall consist of acquisitions (*t*), or of a part only of the present or future property, or that on the decease of the conjoint his heirs shall take a third or a fourth part in the community (*u*) ; and this may be stipulated for by parties marrying under the *régime dotal* (*v*).

The system of community reduced to acquests is common at the

(*q*) Pothier, *ibid.*, s. 464 ; Code Civil, arts. 1536, 1537, 1538 ; C. C. of L.C., arts. 1422—1425.

(*r*) Code Civil, art. 1537.

(*s*) C. C. of L.C., art. 1423.

(*t*) See Riobé *v.* Riobé (1890), Trib. Nantes, Sirey, 1891, ii., 71 (lottery prize) ; Perrin *v.* Synd. Vézien (1897), Sirey, 1900, i., 521 (damages for accident) ; Lecocq *v.* Cinquin (1900), Sirey, 1900, ii., 121 (literary property) ; Cinquin *v.* Lecocq (1902), Sirey, 1902, i., 305.

(*u*) Burge, 1st ed., i., 407 ; Pothier, Tr. de la Com., s. 449 ; Code Civil, art. 1497 ; C. C. of L.C., art. 1384.

(*v*) Code Civil, arts. 1498, 1499, 1581

present time in France, but is rarely or never met with in the Province of Quebec. It was formerly frequently met with in Mauritius.

Clause of Séparation de Dettes.—It may be agreed that the community shall not be charged with any debts contracted or due by either conjoint before the marriage. The debts contemplated by this provision are those owing not only to third parties, but by one of the conjoints to the other, and those which, although due before, are not payable until after the marriage (*x*).

The effect of this agreement for separation of the debts is that the community is to be reimbursed by the conjoint whose debts, contracted before the marriage, have been paid by means of its funds. When the debts are those of the wife, her creditors may proceed against the husband, unless previous to the marriage an inventory was made of the movable effects brought by the wife. If such inventory has been made, he will be discharged from his liability on giving up to them those effects or their value (*y*).

Whether Clause will Bar Husband's Creditors.—When it is the husband's creditors who sue, can he plead against them an agreement for separation of the debts and produce an inventory of the movables brought by him into the community? This is a difficult and controversial question.

Most of the old writers held that the clause of separation of debts could not be pleaded against the creditors of the husband. They reasoned—(1) that during the community the law makes no distinction between the funds of the community and the movable estate of the husband; (2) that as head of the community the husband has absolute control of its administration, and, as he can give it away, he can surely be compelled to pay his debts out of its funds; (3) that no one is entitled to take the plea: not the husband, for he cannot deny his complete control of the community, nor the wife, for during the marriage she has no rights in the community at all (*z*).

And this view is supported still by writers of high authority (*a*).

(*x*) Pothier, *ibid.*, s. 353; Code Civil, art. 1510; C. C. of L.C., art. 1396.

(*y*) Cout., art. 222; Pothier, *ibid.*, s. 362; Code Civil, art. 1510; Burge, 1st ed., i., 408.

(*z*) Lebrun, Tr. de la Com., liv. ii., ch. iii., s. iv., n. 2; Bourjon. Dr. Com. de la France, ed. 1747, i., p. 481, nn. 9 and 10. And see other authorities in Pandectes Françaises, *v.* Mariage, Nos. 6981 *et seq.*

(*a*) Guillouard, Contrat de Mariage,

On the other hand, it is maintained (1) that art. 1510 of the French Code and art. 1396 of the Civil Code of Lower Canada, which is identical with it, make no distinction as to this matter between the creditors of the husband and those of the wife; (2) the wife is entitled at the marriage to stipulate that the movables she brings into the community shall not be liable to be dissipated in paying the husband's antenuptial debts; (3) the clause of separation of debts is intended for this purpose. It leaves the husband's creditors as well off as they were before the marriage and it is not contrary to public policy (*b*).

In the Province of Quebec the language of the Commissioners who prepared the Code confirms the view that no distinction is intended to be made between the case of the husband and that of the wife.

They say: "Between the parties, it matters little whether there be an inventory or not; as regards them, the clause has its effect in either case. With respect to third parties, the case is different; if the movable property contributed by each consort have not been specified by an inventory or other equivalent act, the creditors are not bound to take cognisance of the clause of separation of debts; they may enforce their claim upon the movable property of the consorts as if such clause did not exist" (*c*).

The Clause of Franc et Quitte.—Another agreement called the *convention de franc et quitte* is that by which it is declared that one of the conjoints is free and clear from all debts anterior to the marriage.

Under the Coutume.—Under the *coutume* it was considered that this agreement was binding not on the husband himself, but only on his parents (*d*).

Under the Code Civil.—The Code has adopted a more just principle. It gives the other conjoint an indemnity either from that portion in the community to which the debtor is entitled, or from his *biens propres*, and in case of those means being insufficient, it permits the warranty to be enforced against the father, mother,

3rd ed., iii., n. 1589, and authors cited by him; Planiol, Traité Elémentaire de Dr. Civ., iii., n. 1133.

(*b*) Laurent, xxiii., n. 308; Huc, ix., n. 380; Baudry-Lacantinerie, Courtois et Surville, Contrat de Mariage, 2nd ed., ii., n. 1360.

(*c*) Com. Rep., ii., p. 231.

(*d*) Pothier, *ibid.*, s. 365; Burge, 1st ed., i., 408.

ancestor, or guardian who shall have declared such party *franc et quitte* (*e*).

The law of Quebec is the same. The Code of Lower Canada speaks of the "parties who made the declaration" (*f*) instead of the "father, mother, ancestor, or guardian" of the French Code.

But, even in France, it is admitted that the enumeration is not limitative. The declaration *de franc et de quitte* may be made by a stranger (*g*).

The Clause of Inequality of Shares.—The parties may stipulate that, instead of each taking a moiety, the one shall take a third and the other the residue (*h*).

When there is this inequality in their shares, the liability of the one in the *actif* corresponds with his interest in the *passif* of the community.

An agreement by which one is to bear a part *en actif* greater than that which he took in the *passif* of the community is void (*i*).

It may be stipulated that the wife shall receive a certain sum for all her rights in the community. The husband is bound by such stipulation to pay the sum, whatever may be the state of the community (*j*).

If it contemplates the wife's heirs, it applies only to the case of a dissolution of the community by her death and not to its dissolution by the death of the husband (*k*).

When the husband or his heirs by virtue of the stipulation for that purpose retains the entirety of the community, he is alone liable for all its debts, and no action can be maintained against the wife or her heirs (*l*).

The wife who, in consideration of a sum agreed upon, has the right of retaining the whole community against the heirs of the husband, may elect either to pay them such sum, becoming bound

(*e*) Art. 1513. See art. 1514 and Pointraud *v.* Daunizeau (1902), Siey, 1903, i., 313, and nn. (1), (2), (3), as to the clause *de réprise d'apport franc et quitte* and third parties.

(*f*) Art. 1399.

(*g*) Baudry-Lacantinerie, Précis de Dr. Civ., iii., n. 291; Planiol, M., Traité Elémentaire de Dr. Civ., iii., n. 1142.

(*h*) Code Civil, art. 1520; Burge, 1st ed., i., 408.

(*i*) Pothier, Tr. de la Com., s. 449; Code Civil, arts. 1520, 1521; C. C. of L.C., arts. 1406, 1407.

(*j*) Pothier, *ibid.*, s. 450; Code Civil, arts. 1520, 1522; C. C. of L.C., art. 1408.

(*k*) *Ibid.*; C. C. of L.C., art. 1409.

(*l*) Code Civil, arts. 1520, 1524; C. C. of L.C., art. 1410.

for all the debts, or to renounce the community and abandon the property and charges thereof to the heirs of her husband (*m*).

La Convention d'Apport.—It may be agreed that the parties shall contribute a certain sum to the community. This is called *la convention d'apport* (*n*).

The effect of this stipulation is an exclusion from the community of all the movable property of the conjoint which exceeds the amount stipulated to be contributed, and the conjoint takes, on the dissolution of the community, that excess (*n*).

The conjoint is the debtor to the community in the amount agreed, and must prove the contribution he has made in discharging it (*o*).

The declaration contained in the marriage contract that the husband's movable property is of such value affords sufficient proof of the contribution made by him, and the acquittance given by him is sufficient proof of the contribution by the wife (*p*).

The Civil Code of Lower Canada has an additional provision for the benefit of the wife. "If such contribution be not claimed within ten years the wife is presumed to have made it; saving the right of proving the contrary" (*q*).

La Convention de Réalisation.—The parties may by their agreement exclude from the community the whole or a part of their movable property by declaring it to be *propre;* this is called under the *coutume, la Convention de Réalisation* (*r*). This *réalisation* is express or implied. When the parties declare that the whole or a part of the movable property shall be *propre*, the realisation is express. The *convention d'apport* is a tacit or implied realisation (*s*). The Code Civil adopts the principles of this convention in art. 1500, but it does not designate it by the same terms (*t*).

In the Code of Lower Canada, which is to the same effect, this kind of agreement is called the "clause of realisation" (*u*).

(*m*) Code Civil, art. 1524; C. C. of L.C., art. 1410.

(*n*) Burge, 1st ed., i., 409; Pothier, *ibid.*, s. 287; Code Civil, arts. 1500, 1503; C. C. of L.C., art. 1385.

(*o*) Art. 1501.

(*p*) Code Civil, art. 1502; C. C. of L.C., art. 1387.

(*q*) Art. 1387.

(*r*) Burge, 1st ed., i., 410; Pothier, Tr. de la Com., s. 315.

(*s*) Pothier, *ibid.*, s. 316.

(*t*) The Code describes it as "La clause qui exclut de la communauté le mobilier en tout ou partie."

(*u*) Art. 1385. See Veronneau *v.* Veronneau (1893), R. J. Q. 3 S. C. 199.

This agreement excludes from the conventional community that which would have formed part of the legal community.

It is a disputed point in the Province of Quebec whether the clause of realisation deprives the husband of the right to alienate such *propres*.

This clause is recognised in St. Lucia (*v*).

According to many commentators on the French Code a distinction has to be made between *propres parfaits* and *propres imparfaits*. *Propres imparfaits* are (1) movables *quæ ipso usu consumuntur*; (2) movables which deteriorate by use, or are destined to be sold, *e.g.*, animals reared to sell at a certain age; (3) articles on which a value is fixed when they enter the community.

In regard to the two first classes, it is clear that the community or the husband cannot have the usufruct of them unless he has the power to alienate. And as to the third class, the value indicates that the community is only to be the debtor for the equivalent sum (*w*).

Propres parfaits are incorporeal movables, such as stocks and shares.

Of such movables the community can enjoy the usufruct by the husband taking the revenues. The old law did not make this distinction, because in the old law such property had not come to be of importance (*x*).

The articles of the Code of Lower Canada, 1385—1389, reproduce very closely the articles of the French Code, 1500—1504.

In one case, in which there was an equal division of judicial opinion, the marriage covenants had declared that all that should fall to the wife by way of succession should be *propre*.

A sum of money fell to her under the will of her father. It was seized in the hands of the executor by a creditor of the husband. It was held that the seizure was valid. Such a sum would be a *propre imparfait*.

But the majority of the Court of Review repudiated the distinction made by the modern French law between *propres parfaits* and *propres imparfaits* (*y*).

(*v*) C. C. of St. L., arts. 1301 *et seq.*

(*w*) Baudry-Lacantinerie, Courtois et Surville, Contrat de Mariage, ii., n. 1331; i., n. 759.

(*x*) Baudry-Lacantinerie, Courtois et Surville, Contrat de Mariage, i., n. 759.

(*y*) Veronneau *v.* Veronneau (1893), R. J. Q. 3 S. C. 199. See Mignault, Droit Civil Canadien, vi., p. 350.

The Clause d'Ameublissement.—The parties may make a stipulation of a directly contrary effect, for they may agree that the whole or part of their immovable property shall be deemed movable, and thus that the conventional community shall consist of that which would have been excluded from the legal community. This is called *la convention d'ameublissement*, and the property is called *propres ameublis* (*z*).

It is called in the Code of Lower Canada the "clause of mobilisation" (*a*).

In St. Lucia the clause of mobilisation is also recognised (*b*).

In these systems the clause may comprehend all or part of the immovable property, and is either *déterminé* or *indéterminé* (*z*): *déterminé* when the party agrees that such a particular estate shall be deemed movable and form part of the community, either for the whole estate or to a given sum (*z*); *indéterminé* when it is agreed that immovables are brought into the community to the amount of a certain sum (*z*).

When the immovables of the wife are rendered wholly movable the husband may dispose thereof as of the other effects of the community and alienate them entirely (*c*).

If the immovable is only rendered movable for a certain sum the husband cannot alienate it without the consent of his wife, although he may pledge it without her consent, but to the amount only to which a portion is rendered movable (*d*).

When the *ameublissement* is *indéterminé* the community does not become proprietor of the immovables, but the conjoint who has made the *ameublissement* becomes a debtor to the community, and on its dissolution must bring some of his immovables to the amount promised (*e*).

The husband cannot, therefore, alienate in whole or in part without the consent of his wife the immovables of which the *ameublissement* had been *indéterminé*, but he may pledge them to the amount to which they have been made movable (*e*).

The Clause of Preciput.—The parties usually stipulate that they shall

(*z*) *Ibid.*, s. 315; Code Civil, arts. 1505, 1506; C. C. of L.C., art. 1393; Burge, 1st ed., i., 410.

(*a*) Art. 1390.

(*b*) Arts. 1301—1310.

(*c*) Code Civil, art. 1507.

(*d*) *Ibid.*; C. C. of L.C., art. 1393.

(*e*) Code Civil, art. 1508; C. C. of L.C., art. 1394; Burge, 1st ed., i., 411.

take, *par preciput*, certain specific articles. The term *preciput* signifies being separated from the other effects of the community on its dissolution, and being, in the first instance, deliverable to the party entitled to it. The *preciput* generally consists of those articles which are adapted to the habits or sex of the party, as library, carriage, horses, &c., of the husband, or the ornaments, &c., of the wife. They may be estimated at a certain sum, which may be constituted the *preciput*. It was considered that the amount or value of the *preciput* might be reduced by the authority of the Judge if it exceeded the station and fortune of the parties. The Code, however, has not vested any Court with this discretionary power (*g*).

Not Available for Separation from Bed and Board.—The reservation of this *preciput* does not, under the *coutume* or Codes, prejudice the creditors of the community, for it is competent for them to seize the property. The party entitled to it has his indemnity (*h*).

The *preciput* cannot be claimed when the community is dissolved by divorce or separation *de biens* (*i*).

It opens by the natural death of the consort unless otherwise stipulated.

Moreover, the consort whose fault is the ground of the separation from bed and board loses the right to the *preciput* (*j*).

Wife's Legal Hypothec.—It may be mentioned here that the character of legal hypothecs is assigned to the claims of married women upon their husband's property (*k*), and a hypothec exists without registration in favour of wives for their dowry and matrimonial contracts upon their husband's immovables counting from the day of marriage (*l*).

In Quebec and St. Lucia married women have a legal hypothec

(*g*) Pothier, Tr. de la Com., s. 441; Toullier, tit. 5, c. 2, p. 1, s. 3, n. 407; Code Civil, art. 1515; Burge, 1st ed., i., 411.

(*h*) Burge, 1st ed., i., 412; Bourjon, Droit Comm., tit. De la Com., p. 3, s. 1, nn. 9, 10; Code Civil, art. 1519; C. C. of L.C., art. 1405.

(*i*) Pothier, Tr. de la Com., s. 441; Code Civil, art. 1518.

(*j*) Code Civil, art. 1518; Baudry-Lacantinerie, Précis de Droit Civil, i., n. 791; Planiol, M., Traité Elém. de Dr. Civ., iii., n. 658; Civil Code of L.C., art. 211.

(*k*) Code Civil, art. 2121, *e.g.* arts. 1421, 1472, 1495, 1531, 1559, 1560, 1561, 1579.

(*l*) *Ibid.*, art. 2135, subject, however, as regards unregistered hypothecs, to art. 2193.

for all claims and demands which they may have against their husbands on account of what they may have received or acquired during marriage by inheritance, succession, or gift (*m*).

The law of **St. Lucia** with regard to matrimonial contracts is similar to that of Quebec (*n*).

SECTION VI.

Law of Channel Islands.

Coutume of Normandy.—Channel Islands.—The *Coutume* of Normandy, with later statutory and other modifications, is still the law of the Channel Islands on this subject.

Mutual Rights of Spouses during Lifetime of Both.—Jersey.—(*a*) By the law of Jersey a married woman has no separate estate. Her personalty, from the time of her marriage, becomes the property of the husband, who alone can deal with it as he thinks proper.

With regard to her realty, the husband has the enjoyment of it, but he cannot dispose of such realty, or any portion thereof, without the wife's consent.

During the coverture the law of Jersey, presuming that the husband has all the funds, charges him with all the liabilities.

But means have been provided for giving the wife separate property.

In 1878, an Act was passed by the States of Jersey, and confirmed by His Majesty in Council, intituled "*Loi sur les séparations de biens entre époux*." This law in effect gives to the wife the administration and disposal of her estate, both real and personal, in the same manner as if she were a *feme sole*.

Séparation de biens is effected in Jersey not by way of marriage settlement, but by a proceeding in Court. The husband and wife appear in Court, and, on the motion of counsel, a decree for a *séparation quant aux biens* is granted provisionally. The decree is then posted in the Court-house for 15 days, by way of notice to creditors and others interested in opposing the separation. If such persons appear they are heard in

(*m*) C.C. of L.C., art. 2029; St. Lucia, art. 1919.

(*n*) See C. C. of St. Lucia, arts. 1300—1338.

(*a*) Parl. Rep. (Jersey), 1860—61, pp. xxvii., xxviii.

opposition; if not, at the end of the 15 days, the decree is confirmed as of course. The effect of the decree is to place the whole of the real property of which the wife is at the time seised, and all her subsequently acquired property, entirely under her own control (with power to sue and be sued as a *feme sole*), and beyond the reach of the debts and engagements, present or future, and of the interference of her husband (*b*). The wife can also claim in the Royal Court a *séparation quant aux biens* on account of cruelty or adultery. This is of course a distinct proceeding from the separation *à mensâ et toro* granted for adultery by the Ecclesiastical Court, and which affects the persons, not the property of the married couple. If the husband admit the facts on which the wife's application is grounded, the separation is granted at once; if not, the case is sent to proof, and passes through all the stages of any other contested suit. Alimony *pendente lite* may be granted (*c*). After a *séparation quant aux biens* the husband retains his liability to maintain his wife at all events, if she fall into such poverty as to become a charge on the poor rate. *Séparation de biens* does not deprive the husband of movable property left by the separated wife on her death without issue (*d*).

Prior and even subsequently to the law of June 24th, 1851, which created a limited power of devising real estate by will, *séparations quant aux biens* were frequently resorted to for the purpose of effecting family arrangements which were not directly feasible under the existing law, and yet which would not be obnoxious to the rule prohibiting the conveyance of real estate by a husband to the wife *stante matrimonio* (*e*).

(*b*) See Broomer *v.* Arthur, [1898] A. C., at p. 779.

(*c*) De Garis *v.* Blampied (1891), Table de Déc., 1889—93, p. 90; Fauvel *v.* Renouf (1893), *ibid.*

(*d*) Slous *v.* Mauger (1904), Table de Déc., 1901—07, p 178. A married woman not separated cannot contract: Lambert *v.* Bouteloup (1889), Table de Déc., 1889—93, p. 63; Yvon *v.* De Veulle (1890), *ibid.*; Le Gros *v.* Le Gros (1892), *ibid.*; or sue or be sued: Ex parte Le Boutillier (1900), Table de Déc., 1894—1900, p. 77; In re Davis (1895), Table de Déc., 1894—1900, p. 77; Trésorier des Etats *v.* Quenault (1898), *ibid.* But a wife, *sui juris* by the law of her own domicil, may *ester en justice* in Jersey: Brissonnière *v.* Brissonnière (1901), Table de Déc., 1901—07, p. 90; De Osko *v.* Jugla (1903), *ibid.*; McGrath *v.* McCann (1904), *ibid.*; Hall *v.* Maire (1905), *ibid.*

(*e*) Parl. Rep. (Jersey), 1860—61, pp. xviii., xix.; and cf. Broomer *v.* Arthur, [1898] A. C. 777.

Guernsey.—The husband acquires by marriage the wife's personal estate both belonging to her at the date of the marriage or acquired during coverture, unless otherwise settled by marriage contract. He has the enjoyment of his wife's real property during their joint lives.

The English Married Women's Property Acts are not registered in Guernsey, and there is no Act similar to these.

Rights of Surviving Spouse.—Wife's Dower.—The *douaire* of the wife under the *coutume* of Normandy differs from that which prevailed under the *coutume* of France, in several respects.

It is given by the following article: "La femme gagne son doüaire au coucher, et consiste le doüaire en l'usufruit du tiers des choses immeubles dont le mari est saisi lors de leurs épousailles, et de ce qui lui est depuis échû constant le mariage en ligne directe, encore que lesdits biens fussent échûs à ses pere et mere, ou autre ascendant par succession collaterale, donation, acquêts ou autrement" (*f*).

It consists of the usufruct of one-third only of the immovables mentioned in the above article. The wife's right was acquired not by the nuptial benediction alone, but it was necessary for her *être entrée dans le lit nuptial du mari.*

It is due only from the day on which it is demanded (*g*).

If the father, or grandfather, of the husband have consented to the marriage, the widow will be entitled to her *douaire* out of the immovables of the father, or grandfather, although they may not have descended until after the death of the husband (*h*).

The *douaire conventionnel* may be less, but it never can exceed a third (*i*).

The husband cannot, by the renunciation of the succession, prevent the wife from recovering her *douaire* from it (*j*).

The children take the property, or inheritance, in the third of which the wife takes the usufruct (*k*).

Jersey.—The law of Jersey (*l*) has preserved dower in the form in which it existed under the old law of Normandy, namely, that the widow was entitled to take dower on all the real property that her

(*f*) Burge, 1st ed., i., 390; Cout. Normand., arts. 367, 368.
(*g*) Cout. Normand., arts. 369, 371.
(*h*) *Ibid.*, art. 371.
(*i*) Art. 371.
(*j*) Cout. Normand., art. 380.
(*k*) *Ibid.*, art. 400.
(*l*) Parl. Rep. (Jersey), 1860—61, p. xv

husband possessed at the time of the marriage, and likewise on all property that falls, or would fall to him by inheritance in a direct line. But the widow has another privilege in Jersey which she did not possess by the old Norman law, that of taking, if she chooses, her dower on all the estate that the husband possessed at the time of his death. If she elects to take the former, she must declare her intention so to do before the Royal Court within forty days of her husband's death. In that case she is not entitled to any share in her husband's personal estate, and she does not then become liable for any of the debts. The real property of the husband cannot be freed from this liability, even by sale, except with the consent of the wife, expressed in the deed of sale and acknowledged by her before the Royal Court. In default of a declaration by the wife to take her dower under the old Norman law, she takes it out of the property of her husband at the time of his death. In this case she is entitled also to a third of his personal estate, and becomes liable for her share of the debts, so that if the personal estate has been exhausted in the payment of his debts, and any debts remain unpaid, she is liable to keep down the interest of one-third of those which remain undischarged. In either case her dower is one-third of the estate out of which it is dowable. Her third is sometimes assigned to her by private arrangement; but the usual mode is that the widow sends a summons to the principal heir to deliver her dower and the parties are sent before the Greffier for this purpose. The principal heir furnishes a list of the property upon which dower is due; the widow divides it into three portions; the heir then selects two of them, leaving the remaining third for the widow, who is thus interested in making a fair division.

If there be children the wife has a right to one-third of the husband's personal estate, and if there be no children, to one-half of such estate.

Guernsey.—The wife's dower is the life enjoyment of one-third of the husband's real property, and this she does not forfeit by marrying again.

The widow's *légitime* of her husband's personal property is, one-third if he leaves issue, one-half if there is no issue (*m*).

Rights of Husband.—Coutume of Normandy: Droit de Viduité.—The *coutume* of Normandy gives to the husband, if there has been a child

(*m*) Carey, Inst. of Guernsey, 124, 131, 132, 134, 166, 167.

born alive of his wife, the enjoyment for his life, so long as he remains a widower, of all the income which belonged to his wife at the time of her decease, notwithstanding the child may have died before the dissolution of the marriage. If he marries again, he is entitled to the usufruct of only one-third.

"Homme, ayant eu enfant né vif de sa femme, joüit par usufruit tant qu'il se tient en viduité de tout le revenu appartenant à sadite femme lors de son decés, encore que l'enfant soit mort avant la dissolution du mariage, et s'il se remarie, il n'en joüira que du tiers" (*n*).

This interest of the husband is called *droit de viduité*.

Jersey : Franc Veuvage.—The "Franc Veuvage" of the husband corresponds with the estate by the curtesy in the law of England. If there has been issue of the marriage, the widower is entitled to the usufruct and enjoyment of all the real property which his wife had in possession at the time of her death, but only so long as he remains unmarried. If he marries again, he forfeits the enjoyment of the property. It was held by the Privy Council in the case of *Lemprière* v. *Vibert* (*o*), that this *droit de viduité* of the husband was not forfeited by a *séparation quant aux biens* at the request of both husband and wife, as regards property possessed by the wife previous to the separation. The Judicial Committee, however, expressed no opinion as to the effect of a *séparation quant aux biens* obtained otherwise than upon the joint request of husband and wife, or of a *séparation de corps ;* or as to the consequences of a *séparation quant aux biens* as regards the husband's interest in property acquired by the wife after the separation.

With regard to the wife's personal estate (which she can only possess if the parties are "separated") it goes to her children, and if there be no children, to the husband.

Assuming that the wife is not separated "*quant aux biens,*" she can dispose of her property, *inter vivos*, with the consent of her husband, but she cannot dispose of it by will.

If the wife be separated, she can dispose of her real and personal property by will, in the same manner as if she were a *feme sole*.

Guernsey.—The husband has the enjoyment of the wife's real

(*n*) Cout. Normand., art. 382 ; Burge, 1st ed., i., 391.

(*o*) (1862), 10 W. R. 870.

property after her death, if there is issue of the marriage, but so long only as he remains unmarried.

If there is no issue, the wife has the power of disposing, by will, of her realty. Where she has the power of disposing of her personalty the children's *légitime* is one-half (*p*).

Donations between Spouses.—Coutume of Normandy.—The *coutume* of Normandy contains the same prohibition as the *coutume* of Paris, but it does not permit the *don mutuel*. "Gens mariez ne se peuvent ceder, donner, ou transporter l'un à l'autre quelque chose que ce soit, ni faire contrats ou concessions par lesquels les biens de l'un viennent à l'autre, en tout ou partie, directement ou indirectement" (*q*).

Jersey.—By the law of Jersey a conveyance of real estate by a husband to his wife, *stante matrimonio*, to the prejudice of his lawful heirs, is invalid (*r*). Where, however, by deed of family arrangement, it appeared that a husband and his wife, separated *quant aux biens*, each took from her father (subject to a charge of an annuity in his favour) a conjoint interest in the settled lands during their joint lives with the chance of the fee on survivorship, the Judicial Committee held that the deed was in no sense a conveyance by the husband of any interest acquired by him thereunder, and that on his death before his wife his interest ceased and could not pass to his heirs (*s*).

Authorities.—Burge mentions as references for this subject the following works on the *Communauté Légale* and *Conventionnelle* under the *Coutume* of Paris:—Pothier, titles "Du Contrat de Mariage," "De la Puissance du Mari," and "De la Communauté"; Poullain du Parc, "Sur la Coutumes Générales de Bretagne" and "Principes du Droit Francais"; Renusson, Lebrun, Dumoulin, Ferriere and Duplessis; Le Maistre on the "Coutume of Paris"; D'Argentré, "Sur la Coutume de Brétagne"; Brodeau, "Sur Louet," the title "De la Communauté," in the 10th vol. of the works of Pothier by M. Dupin; under the *Coutume* of Normandy, Basnage and Mervile; on "Le Régime de la Communauté," under the Code Civil, liv. 1,

(*p*) Carey, Inst. of Guernsey, 120, 166, 167.

(*q*) Cout. Normand., art. 410; Burge, 1st ed., i., 398. See p. 556, *ante*.

(*r*) Broomer *v.* Arthur, [1898] A. C. 777.

(*s*) Broomer *v.* Arthur, [1898] A. C. 777.

tit. 5, and liv. 3, tit. 5, of the Code, and this title in Toullier, in the 12th and 13th vols. of his "Droit Civil Francais," and the "Traité de la Communauté des Biens entre Epoux," by B. Battur; on "Le Douaire Coutumier," and "Conventionnelle," the articles in the *Coutumes* of Paris and Normandy, and the preceding commentators; on "Le Régime Dotal" of the Code Civil, liv. 3, tit. 5, cc. 1 and 3; Toullier on that title in the 14th vol. of his works; Carrier, "Traité sur les Engagemens, &c."; on "Donations entre Mari et Femme," the articles on that title in the *Coutumes* of Paris and Normandy, and the above commentators; Ricard, on the title "De Donations du don Mutuel," liv. 3, tit. 2, c. 9, of the Code Civil, and the "Commentary" of Toullier, in the 5th vol. of his works; Grenier, "Traité des Donations des Testamens, &c."; Duranton, "Cours de Droit Francais, &c."; on "Second Marriages," those titles in the *Coutumes* of Paris and Normandy, and the above commentators; the dictionaries of Denisart and Merlin, on these several titles, and on those of "Acceptation de Communauté," "Avantage," "Aport," "Ameublissement," "Conquêt," "Confiscation," "Domicile," "Douaire," "Noces," "Propres," "Réparations," "Réalisations," "Récompense," "Société d'Acquêts," "Usufruct." To these may be added Guillouard, "Traité du Contrat de Mariage"; Baudry-Lacantinerie, Courtois Surville, "Contrat de Mariage"; "Pandectes Françaises, *v.* "Mariage," where see especially the bibliography at the end.

CHAPTER XI.

EFFECT OF MARRIAGE ON THE PROPERTY OF HUSBAND AND WIFE—CONTINENTAL SYSTEMS.

The provisions of the other Continental systems, such as those of Italy (and Malta), Spain, Germany, Austria, Hungary, and Switzerland, with regard to the marriage property *régime*, may next be noticed.

SECTION I.

Law of Italy and Malta.

Italian Law.—The French system of community of goods was foreign to Italian custom, and while Italy in the early part of the nineteenth century was under French dominion it became a general habit to exclude the statutory *régime* of the Code Napoléon by marriage contract. The Codes which subsequently were introduced in various parts of Italy did not establish any statutory *régime*, but allowed the system of community of goods to be adopted by marriage contract, subject, however, in the case of the Sardinian Code, to the restriction that no community of a more extensive kind than the community of income and profits (*comunione degli utili, communauté réduite aux acquêts*) was to be lawful. In the memorandum accompanying the draft of the Civil Code of the kingdom of Italy it was stated that, as a matter of fact, contracts subjecting the spouses to the *régime* of community of goods were quite unknown in Italian practice. Like the Sardinian Code, the new Code forbids the adoption of any system of community of goods going beyond the community of income and profits, but allows the last-mentioned kind of community as well as the "dotal *régime*" to be provided for by marriage contract. In the absence of a marriage contract the spouses live under the system of separation of goods. The dotal *régime* is the one usually adopted in Italy.

Marriage Contract.—Form and Capacity.—As under French law, a

marriage contract must be evidenced by public act before a notary before the celebration of the marriage, and no modification agreed upon at any subsequent time is effectual (*a*).

The following kinds of stipulations are forbidden under Italian law: (1) Stipulations by which the rights of the head of the family or certain specified rights conferred by law on the husband and on the wife respectively are in any way modified; (2) stipulations by which the rules as to intestate succession are modified; (3) stipulations referring in general terms to any local law or to any system of law to which the spouses are not subject (*b*).

As under French law, an infant capable of marrying is also deemed capable—with the assent of the person whose assent is required for his or her marriage—to enter into a valid marriage contract and to make any disposition of property which can be provided for by any such contract (*c*). A person against whom a judicial restriction of capacity on the ground of mental debility or prodigality has been applied for or obtained cannot enter into a valid marriage contract without the assent of his curator (*d*).

The main features of the two kinds of *régimes* are next considered.

(1) **Dotal Régime.**—The dotal *régime* resembles the dotal *régime* of French law. Under that *régime* the wife's property consists partly of her "dowry" (*dote*), being the property intended to provide for the wife's share in the joint expenses, and partly of her paraphernal goods (*beni parafernali*), being the wife's privileged property. Any property to which the character of "dowry" is given by the marriage contract has to be dealt with as such. As under French law, the dowry may be provided for by the wife herself, or by any third party, including the husband, and may consist of the whole or of any aliquot part of the wife's existing or after-acquired property, or of any specific objects. A stipulation that all the wife's property is to be dealt with as her dowry is, however, presumed not to refer to after-acquired property (*e*). A dowry constituted for a first marriage is not deemed to be tacitly reconstituted in the event of a subsequent marriage (*f*). Other articles of the Code relating

(*a*) Code Civil, arts. 1394, 1395; Codice Civile, arts. 1382—1385.
(*b*) Codice Civile, arts. 1379—1381.
(*c*) Code Civil, art. 1398; Codice Civile, art. 1386.
(*d*) Codice Civile, art. 1387.
(*e*) Codice Civile, arts. 1388, 1839.
(*f*) *Ibid.*, art. 1390.

to the constitution of the dowry reproduce those of the French Code (*g*).

Husband's Powers as to Dowry.—The property forming the dowry comes into the husband's possession and under his management. The rules on this subject are very similar to those applicable to the *régime dotal* under French law, and many sections of the Italian Code dealing with this matter are literal translations of the corresponding sections of the Code Civil (*h*). The principal differences are the following: (1) Under French law the husband cannot be required to give security for the wife's dowry unless this is expressly provided for in the marriage contract. Under Italian law a judicial order requiring security may in certain specified events be obtained on the wife's application (*i*). (2) Under French law no immovable property forming part of the dowry can, in the absence of an express provision to the contrary in the marriage contract, be sold or mortgaged, even with the concurrence of husband and wife, except for certain specified purposes; under Italian law, on the other hand, the sale or mortgage of any such property may be effected by the husband with the wife's concurrence and subject to the leave of the competent Court in any case in which such Court is of opinion that the proposed transaction is obviously necessary or useful (*k*).

As under French law, a revocation of the husband's power over the wife's dowry (*separazione della dote*) may be ordered by the Court in the case of a marriage governed by the dotal *régime* if the safety of the dowry is imperilled (*l*).

Restitution of the Dowry.—The rules as to the restitution of the dowry on the dissolution of the marriage are, with a few unimportant exceptions, literal reproductions of the corresponding provisions of the French law (*m*).

Wife's Privileged Property.—With reference to her privileged

(*g*) Thus Italian art. 1389 corresponds to French art. 1542; Italian 1391 to French 1543; Italian 1392 and 1395 to French 1544; Italian 1393 to French 1545; Italian 1394 to French 1546; Italian 1396 to French 1547; Italian 1397 to French 1548.

(*h*) Thus Italian arts. 1389—1403 correspond to French arts. 1549—1553.

(*i*) Cf. Code Civil, art. 1550, with Codice Civile, art. 1400 (second part).

(*k*) Cf. Civil, arts. 1554—1558, with Codice Civile, arts. 1401, 1405, 1407.

(*l*) Code Civil, arts. 1433—1452, 1563; Codice Civile, arts. 1418—1424

(*m*) Code Civil, arts. 1564—1573; Codice Civile, arts. 1409—1417.

property (*beni parafernali*) the wife is in one respect in a better position under Italian law than under French law. Under French law a wife cannot dispose of her *biens paraphernaux* without her husband's concurrence or the leave of the competent Court; under Italian law the wife has unfettered powers of disposition over her privileged property (*a*). There is also a difference as to the computation of the contribution to be made from the income of the privileged property to the household expenses (*b*), but having regard to the interpretation put on the provision in question by the French Courts, the practical effect of the rules on the subject is the same in both systems. In all other respects the Italian rules relating to the wife's privileged property under the dotal *régime* are identical with the French rules (*c*).

(2) **Community of Goods between Husband and Wife.**—As mentioned above, the only kind of community of goods between husband and wife allowed under Italian law is the community of income and profits (*comunione degli utili*), which corresponds to the French *communauté reduite aux acquêts* (*d*). As under French law this community of income and profits may be combined with the dotal *régime* (*e*).

Limits of Contractual Freedom.—The details of the affairs of the community may be specially provided for by contract; in the absence of a contract the rules of the Italian Code as to non-commercial partnerships apply (*f*). The contractual provisions may not include any stipulations under which the property belonging to either of the spouses at the date of the marriage or accruing to either of them during the marriage by way of gift or inheritance becomes part of the common fund, which is the effect of this community (*g*). In the absence of a contractual stipulation to the contrary, the common fund belongs to the spouses in equal shares; a stipulation under which one of the spouses is entitled to a larger share is not deemed to be a gift to that spouse from the other spouse. A stipulation providing that the share in the liabilities of one of the spouses is to be larger than his or her share in the assets is void (*h*).

(*a*) Cf. Code Civil, art. 1576, with Codice Civile, art. 1427.
(*b*) Cf. Code Civil, art. 1575, with Codice Civile, art. 1426.
(*c*) Code Civil, arts. 1574—1580; Codice Civile, arts. 1425—1431.
(*d*) Arts. 1498 *et seq.*
(*e*) Code Civil, art. 1581; Codice Civile, art. 1433.
(*f*) Codice Civile, art. 1434.
(*g*) Codice Civile, art. 1435.
(*h*) Codice Civile, art. 1440.

Common Fund.—As under the corresponding *régime* under French law, the common fund consists exclusively of the joint or separate earnings of the spouses and of the net income of the common fund and of the separate property of the spouses remaining after deduction of all payments and debts chargeable on the common fund (*i*). As under French law there is a presumption that all property of which no formal inventory was taken at the date of the marriage or at the time of its acquisition was acquired out of funds derived from earnings or from income (*j*).

The husband, as under French law, has power to dispose of any part of the common fund for valuable consideration, but while under French law he may also within certain prescribed limits make gifts out of the common fund, Italian law deprives him entirely of the power to use the common fund for any gratuitous dispositions (*k*).

Dissolution of Community.—The community is dissolved: (a) by the death of one of the spouses; (b) by a judicial declaration as to the prolonged absence of one of the spouses; (c) by the definitive separation of the spouses; (d) by a judicial order for separation of goods (*l*).

A judicial separation of goods is ordered if the husband's management of the common fund is proved to be bad, or if, by reason of the disordered state of the husband's financial affairs, the wife's interests are endangered (*m*).

On the dissolution of the community the wife, or the persons representing her estate, have somewhat more extensive privileges than those to which a wife or her representatives are entitled under French law. Under Italian law she or they may, at her or their option, do any of the following things: (a) renounce the community; (b) accept it with benefit of inventory (*n*).

If the community is accepted by the wife with benefit of inventory, she or her representatives are not liable for the debts of the

(*i*) Code Civil, art. 1498; Codice Civile, art. 1436.

(*j*) Code Civil, art. 1499; Codice Civile, art. 1437.

(*k*) Cf. Code Civil, arts. 1421, 1422, with Codice Civile, art. 1438. As to the husband's power to let on lease any property of which the income forms part of the common fund see Codice Civile, art. 1439, and cf. with Code Civil, arts. 1429, 1430.

(*l*) Codice Civile, art. 1441; cf. with Code Civil, art. 1441.

(*m*) Codice Civile, art. 1442; cf. with Code Civil, art. 1443.

(*n*) Cf. Code Civil, art. 1453, with Codice Civile, art. 1444.

community beyond the amount of the assets. If the wife disclaims the community, she or her representatives are free from any liability for the debts of the community. On the division of the common fund, even in a case in which the wife has accepted with benefit of inventory or disclaimed, the presumption referred to above as regards the constitution of the common fund is not applied in respect of movables which the wife can prove to represent property owned by her at the date of the marriage, or gifts or bequests received during the marriage; but a reservation is made in favour of third parties, who without notice of the wife's rights have acquired any rights in respect of any such movables (*o*).

Where the community has been dissolved by any cause other than the death of one of the spouses it may be re-established in the same manner and with the same effect as under French law (*p*).

In **Malta** (*q*) the law of married women's property is similar to the provisions of the Italian Civil Code.

SECTION II.

Law of Spain.

Spanish Law.—The Spanish Civil Code deals with the subject of the marital property *régime* under the following heads:—(a) General dispositions; (b) donations in contemplation of marriage; (c) dowry (*dote*), its constitution and security, administration and usufruct, and its restitution; (d) the wife's paraphernalia or privileged property; (e) the system of community of acquisitions (*gananciales*); (f) the system of separation of property, or the withdrawal of the wife's property from the husband's administration.

General Dispositions.—The law of Spain sets up as the statutory *régime* in the absence of contract the *communio quaestuum*. It allows any marriage contract regarding property to be made free from any restrictions except those imposed by the Code, except that any provisions in such contracts which subject the spouses' property to the powers and customs of provincial law and not the Code are null (*r*).

(*o*) Codice Civile, art. 1445, 1446.

(*p*) Code Civil, art. 1451; Codice Civile, art. 1443.

(*q*) See Ordinances 7 of 1868 and 1 of 1873.

(*r*) Civil Code, art. 1315.

A minor can make such a contract with the consents which are required to his contracting a marriage; and if such a contract is null for want of such consents, he is taken to have adopted the *régime* of the community of acquisitions (*gananciales*) (*t*).

The contract must be made by authentic act, executed before marriage, and with other formalities, and must be registered, *i.e.*, inscribed (*u*).

In the case of a marriage abroad between a Spaniard and a foreign woman, or *vice versâ*, where no declaration or agreement has been made with regard to their property, in the former case it is assumed that the *régime* of community of acquisition is adopted; in the latter case that the usual marital *régime* established by the law of the husband's State is adopted, except as regards immovable property (*v*).

The contract becomes null if no marriage takes place (*x*).

Donations Propter Nuptias.—These are donations made before the marriage in consideration of it and in favour of one or the other spouse, and are governed by the general rules applicable to donations, with certain exceptions (*u*). Minors can give or receive them with the consents required to their contracting a marriage (*z*). Spouses can give each other by the matrimonial contract one-tenth of their present property; and future property can only be disposed of in case of death, and to the extent allowed by the dispositions of the Code referring to testamentary succession. Such donations are only revocable if conditional and the condition be not fulfilled, or if the marriage be not celebrated or if it takes place without proper consents or if annulled on account of the *mala fides* of a spouse. All donations between spouses during marriage are null, except presents of inconsiderable value made on family occasions, as are also donations made by one spouse to children of the other spouse by another marriage, or persons to whom the other spouse was presumptive heir at the time of the donation (*a*).

Dowry (Dote).—Dowry comprises all property brought in as such by the wife upon marriage and any other such property which she acquires during the marriage by donation, succession, or legacy of a

(*t*) Art. 1318.
(*u*) *I.e.*, arts. 1321—1324.
(*v*) Art. 1325.
(*x*) Art. 1326.
(*z*) No acceptance is required for their validity.
(*a*) Arts. 1327—1335. Cf. French Code Civil, art. 1100.

dotal character. A dowry can be constituted in favour of the wife before or after marriage by the father or mother or relations of the spouses, or by strangers; and by a spouse in favour of the other spouse before marriage. If given at or before marriage it is subject to the rules governing donations *propter nuptias;* if given afterwards it follows the rules governing ordinary donations. There are detailed provisions respecting obligatory dowries, which are one-half of the child's reserved portion of the parent's property, and to which legitimate daughters are entitled from their parents unless they marry without their consent; and respecting the payment and security and valuation of dowries, which may be valued or unvalued, and are secured by a hypothec of the husband in either case. In the case of a valued dowry the ownership is transferred to the husband, and he is bound to restore their value, and takes the risk of gains or losses; in the case of an unvalued dowry the wife retains the ownership, and the husband is obliged to restore them *in specie* or their value if movables. If the marriage contract does not specify the quality of the dowry, it is taken as unvalued.

The usufruct of an unvalued dowry is enjoyed by the husband, but the wife retains the ownership of it and its consequent gains and losses, the husband only being liable for losses caused by his fault or negligence. The wife can alienate, charge, and hypothecate it with her husband's consent if of age, otherwise with proper judicial or official consents, and the husband must give a hypothec similar to that in the case of a valued dowry. It is liable for the daily household expenses incurred by the wife and allowed by the husband, but not till after recourse to the common acquisitions and the separate property of the husband. This differs from the French law by which the wife's property is absolutely secured against creditors of the common property, and even creditors for household necessaries, except in certain specified cases (*b*). These provisions apply in the case of a marriage contract by the spouses which excludes community of acquisitions but does not mention any marital *régime*, or where the wife or her heirs renounce the community, and the husband can appropriate all the revenues which will be considered as acquisitions under the *régime* of community of acquisitions (*c*).

(*b*) Code Civil, art. 1558. (*c*) Arts. 1357—1364.

Restitution of Dowry.—Dowry is restored to the wife (1) when the marriage is dissolved or annulled; (2) when the management of the dowry is transferred to the wife of a person declared prodigal (*d*); (3) when the Court so decrees in pursuance of the Code (*e*). There are detailed provisions for ascertaining the amount of dowry which the husband is bound to restore (*f*). The wife is entitled to receive, without including its value in the dowry, her usual bed and personal apparel, and the debts and rights brought into the unvalued dowry in the condition in which they are when the marriage is dissolved, or their value if irrecoverable. In repaying an unvalued dowry deductions are made of expenses paid by the husband on account of the dowry, the debts chargeable to it and not included in the community of acquisitions under the marriage contract or the Code, and debts personally due from the wife under the Code, and donations *propter nuptias* made by the husband, except in the case of separation of property or nullity of marriage where one spouse has acted *malâ fide*. Provision is made for the apportionment of income of the dowry on the dissolution of the marriage (*ff*).

Paraphernal Property.—This includes the property brought in by the wife not included in the dowry and property acquired by her subsequently not added to the dowry. She retains the usufruct of it (and the husband cannot take action with regard to it without her concurrence and consent) and the administration of it, unless by notarial act she hands it over to him to manage, and he then has to give a hypothec for the value of the movable property in the form required in the case of dowry (*g*). The income of the property is part of the fund of the community, and is employed in defraying the conjugal expenses, for which they are liable if the husband's separate property or the dowry are insufficient. The personal obligations of the husband do not bind the income of the paraphernal property except to the extent of any benefit derived by the family from them. The wife cannot without her husband's authorisation alienate, bind, or hypothecate it unless judicially authorised, and the husband can require, if it consists of securities or movables of value and the wife retains the administration, that

(*d*) Art. 225.
(*e*) Art. 1441.
(*f*) Arts. 1366—1378.
(*ff*) Arts. 1365—1380.
(*g*) Arts. 1381—1384.

it shall be deposited so as to prevent dealings with it without his consent. If it is entrusted to him he administers it subject to the rules governing an unvalued dowry, and these also apply to its restitution (*h*).

Community of Acquisitions during the Marriage (Sociedad de Gananciales).—Under this system the spouses at the dissolution of the marriage are entitled to equal moieties of the profits and gains made, obtained or acquired by either indiscriminately during marriage. The *régime* begins on the day of marriage (and this cannot be excluded by contract), and it cannot be renounced during marriage except in case of judicial separation of the spouses. It is governed by the rules of the contract of partnership, subject to the following provisions (*i*). The spouses' separate property consists of (1) property brought in by the spouses at marriage, or acquired gratuitously during marriage, (2) property acquired for valuable consideration with property belonging to one of the spouses, or bought with the money exclusively of the wife or husband. Instalments of a credit belonging to one party payable over a term of years are not *gananciales*, but separate property of that party (*k*).

The term "acquisitions" includes—(1) property acquired by onerous title during marriage by means of the common fund, whether in the name of one spouse or of the community; (2) profits made by the industry of the spouses or either of them, or (3) received or accrued during the marriage proceeding from the common property or property belonging to one of the spouses. A right of usufruct belonging in perpetuity or for life to a spouse is her separate property, but the income of it received during marriage is an acquisition, and thus includes the usufruct in the property of children, even those by another marriage. The term also includes expenditure or advances made by the common fund on the separate property of the spouses, and buildings erected during marriage on land belonging to one of the spouses, taking account, however, of the value of the site to the owner; in the case of cattle belonging to the wife's dowry or the husband's capital, the excess over the number brought in at marriage; gains at play; and all property of the household not shown to be separate

(*h*) Arts. 1385—1391.
(*i*) Arts. 1392—1395.
(*k*) Arts. 1396—1400.

property (*a*). The charges and obligations on this property include the husband's debts incurred during marriage or the wife's, where they are binding on it; repayments and interest due during marriage upon obligations secured on separate or *ganancial* property; ordinary repairs (not extraordinary) of the separate properties; major and minor repairs of the *ganancial* property; maintenance of the family and education of children common to both spouses and legitimate, and donations made to such children or promised by the husband or both spouses, unless with a reservation that the obligation is to be discharged out of separate property; payment of legal gaming debts; but not ante-nuptial debts of either spouse nor pecuniary fines or damages incurred by them, except arrears of such debts, after paying the debts above-mentioned (*b*).

The husband administers the common fund and can alienate and charge it without the wife's consent, but not so as to prejudice her or her heirs. By will he can dispose of one-half of it.

The wife cannot bind the common property without the husband's consent, except where the administration has been granted to her (*c*), and in cases where it is resorted to, as well as the husband's separate property and the wife's unvalued dowry, for household expenses (*d*).

The community is dissolved by dissolution or annulment of the marriage, but a spouse who has caused the nullity by *mala fides* forfeits his or her share. It is also dissoluble where separation of property is demanded by one spouse on account of civil interdiction following on a penalty pronounced against the other, or for the other's legal absence, or where judicial separation of the spouses can be demanded (*dd*). Liquidation of the community is also provided for (*e*).

Separation of Property.—Provision is also made on the lines followed by the other systems already mentioned for separation of spouses' property for the purpose of carrying on the administration of the marriage property while the husband is legally absent or incapable: but the Spanish law does not provide the same security for the wife's dowry as does the French Code (*f*).

(*a*) Arts. 1401—1407.
(*b*) Arts. 1408, s. 4, and 1410.
(*c*) Arts. 1441, 1442.
(*d*) Arts. 1362 and 1408, s. 5.
(*dd*) Art. 1417.
(*e*) Arts. 1418—1431.
(*f*) Code Civil Espagnol, trans. by A. Levy (1890), p. 271. C. C., art. 1413.

Failing an express stipulation to that effect in the marriage contract, separation of property can only be effected during marriage by judicial decree, except in the case of marriages between persons prohibited from contracting them, *e.g.*, for want of parents' consent or for a woman within 301 days after the death of her former spouse, or between guardian and ward (*g*). Either spouse can demand it (*h*), and it must be granted when the other spouse has been sentenced to a penalty involving civil interdiction, or has been declared legally absent or has given cause for a decree of judicial separation, and thereupon the community of acquisitions is dissolved and liquidated, but the spouses must provide for their maintenance and that of their children. Where the husband demands it, the power of administering the marriage property given to him by the Code continues even after separation of property has been pronounced, but the wife has no right to subsequent acquisitions and the husband's rights are governed by the rules applicable to the administration and usufruct of dowry and restitution of dowry. Where the wife demands it and it is granted for the husband's civil interdiction, she transfers to him the administration of the marital property and future acquisitions; if in like case it is granted on account of his legal absence, or his being the cause of judicial separation, she recovers the administration of the dowry, as she also does if he is declared prodigal (*i*). Administration of the marriage property is also transferred to her by order of the Court where she is guardian to her husband and in the cases mentioned above (*k*): and, also, with such limitations as it thinks fit, if he is a fugitive from justice or in criminal contempt or incapable of acting. The wife has the same power and responsibilities as the husband in exercising the administration; but the authorisation of the Court is required for her dealing with the property (*l*). Separation does not affect the previously acquired rights of creditors. Nor does it authorise the exercise of the rights of the spouses stipulated for in case of their respective deaths, nor (as provided in case of restitution of dowry or liquidation of the community) a claim for return of the personal effects of the spouses, but it does not affect the provisions which take effect when that event happens, except as regards the

(*g*) Arts. 50, 1432, and 1434.
(*h*) Arts. 1433, 1437.
(*i*) Arts. 1434, 1435, 1436, 1443, and 225.
(*k*) Arts. 183. 185—220, 1436, and 1441.
(*l*) Arts. 1442, 1444.

effects of judicial separation (*m*). When the separation terminates, the former marital *régime* is resumed (*n*).

SECTION III.

Law of Germany.

I. **Statutory Régime.**—There were numerous systems in force in the several parts of Germany prior to 1900 which need not be considered for the present purpose (*o*).

Exclusion by Ante-Nuptial or Post-Nuptial Contract.—In contradistinction to the French law which only allows an ante-nuptial contract to modify the statutory *régime*, the German Civil Code allows the statutory *régime* to be modified by contract, either before or after marriage (*p*).

Husband's Rights and Duties as to Wife's Property.—General Provisions.—The wife's property, whether possessed by her at the time of the marriage or acquired by her during the marriage and not being of the nature of privileged property (*Vorbehaltsgut*), is termed *Eingebrachtes Gut* (which term may be translated by the expression "non-privileged property"), and is subject to the management and usufruct of the husband. In the case of the wife being under restricted capacity at the date of her marriage and marrying without the authorisation of her statutory agent this right of the husband does not arise; the parties in such a case are deemed to live under the *régime* of "separation of goods" (*q*). The privileged property includes: (a) Things destined exclusively for the personal use of the wife, more particularly articles of dress and ornament or tools or apparatus used for purposes of work; (b) the personal earnings of the wife; (c) objects of property specifically

(*m*) Arts. 1438, 1440.

(*n*) Art. 1439.

(*o*) See the following authorities:—Stobbe, "Deutsches Privatrecht," iv., 63—302; Roth, "Deutsches Privatrecht," ii., 25—267; Dernburg, "Pandekten," vol. 3, pp. 19—44; for a short summary of mediæval Germanic law see Brunner, in Holtzendorff's Encyclopædia (6th ed.), vol. i., 255—256.

(*p*) S. 1432.

(*q*) Ss. 1363, 1364, 1365. A marriage entered upon by a person of restricted capacity without the authorisation of the statutory agent is voidable. The rule stated in the text remains operative if the marriage is not avoided within the period allowed for that purpose; as soon as the restriction ceases the wife may, of course, give her husband the right of management and usufruct by becoming a party to a contract to that effect.

declared to be privileged by the contract of marriage; (d) property given to a wife by will or by gift *inter vivos* in so far as the testator or donor gives it as privileged property; (e) property received by virtue of a right forming part of the privileged property or received in substitution or in exchange for other privileged property (*r*).

The privileged property of the wife is subject to the same rules as the whole of the wife's property would be under the contractual *régime* of separation of goods; but while under the last-mentioned *régime* the wife is bound to contribute to the household expenses in proportion to her means, no corresponding duty exists under the statutory *régime*, no contribution being due from the income of the privileged property unless the income derived from the non-privileged property is insufficient (*s*). Each of the spouses is entitled to an inventory of the wife's non-privileged property (*t*).

Management of Non-Privileged Property.—The husband has the right to take possession of the wife's non-privileged property (*u*). He is bound to administer it in a regular manner and give the wife all information required by her as to the state of the property (*x*). The right of management does not enable the husband to impose any personal obligation on the wife or to dispose of any part of her non-privileged property without the wife's assent, but this rule is subject to the following exceptions:—(a) He may dispose of money and other things *quæ usu consumuntur* (including interest coupons, dividend warrants, &c.); (b) he may set off claims owing to the wife against debts for which she is liable and which may be enforced against the non-privileged property; (c) if the wife has contracted to deliver any object belonging to the non-privileged property, the husband is entitled to carry out her promise. If the husband has made use of any of these exceptional powers of disposition without the wife's assent save for the purpose of the regular management of the property, the wife is entitled to the reimbursement of the loss resulting from any such disposition. The husband is bound as agent for his wife to invest in trustee securities all moneys belonging to the wife's non-privileged property, except in so far as any such moneys are required to meet immediate

(*r*) Ss. 1366—1370.
(*s*) S. 1371.
(*t*) S. 1372.
(*u*) S. 1373.
(*x*) S. 1374.

expenses. As regards things other than money, *quæ usu consumuntur*, the husband may alienate or consume them for his own benefit, subject to the reimbursement of their value on the termination of his right of management and usufruct or at an earlier period if this is required in due course of management. If the assent of the wife is unreasonably refused to any transaction necessary for the proper management, or if the wife by reason of absence or illness is unable to give her assent to a transaction which cannot safely be delayed, the wife's assent may be replaced by the sanction of the guardianship court (*y*).

The ownership of any movables (including negotiable instruments issued to bearer or endorsed in blank) acquired by the husband out of funds derived from the wife's non-privileged property passes to the wife from the time of acquisition unless the husband intends to acquire them for himself. In the last-mentioned event the ownership vests in the husband, but the wife is entitled to claim its transfer to her. Household articles acquired in substitution for articles originally forming part of the wife's non-privileged property become part of such property in any event (*z*).

The powers of management of a husband who is under guardianship are exercised by the guardian even in the case where the wife is guardian (*a*).

Husband's Right of Usufruct.—The husband is entitled to the income and profits of the wife's non-privileged property in the same manner and to the same extent as any other usufructuary, and he has to bear conformably to the rules as to usufruct the expenses of getting in the income and preserving the property. He is bound as between himself and the wife to discharge: (a) Certain specified outgoings, including insurance premiums; (b) the interest on all debts enforceable against the wife's non-privileged property; (c) all other periodically recurring obligations to which the wife is subject and which in due course of management ought to be discharged out of income (including obligations in respect of the

(*y*) Ss. 1375—1377, 1379. As to the husband's rights and duties concerning the farming stock appurtenant to any parcel of land forming part of the wife's non-privileged property, see s. 1378. As to the husband's power to bring and defend actions relating to rights belonging to the wife's non-privileged property, see s. 1380.

(*z*) Arts. 1381, 1382.

(*a*) S. 1409.

maintenance of relations); (d) certain specified costs of litigation. As regards all outgoings which as between the spouses have to be discharged by the husband, he is liable to the wife's creditors severally and jointly with the wife (*b*).

The husband has to bear the expenses of the conjugal life; the wife may require him to apply the net income of her non-privileged property towards his and her maintenance and the maintenance of their common issue before he satisfies any other claims. Necessary expenses incurred by the husband in the course of the administration of the wife's property are to be reimbursed to him by the wife, unless, under the rules stated above, such expenses as between the spouses have to be discharged by him (*c*). The husband has no power to assign his right of usufruct to any other party; if he is under guardianship the right of usufruct is exercised by his guardian on his behalf even in a case in which the wife is the guardian (*d*).

Wife's Rights and Duties.—The wife cannot, except in the cases referred to below, dispose of any part of her non-privileged property without her husband's authorisation. A contract affecting matrimonial property made without such authorisation may however become binding if ratified by the husband in the manner prescribed by the Code. On the other hand, a unilateral act by which the wife without the husband's authorisation disposes of any non-privileged property cannot be made binding by subsequent ratification (*e*). A transaction by which the wife incurs an obligation is binding upon her personally, whether assented to by the husband or not; if assented to by the husband it is also binding on the non-privileged property; if not so assented to, it binds such property to the extent of the benefit accruing to it by virtue of such transaction (*f*). The following classes of transactions are binding on the non-privileged property whether assented to by the husband or not: (a) Any transaction arising in the course of any business carried on by the wife with her husband's authority or with his knowledge and without opposition on his part; (b) the acceptance or disclaimer of any share in the estate of a deceased person or of

(*b*) Ss. 1383—1388.
(*c*) Ss. 1389, 1390.
(*d*) Ss. 1408, 1409.
(*e*) Ss. 1395—1398.
(*f*) S. 1399; and see s. 818. As to the effect of the wife being a party to judicial proceedings without the husband's authorisation, see s. 1407.

any legacy given to the wife: (c) the refusal of the offer of a contract or of a gift; (d) any transactions between the spouses; (e) certain specified kinds of judicial proceedings (*g*).

The husband's assent, though otherwise required under the rules stated above, may be dispensed with if by reason of illness or absence he is unable to give it and if the intended transaction cannot be delayed without danger; if the husband unreasonably refuses his assent to any transaction required for the proper management of the wife's personal affairs, such assent may be replaced by the sanction of the Guardianship Court (*h*).

The restraints imposed upon the wife by the rules stated above are binding on any third party dealing with the wife even if such party was ignorant of the fact that the wife was a married woman (*a*).

Liability for Debts.—The husband's creditors have no claim against the wife's privileged or non-privileged property. The wife's creditors may, subject to certain exceptions, enforce their claims against her non-privileged property notwithstanding the husband's rights of management and usufruct, and notwithstanding the fact that such claims might be satisfied out of her privileged property. As between husband and wife the following kinds of claims against the wife have to be discharged out of her privileged property: (a) Claims in respect of unlawful acts committed by her during the marriage, including claims for costs; (b) claims arising from obligations relating to the privileged property even if incurred before the marriage or before the time when the property became privileged, including claims for costs; (c) the costs of certain specified judicial proceedings. Any amounts expended out of the non-privileged property for the purpose of discharging any such claims must be made good out of the privileged property. On the other hand, any amount paid by the wife out of her privileged property for the purpose of discharging a claim which, as between the spouses, is chargeable on the non-privileged property, has to be made good out of the latter (*b*).

Wife's Remedies in Case of Husband's Maladministration or Incapacity.—The remedies to which the wife is entitled in the events mentioned below are: (a) Security; (b) lodgment of bearer securities with a public authority or registration in the wife's name; (c) ter-

(*g*) Ss. 1405—1407.
(*h*) Ss. 1401, 1402.
(*a*) S. 1404.
(*b*) Ss. 1410—1417.

mination of the husband's right of management and usufruct by order of the Court. All these remedies are available if the non-privileged property is endangered by the husband's mismanagement, and the remedy mentioned under (c) is also available in the following events: (a) If the husband does not comply with his duties as to the maintenance of the wife or of any of their common issue (*c*); (b) if the husband is put under guardianship, and in certain other similar events (*d*).

Termination of Husband's Right of Management and Usufruct.—The husband's right of management and usufruct, as mentioned above, may be terminated by order of the Court. It is terminated *ipso facto:* (a) By the husband's bankruptcy; (b) by judicial declaration of his death; (c) on the wife's death (*e*).

On the termination of the husband's right of management and usufruct the husband has to return the property to the wife or her heirs and account for its administration as soon as he becomes aware or ought to have become aware of such termination. A third party dealing with the husband after the termination of his right is not entitled to take advantage of the husband's ignorance if he himself knows or ought to have known of the cessation of the husband's right (*f*). If the marriage continues after the cessation of the husband's right the spouses are thenceforth deemed to live under the *régime* of separation of goods (*g*).

Reinstatement of Husband's Rights.—Where the disability by reason of which the husband was deprived of his right of management and usufruct has ceased to exist, or where a husband judicially declared to be dead proves to be alive, the husband may apply for and obtain a restitution of his rights. The restitution of the

(*c*) See vol. ii., chap. 4, Alimentary Obligation.

(*d*) Ss. 1391—1393. As to the mode of giving security, see ss. 232—240; as to the rules about lodgment with a public authority, see Introductory Law to the German Civil Code, arts. 144, 145.

(*e*) Ss. 1419, 1420. As to the circumstances under which a judicial declaration of death is made, see ss. 13—20; in all cases in which the husband's right is terminated without his knowledge he is entitled to continue the management until he receives notice of the termination, or would, but for his default, have received such notice. When the right is terminated by the wife's death he is bound to attend to all urgent matters until the heirs are in a position to provide otherwise (s. 1424).

(*f*) Ss. 1421, 1424, and see further ss. 1422, 1423.

(*g*) S. 1426.

husband's rights does not affect any third party without notice thereof unless it is registered in the marriage property register (*h*).

Separation of Goods.—Separation of goods is brought about by virtue of statutory rules in any of the following cases: (a) In a case where a wife being of restricted capacity marries without the authorisation of her statutory agent (see above); (b) on the termination of the husband's right of management and usufruct; (c) on the dissolution of the community in any case in which the spouses have previously lived under a contractual community of goods; (d) in any case in which a decree of judicial separation is rescinded (*i*). It may also be brought about by ante-nuptial or post-nuptial contract between the spouses.

Where spouses live under the *régime* of separation of goods, the following rules apply. The husband has to bear the expenses of the conjugal life, but the wife has to furnish a reasonable contribution from the income of her property and from her earnings; if the maintenance due from the husband to the wife and their common descendants is seriously endangered, or if the husband is under guardianship or if his property is in the care of a curator, the wife may retain so much of her contribution as is necessary to provide for such maintenance. Any contributions made by the wife to the expenses of the conjugal life are presumed to be made without the intention of claiming repayment. If the wife entrusts the management of the whole or part of her property to her husband, he is, in the absence of contrary direction on her part, entitled to apply the income accruing during the time in which such property is under his management in such manner as he may think fit, except in so far as it is required for the discharge of the expenses of management or of such of the wife's obligations, as under a proper course of management ought to be discharged out of income. The separation of goods does not affect any third party not having notice thereof unless at the time material for the particular transaction it has been registered in the marriage property register (*k*).

II. **Contractual Régime.**—The spouses are deemed to have adopted the rules applicable under the statutory *régime* in so far only as they are not modified by ante-nuptial or post-nuptial contract. A con-

(*h*) Ss. 1425, 1431. As to the register, see also ss. 1435, 1558—1563.

(*i*) Ss. 1361, 1418—1420, 1426, 1470, 1545.

(*k*) Ss. 1426—1431.

tract, modifying the statutory *régime* or a previously existing contractual *régime*, is called a "marriage contract" (*Ehevertrag*) (*l*)

If the parties adopt without modification one of the contractual *régimes* defined by the Code it is sufficient for them to say what *régime* they adopt. On the other hand, a contract in which one of the former German *régimes* is adopted without further explanation is of no effect. If such a *régime* is intended to be applied all its detailed consequences must be set out in the contract. A general reference to a foreign *régime* is permitted if the intending husband at the material date is domiciled in a country under whose law such a *régime* is recognised; in any other case a marriage contract referring to a foreign system without specific explanation is of no effect (*m*).

Form of Contract.—If the contract is executed within the German Empire it must be executed before a judicial officer or a public notary; if executed outside of the German Empire any form of execution which is lawful in the place of execution is sufficient, but execution in the German form is also allowed in such a case (*n*).

A marriage contract must be executed in the simultaneous presence of both parties; either in person or by attorney. A party whose capacity is *restricted* cannot enter into a contract stipulating for general community of goods or for community of movables except with the assent of his or her statutory agent, and where the statutory agent is a guardian he cannot give his assent without the sanction of the Guardianship Court. A party who is under *incapacity* cannot in any event enter into such a contract (*o*). A contract by which the husband's right of management and usufruct is excluded or modified is not effectual against any third party not having notice thereof, unless at the time of the particular transaction, such contract was duly registered in the marriage property register (*p*).

Contractual Systems defined by the Code.—The German Civil Code defines three forms of community of goods. In all these

(*l*) S. 1432.

(*m*) S. 1433.

(*n*) S. 1434; Introductory Law to the German Civil Code, art. 11; see also art. 141. Where both parties are German subjects a German consul has the same powers as a German notary (s. 16 of the statute of 1867, relating to Federal Consulates).

(*o*) Ss. 1434, 1437, 1549.

(*p*) S. 1435. As to procedure for registration and inspection of the register, see ss. 1558—1563.

systems there exists a common fund belonging to both spouses as tenants in common and managed by the husband; and the distinction between the systems consists in the mode in which such common fund is formed. The three systems are respectively known under the names of: (1) The general community of goods; (2) the community of income and profits; (3) community of movables. The system of separation of goods, which is another system defined by the Code, has already been described above. A contract by which the husband's right of management and usufruct is excluded, or by which a contractual community of goods is terminated, is deemed to provide for the *régime* of separation of goods unless the contrary appears (*q*).

(1) **General Community of Goods.—Formation of Common Fund.**—Under this *régime* the common fund consists of the whole of the property of both spouses existing at the time of the marriage or accruing during the marriage in so far as such property is not to be deemed separate property according to the rules stated below. Neither spouse can dispose of his or her share of the common fund. There is no right to demand partition except on the dissolution of the community (*r*).

Rules as to Separate Property.—Each of the spouses may have separate property, and such separate property may either be non-privileged (*Sondergut*), or privileged (*Vorbehaltsgut*). The non-privileged separate property consists of all objects of which the ownership cannot be transferred by act *inter vivos* (*e.g.*, certain feudal rights, rights of usufruct, &c.); the privileged separate property consists of the same classes of property as the wife's privileged property under the statutory *régime*, excepting, however, things intended for the personal use of either spouse, or things acquired by means of his or her work, all of which things form part of the common fund. The wife's privileged property is dealt with in the same way as the whole of the property of a wife living under the *régime* of separation of goods, but she is under no duty to contribute to the conjugal expenses unless the income of the common fund is insufficient (*s*).

Husband's Powers of Disposition.—The common fund is under the management of the husband, and his powers in respect of such

(*q*) S. 1436.
(*r*) Ss. 1438, 1442.
(*s*) Ss. 1439—1441.

fund are more extensive than his power in respect of the wife's non-privileged property under the statutory *régime*. He may in particular sell or pledge all movable objects forming part of the fund; he cannot, however, without the wife's authorisation or ratification, make any disposition affecting the whole common fund or affecting any immovables forming part thereof; or dispose of any part of the common fund by way of gift except for the purpose of discharging a moral duty or complying with the rules of social propriety. The sanction of the Court takes the place of the wife's assent in the same events as under the statutory *régime*. The husband cannot by any act of management relating to the common fund impose any personal liability on the wife either towards any third party or towards himself. While under the statutory *régime* the husband is responsible for reasonable care of the wife's non-privileged property, under this *régime* he is not responsible to the wife in respect of the care of the property comprised in the common fund. He must, however, replace any loss arising to the common fund from acts done by him with the intent of injuring the wife's interests or from acts done without the wife's assent in any case in which such assent was required under the rules stated above (*t*).

If the husband is under guardianship his powers of management are vested in his guardian, even if it be the wife (*u*). As regards the wife's non-privileged separate property, the husband has the same rights of management and usufruct as under the statutory *régime* (*v*).

Wife's Powers of Disposition.—The wife, as a general rule, has no power of disposition over any property forming part of the common fund, but any such property may become bound by transactions entered upon by her with or without her husband's assent (or with the sanction of the Court in lieu of such assent) in a similar way and in the same events as her non-privileged property may become bound by her dispositions under the statutory *régime* (*x*).

As regards the non-privileged separate property, she is in the same position as she is with reference to the non-privileged property under the statutory *régime*. As regards her privileged separate property, she has unrestricted powers of disposition (*y*).

(*t*) Ss. 1443—1448, 1456; see also s. 1455.
(*u*) S. 1457.
(*v*) S. 1439.
(*x*) Ss. 1450—1455.
(*y*) S. 1441; cf. s. 1371.

Rules as to Receipt and Disposal of Income.—The income of the common fund and also the income of the non-privileged property of both spouses is receivable by the husband by virtue of his powers of management, but it accrues to the common fund and must be accounted for accordingly. The conjugal expenses are payable out of the common fund, and if the income is insufficient for that purpose they have to be provided for out of capital. The wife is not bound to apply any part of her privileged separate property towards the discharge of the conjugal expenses except in so far as the income accruing to the common fund is insufficient for the purpose of discharging such expenses (*z*).

Liability for Debts.—As between Spouses and Creditors.—The husband's creditors may enforce their claims against the common fund in all cases; the wife's creditors may, as a general rule, enforce their claims against the common fund, but the same classes of liabilities, which under the statutory *régime* are not binding on the wife's non-privileged property, are, under the *régime* of general community of goods, not binding on the common fund. The husband's creditors may also enforce their rights against his separate property; the wife's creditors may in all cases enforce their rights against the wife's privileged separate property; as regards the non-privileged separate property, their rights are the same as under the statutory *régime*.

Each spouse is, of course, personally liable for his or her own debts, but as regards such of the wife's debts as are chargeable on the common fund, the husband is also liable severally and jointly with the wife (*a*).

As between the Spouses inter se.—Some of the liabilities which, as between a spouse and his or her creditors, are enforceable against the common fund, are, as between the spouses *inter se*, chargeable on the privileged property of the spouse through whom the liability arose. This is the case with reference to all kinds of liabilities, which, if incurred by a wife under the statutory *régime*, are, as between the spouses, chargeable on her privileged property (*b*).

(*z*) Ss. 1438, 1458.

(*a*) Ss. 1459—1462.

(*b*) Ss. 1463, 1464; compare ss. 1415, 1416. As regards the liabilities of the spouses *inter se* in respect of the outfit to be provided on the marriage of any common child or of any child of either spouses, see s. 1465.

A husband who uses any property forming part of the common fund for the benefit of his privileged property, must replace the value of such property, and a husband who uses any part of his privileged property for the benefit of the common fund is entitled to compensation out of the latter fund (*c*). The amounts owed by each spouse to the common fund under the rules stated above need not, as a general rule, be reimbursed before the dissolution of the community, but in so far as any such amount is owed by a wife having sufficient privileged property, the debt must be discharged as soon as it arises (*d*).

Dissolution of Community.—The community is dissolved *ipso facto*: (a) On the death of either spouse (except in the case of a continuance of the community between the surviving spouse and the children of the marriage under the rules referred to below); (b) on the re-marriage of one of the spouses after the judicial declaration of death of the other spouse; (c) on the judicial separation of the spouses or on the dissolution of the marriage by divorce; (d) by a post-nuptial marriage contract providing for such dissolution (*e*).

The community may be dissolved by judicial order on the wife's application: (a) If the husband has without the wife's assent made any disposition affecting the common fund and requiring such assent, and if by reason thereof there is ground to apprehend serious prejudice to her for the future; (b) if the husband has diminished the value of the common fund with the intention of prejudicing his wife; (c) if he has not complied with his duties as to the maintenance of his wife and their common issue, and their future maintenance is seriously endangered; (d) if he has been placed under guardianship on the ground of prodigality or if by his prodigality he is seriously endangering the existence of the common fund; (e) if the debts of the common fund by reason of liabilities incurred by the husband exceed the assets to such an extent that the wife's after-acquired property and earnings are endangered (*f*).

The community may be dissolved on the husband's application if the wife has incurred liabilities in respect of which the creditors

(*c*) S. 1466.
(*d*) S. 1467.
(*e*) Ss. 1482, 1483, 1348 1564, 1586, 1436.
(*f*) S. 1468.

may resort to the common fund, but which as between the spouses are chargeable on the wife's separate property, and if such liabilities exceed the assets of the common fund to such an extent that the husband's after-acquired property and future earnings appear to be endangered (*g*).

In all cases in which dissolution is ordered by the Court it takes effect on the day when the judgment ceases to be appealable; but the applicant may require the partition to be effected as from the date of the application.

As from the date from which the dissolution of the community operates, the parties, in so far as their marriage continues, are deemed to live under the *régime* of separation of goods. The rules about the effect of the change of *régime* on third parties, and about the right or duty of the husband to continue his management in certain events are the same as the corresponding rules applicable in the event of withdrawal of the husband's right of management and usufruct under the statutory *régime*. Each of the spouses is entitled to claim partition; pending partition neither spouse can dispose of his or her share in the common fund; and the management of the partition of the common fund is entrusted to both spouses jointly, the heirs of a deceased spouse taking his or her place in a case where the community was dissolved by his or her death (*h*).

The property comprised in the common fund is in the first place applied towards the discharge of all liabilities payable out of the common fund, and for that purpose a sufficient part thereof must be converted into money (due regard being had to outstanding or disputed liabilities). The residue is divided in equal parts, but so that any amount owing to the common fund by either spouse is set off against the moiety to which he or she or his or her estate is entitled. Each spouse may select as part of his or her share articles intended for his or her personal use and also all articles contributed by him or her to the common fund.

Where on a divorce or judicial separation one of the spouses is declared to be the exclusively guilty party, the rule of division is considerably modified. In such a case the innocent spouse can at his or her option either claim his or her moiety of

(*g*) S. 1469. (*h*) Ss. 1470—1472, 1479.

the common fund, or the restitution of the value of the whole property contributed by him or her to the common fund, and if the whole of the common fund is insufficient for that purpose the party declared guilty is liable personally for half the deficiency.

After the completion of the partition both spouses are liable jointly or severally for all outstanding liabilities payable out of the common fund, but in so far as a spouse during the subsistence of the community was not personally liable, his or her liability is limited to the extent of the value of the property received by him or her upon the partition, each spouse being, however, entitled to be indemnified by the other in respect of any liability which, as between him and the other spouse, ought to be satisfied by the latter (*i*).

Rules as to Continuance of Community.—If, on the death of either spouse, any issue of the marriage survive, the community is continued between the surviving spouse and such of the issue of the two spouses as in case of the intestate succession of the predeceasing spouse would be entitled to his or her estate, unless such continuance is excluded or prevented under any of the rules stated below. If the community is continued the share of the deceased spouse does not form part of his or her estate, but passes to the issue in the same way as if it had under an English settlement been vested in the deceased spouse for life with remainder to his or her surviving issue (*k*).

The continuance of the community may be *excluded:* (a) By express stipulation in any contract between the spouses; (b) in certain specified events by testamentary disposition of the predeceasing spouse. The continuance of the community may be *prevented* by the refusal of the surviving spouse to submit to it (*l*).

Where besides the common descendants there are other descendants of the predeceasing spouse, they take their share in the moiety belonging to such spouse in the same manner as if the community had not been continued. Subject to the satisfaction of the claims of any such descendants the common fund of the continued community consists (a) of the common fund existing

(*i*) Ss. 1477—1481.
(*k*) Ss. 1482, 1483.
(*l*) Ss. 1508, 1509, 1484.

at the time of the death of the predeceasing spouse; (b) of the share of the surviving spouse in the estate of the deceased spouse; (c) of any property accruing to such surviving spouse during the continuance of the community (*m*).

The rules as to the management of the common fund are also applied to the continued community, but so that the surviving spouse takes the position of the husband and the participating issue take the position of the wife (*n*).

All liabilities of the surviving spouse and all such liabilities of the deceased spouse as were payable out of the original common fund are payable out of the common fund of the continued community; the surviving spouse is also personally liable for the liabilities payable out of the common fund of the continued community, but in so far as his liability is increased by reason of the continuance of the community it is limited to the same extent as the liability of an heir is limited (*o*).

On the death of any of the participating issue leaving issue such issue are substituted in his or her place; the share of any issue not leaving issue accrues to the surviving participating issue. In default of such issue the surviving spouse takes the whole (*p*).

A person entitled to a share in the continued community may waive his right to such share, but if he is subject to parental power or guardianship his waiver requires the sanction of the Guardianship Court. The effect of the waiver is the same as if the party waiving his right had died without leaving issue (*q*).

The continued community may be dissolved at any time by a declaration made by the surviving spouse in a prescribed form, and it is dissolved *ipso facto* by the re-marriage or death or declaration of death of the surviving spouse. It may also be dissolved by the order of the Court on the application of any participating issue: (a) On grounds substantially identical with the grounds on which a wife may apply for dissolution of the original community; (b) on the ground that the surviving spouse has forfeited his or her parental power over the applicant or would have forfeited it if the applicant had been under parental power. On dissolution the

(*m*) Ss. 1483, 1485.
(*n*) S. 1487.
(*o*) Ss. 1488, 1489.
(*p*) S. 1490.
(*q*) S. 1491.

partition takes place in a similar manner as in the case of the dissolution of an ordinary community (*r*).

Each spouse may by will, within certain prescribed limits, modify the rights of descendants in regard to the continued community. Such dispositions, if made by one spouse alone, require the consent of the other spouse (*s*).

(2) **Community of Income and Profits.—Formation of Common Fund.**—Under this *régime* the common fund is formed exclusively of such property as represents profits, earnings, and income accruing to each of the spouses during the marriage, with the exception of the income derived from the wife's privileged property or income which by marriage contract is excluded from the common fund (*t*).

Rules as to Separate Property.—All property belonging to either spouse not representing profits, earnings, or income (whether existing at the time of the marriage or accruing during its subsistence by way of gift or inheritance) remains the separate property of such spouse. Privileged separate property is only recognised in the wife's case, and is formed of the same kinds of property as are deemed privileged property under the *régime* of general community of goods. All other separate property of either spouse is non-privileged property of such spouse (with the result that the income of such property belongs to the common fund unless a marriage contract provides otherwise). All property which cannot be proved to be separate property of either spouse is deemed to belong to the common fund. Each of the spouses is entitled to an inventory of the separate property of each of the spouses (*u*).

Management of Common Fund and Separate Property. — The common fund is administered in the same way as under the *régime* of general community of goods. The wife's separate non-privileged property is administered in the same way as under the statutory *régime* (*x*).

Liabilities Payable out of Common Fund.—The common fund

(*r*) S. 1492—1502. As to the apportionment of the moiety belonging to the issue and of the liabilities to which the issue are all subject, see ss. 1503, 1504; as to the rights of any issue in respect of gifts made during the lifetime of the spouses, see s. 1505; as to the exclusion of any issue declared "unworthy" by judicial order, see s. 1506; as to the official certificate relating to the continuance of the community, see s. 1507.

(*s*) Ss. 1511—1516.

(*t*) Ss. 1519, 1525.

(*u*) Ss. 1520—1528.

(*x*) Ss. 1519, 1525.

is charged with (a) the expenses of the conjugal life; (b) all outgoings affecting the husband's separate property, and all outgoings affecting the wife's non-privileged separate property; (c) all debts and liabilities incurred by the husband and certain specified liabilities incurred by the wife. Elaborate rules are also given for the apportionment of liabilities as between husband and wife which somewhat differ from those applicable in the case of the general community (*y*).

Dissolution of Community of Income and Profits.—The community may be dissolved by order of the Court on the application of either spouse on grounds similar to those on which the applicant would be entitled to obtain an order for the dissolution of the community under the *régime* of the general community of goods. The wife may also obtain an order for such dissolution on the grounds on which she could obtain the revocation of the husband's right of management and usufruct under the statutory *régime*.

The community is dissolved *ipso facto* on the grounds on which the general community is dissolved *ipso facto*, and also on the grounds on which the husband's right of management and usufruct under the statutory *régime* is revoked *ipso facto*. If the dissolution is brought about during the subsistence of the marriage the *régime* of separation of goods takes the place of the former existing *régime*. The reinstatement of the community may be brought about in the same way as the reinstatement of the husband's right of management and usufruct under the statutory *régime*. Where the husband's bankruptcy has caused a dissolution, the wife may obtain a judicial order for the reinstatement of the community (*z*).

A continuance of the community after the death of one of the spouses cannot take place under this *régime* (*a*).

(3) **Community of Movables.**—This is the short name for the *régime* of which the full designation is "Community of movables and of income and profits" (*Gemeinschaft des beweglichen Vermögens und der Errungenschaft*). The common fund under this *régime* consists of the same classes of property of which that fund consists under the *régime* of general community of goods, except that all immovables belonging to either spouse at the date of the marriage or subsequently accruing to him or her by way of gift or

(*y*) Ss. 1529—1541.
(*z*) Ss. 1542—1548.
(*a*) Cf. ss. 1483 and 1557.

inheritance are excluded. Immovables acquired in exchange for property originally included in the common fund become part of that fund though the community is described as a community of movables. Easements, real rights of pre-emption, perpetual charges affecting land, rights of common, rights of patronage, sporting rights, and similar rights are deemed immovables (*b*).

The separate property of each spouse consists: (a) Of all immovables belonging to each spouse at the date of the marriage or accruing to him or her during the marriage by way of gift or inheritance; (b) of all inalienable objects belonging to or accruing to such spouse; (c) of all objects declared to be separate property by marriage contract; (d) of all objects declared to be given as separate property by the testator or donor from whom they are derived. In the wife's case any of the objects described under (c) and (d) may be declared to be privileged separate property. The husband, on the other hand, is not entitled to have any privileged separate property (*c*).

As regards the management of the fund, the liability for debts and other similar matters, the same rules apply as under the *régime* of general community of goods (*d*).

Whilst under the *régime* of "general community of goods" a continuance of the community takes place on the death of one of the spouses unless prevented or excluded by one of the events mentioned above, and whilst under the *régime* of community of income and profits such a continuance cannot take place in any event, the *régime* of the community of movables admits of a continuance after the death of one of the spouses, but only in so far as this is provided for by marriage contract (*e*).

SECTION IV.

Laws of Austria and Hungary.

Austrian Law.—Statutory Marriage Régime of Property.—Marriage has, in general, no effect on property relations of the spouses. The spouses retain their respective rights of property, and the one has no claim upon what the other acquires during the marriage or

(*b*) Ss. 1549, 1554, 1551.
(*c*) Ss. 1551—1555.
(*d*) Ss. 1549; but see s. 1556.
(*e*) S. 1557.

obtains in any way. In doubtful cases it is presumed that the acquisitions are derived from the husband (*f*).

Nevertheless, in the absence of any contradiction by the wife, the legal presumption is that she has entrusted to the husband as her legal representative the management of property that she has absolutely at her disposal (*g*). The husband, as regards this management, is in the same position as any other person entrusted with a full power of attorney for the other. But he is only responsible for the *corpus*; he is not liable to account for income acquired during his management unless this has been specially provided for, his enjoyment of the income being considered as lawful up to the day when his management ceases (*h*).

Similarly the wife is not liable to account for the income which she has made over to her husband, but has herself enjoyed during the marriage. Each spouse is, however, at liberty at any time to determine the power of management tacitly entrusted to the other spouse (*i*). In urgent circumstances, or where there is a risk of injury to the property, the power of management can be withdrawn from the husband, even though it has been conferred upon him expressly and without any limit of time. On the other hand, the husband is entitled to put a stop to improvident management on the wife's part, even as regards her own fortune, and to have her declared spendthrift according to the statutory provisions (*k*).

Contractual Property Régime.—The spouses can regulate their proprietary relations as they like by contract. Such contracts relate either to their mutual legal relations as regards property during the marriage, or they provide certain benefits for the survivor of the two spouses. The Code contains special provisions with regard to "marriage property"—which is property transferred or secured by the wife or a third party on her account to the husband in order to lighten the burden of expenditure in connection with the marriage (*l*).

The marriage property consists of immovables, rights, or of such movables as can be enjoyed without detriment to their substance. The wife is considered as the owner and the husband as the

(*f*) C. C., art. 1237.
(*g*) Art. 1238.
(*h*) Art. 1239.
(*i*) Art. 1240.
(*k*) Art. 1241.
(*l*) Art. 1218.

usufructuary, until it is proved that the husband has taken over the marriage property for a fixed sum, and has bound himself to return only that specific sum of money (*m*).

By law the marriage property, after the death of the husband, reverts to the wife, and if she predeceases him her statutory or testamentary heirs take it in her place. If such reversion is to be excluded, an express stipulation is necessary. A person who voluntarily provides the marriage property can stipulate that it shall revert to him after the death of the husband (*n*).

There are further different rules which regulate the legal consequences of certain provisions made for the benefit of the wife, namely, those relating to jointure (*o*), gifts made immediately on marriage (*p*), provision of income for maintenance during widowhood (*q*), and usufruct in the event of death (*r*).

If community of goods has been agreed upon between the spouses, that is usually understood only to refer to the event of death. gives the spouses the right to claim half of the funds remaining after the death of one of the spouses out of the common fund formed by the properties respectively contributed thereto by the two spouses (*s*).

Hungarian Law.—Freedom of married women's property is a fundamental principle of Hungarian law, laid down of old in the Tripartitum (A.D. 1514). The married woman retains free possession of her goods; there are no restrictions whatever of women's capacity. For the validity of contracts between husband and wife a public notary's act is required.

Stante matrimonio, the Roman *dotal-paraphernal* system remains in full vigour; the husband has only the usufruct of the dowry given to him by special contract. Yet, on the dissolution of marriage, either by death or by divorce, the right of community of income and profits may be claimed, varying with the different classes of society. Between spouses belonging to the nobility or the "*honoratiores*," *i.e.*, persons employed in one of the learned professions (lawyers, medical men, teachers, etc.), there is no statutory right of community of income and profits, the husband

(*m*) Art. 1228.
(*n*) Art. 1229.
(*o*) Arts. 1230, 1231.
(*p*) Art. 1232.
(*q*) Arts. 1242—1244.
(*r*) Arts. 1255—1258.
(*s*) Art. 1234.

being considered as "chief earner of income;" but the right may arise by virtue of a contract or in the event of the husband deriving any profit from the wife's property. Between spouses not belonging to the nobility or the learned professions, *i.e.*, those earning their living by trade, there is a statutory right of community of profits and income, and on the dissolution of marriage each party is bound to deliver to the other, or his or her heirs, half of the accession of property acquired during the marriage otherwise than by gift and inheritance.

An ancient and nearly obsolete institution of Hungarian marriage property law is the so-called legal "*dotalitium*," a sum of money to be paid *ex lege* from the husband's property to the wife on the dissolution of marriage, which, however, is forfeited in case of the wife's infidelity. A variety of this institution is the so-called *dos scripta*, a sort of "Morgengabe" promised by special contract by the husband to his wife.

The husband has to bear the common household expenses out of his own means, and has no claim whatever to recoupment from the wife's property. The wife, if surviving, has a very substantial right of dower, the consideration of which belongs properly to the law relating to the devolution of property on death.

SECTION V.

Law of Switzerland.

The *régime matrimonial* in Switzerland is governed by the law of the canton in which the first matrimonial domicil is established, which in case of doubt is the canton of which the husband is a citizen at the time of the marriage; but if the matrimonial domicil is changed during the continuance of the marriage the spouses may, with the consent of the proper public authority of the new domicil, subject the relations between themselves to the law thereof by means of a joint declaration made to the proper cantonal officer. Such a declaration will relate back to the commencement of the property relation. The rights of third parties against the spouses, and in particular those of the husband's creditors against the wife, in case of bankruptcy or execution against him, are governed by the law of the domicil for the time

being; and no right acquired by third parties under the law of any domicil of the spouses can be altered by a subsequent change of domicil (*a*).

I. The Existing Law.

The legal systems of the cantons vary very greatly, and it is not possible to give a complete account of them in a moderate space (*b*). They have been classified as follows :—

1. **Combination of Property** (*Güterverbindung* or *Verwaltungsgemeinschaft*, *Régime sans Communauté* (*c*)).—This system, which is closely parallel to that of the German Code, is the most usual in Switzerland, and prevails in Zürich, St. Gallen, both cantons of Appenzell, Uri, Schwyz, Unterwalden, Luzern, Glarus, and Zug, and it may also be adopted by the spouses in those parts of Switzerland where the law is the French Code (*d*). The main principle is that the goods of the spouses are considered as united into one complex, which is administered by the husband, but he has only a usufruct and administration of such property as his wife has at the date of the marriage, or acquires during its continuance by

(*a*) See Federal Law of June 25th, 1891, on the Civil Relations of citizens established or resident in a canton other than that of origin, arts. 19—21; and Bader's commentary thereon.

(*b*) For fuller information, see Huber, Schweizerisches Privatrecht, i., 237—393; Schreiber, Die Ehelichen Güterrechte der Schweiz. A good general summary of these systems is to be found in the introduction to the Manuel du Droit Civil Suisse of Rossel and Mentha, now in course of publication; and a historical account in Die Ehelichen Güterrechte der Schweiz, by F. von Wyss.

(*c*) This is the name of the most closely corresponding *régime* under the French Code. In the French text of the Swiss Federal Code it is called *union des biens;* in the Italian *unione dei beni*.

(*d*) These are Geneva and the western or French-speaking part of the canton Bern (*Jura bernois*). The latter has preserved the French Code in its origiual form, though it is said that the *hypothèque légale* of the married woman (above, pp. 114, 570) does not exist in the Protestant part of the *Jura bernois*, but only in the Catholic part (Rossel, Manuel du Droit Civil de la Suisse romande, p. 412); the former has introduced considerable modifications. Thus, by the law of November 7th, 1894, a married woman has a right to the profits of her personal labour during the marriage, as though she were under the *régime* of separate property, and these profits are liable for debts contracted by her without her husband's authorisation, and (after the husband and the community) for the support of the household and the maintenance and education of the children; and by the law of September 12th, 1868, the *hypothèque légale* of the married woman is subject to the formality of registration.

inheritance or gift (*e*), though he remains the owner of the property contributed by him. The ante-nuptial debts of the spouses remain separate and are attached to their respective property, but the debts contracted during the marriage are borne by the husband (*f*). Upon the termination of the marriage the husband or his heirs are required to restore to the wife or her heirs so much of the property belonging to her as still exists *in specie* and to make compensation for so much as no longer exists (*g*). For this purpose an inventory may be drawn up, either by compulsion of law or at the request of the wife.

2. **Unity of Property** (*Gütereinheit*), a system which prevails in the cantons of Bern and Aargau generally, and also in Vaud and Fribourg (*h*) as regards the immovable property of the wife, and also her movables to such extent as the husband gives security for them. Under this system the wife's property becomes the husband's absolutely, and he is bound to bear all her debts, whether contracted before or during the marriage; but the wife becomes a creditor of the husband for the amount of her fortune, and the debt falls due upon the termination of the marriage.

3. **Community of Acquisitions or of Income and Profits** (*Errungenschaftsgemeinschaft, Communauté restreinte aux Acquêts*), which is the ordinary law of Neuchâtel, Valais, Solothurn, Schaffhausen, and the Grisons, may be adopted by the spouses in the parts which are subject to the French Code and in the cantons of Vaud and Fribourg (*i*). This system is differentiated from the first two by the fact that while in them the wife has no share in the success or failure of the marriage, so that her claim against her husband remains unaffected by the gains or losses which may accrue during

(*e*) In the Federal Code (see art. 195) such property is called the property contributed by the wife (*eingebrachtes Gut, apports, apporto*).

(*f*) Huber, i., 242, 247. Action may, however, in general, be brought against the husband during the continuance of the marriage for his wife's ante-nuptial debts: *ibid.*, 296.

(*g*) Cf. Federal Code, arts. 212, 213.

(*h*) Huber, Schweizerisches Privatrecht, i., 243, 245. Rossel (Manuel du Droit Civil de la Suisse romande, 379, 387) and Schreiber (I., 69, 146) prefer to regard the common law system of these two cantons as a variety of combination of property; and this seems to be more correct as regards the wife's property for which security is not given. By the law of the Canton de Vaud of 1899, the wife's consent is necessary to the passing of her property to her husband.

(*i*) It is also the law of Thurgau, so far as the dissolution of the conjugal community is concerned.

its continuance, in the system of common acquisitions the wife will receive a share of the additions made to the common stock during the marriage. The relations of the capital of the wife's property to the common stock may, under this system, be either one of unity, as in Solothurn, or of combination, as in the four other cantons above named. Some of these cantons (Schaffhausen and the Grisons) go further and add to the community of acquisitions a community of losses; while Solothurn formerly made the wife jointly responsible with her husband in case of his insolvency (*j*).

4. **Community of Property** (*Gütergemeinschaft, Communauté de Biens*).—This, which is, as we have seen, the common law of France, is likewise the common law of the parts of Switzerland where the French Code prevails, and is also to be found in the two half-cantons of Basel and in Thurgau, where it is extended also to the immovable property belonging to the spouses at the date of the marriage. In this system the fortunes of the husband and wife are united into one complex, which belongs to the married pair as joint owners, and bears the ante-nuptial debts of both spouses; and upon the termination of the marriage it is divided between the spouses or their legal representatives. But the system is nowhere in Switzerland carried out logically to its full extent (*k*).

Under all these systems the property of the wife, or so much of it as is not specially reserved to her, is joined to the husband's, and he has full powers of disposition thereof, subject in some cases to the wife's consent or to other formalities (*l*). So, too, in case of his bankruptcy the conjugal property forms part of the property divisible among the creditors, except in so far as the cantonal law gives the wife a right to recover it *in specie*, and no special proceeding against it is necessary (*m*). This differentiates them from the last system which we have to consider, in which the property

(*j*) Civil Code of 1855, art. 198; Huber, i., 245, 300.

(*k*) See Huber, i., 259.

(*l*) Huber, i., 266 *et seq.* Thus, under the Laws of Zürich (Civil Code, art. 591) and Luzern (law of December 25th, 1880, s. 7) the husband cannot alienate landed property belonging to his wife without her consent.

(*m*) Weber and Brüstlein, Das Bundesgesetz über Schuldbetreibung und Konkurs, p. 257, n. 10 b. As to the privileges conferred upon the wife's claims for her property in the husband's bankruptcy by many cantons, see Huber, *op. cit.*, i., 327—334.

of the wife remains hers, and she retains full powers of management and alienation.

5. **Separation of Property** (*Gütertrennung, Régime des biens Séparés, Separazione dei Beni*).—This is the common law of the canton of Ticino (*n*), and it may also be adopted by the spouses in cantons under the French Code (*o*), and under the Codes of Neuchâtel (*p*) and the city canton of Basel. In Ticino and cantons under the French Code it may be combined with a *dos*. Moreover, in many of the cantons which fall under one of the other systems property may be reserved to the wife by contract or otherwise (*Sondergut, vorbehaltenes Gut*), and she is then in general treated, in regard to it, as though she were living under the *régime* of separate property (*q*). And in several cantons the property of the wife may be separated by a judicial or administrative authority from that of her husband, generally upon her request, but sometimes upon his also, for the purpose of protecting it against loss (*r*).

The provisions of the French Code as to the *dos* have already been given (*s*); they are law both in Geneva and the French part of the canton of Bern; but they must be read in conjunction with art. 35 of the Federal Code of Obligations (*t*), and (for Geneva) with the law of November 7th, 1894 (*u*).

The *dos* is defined by the Code of Ticino as consisting of the property which the wife contributes to assist her husband in bearing the expenses of the marriage. It may also be contributed by other persons, for example the wife's parents; the contributions of the wife must be made before marriage, but other persons may constitute or add to the *dos* during the marriage. Gifts made during the marriage must be expressly accepted by the husband, otherwise they will be only part of the extra-dotal property of

(*n*) Huber, i., 245; Civil Code, arts. 655—658.

(*o*) See p. 611, above, n. (*d*).

(*p*) Civil Code, arts. 1137, 1198—1202.

(*q*) See, *e.g.*, Civil Codes of Zürich, art. 597; Bern, arts. 89, 90; Glarus, art. 154; Grisons, art. 39; Zug, art. 35; Schaffhausen, art. 145; Luzern, law of December 25th, 1880, art. 11; Huber, Schw. Privatrecht, i., 293—295.

(*r*) Huber, i., 313—317; Civil Codes of Grisons, art. 45; Solothurn, arts. 91, 108; Basel (city), law of March 10th, 1884, art. 40; Vaud, arts. 287 *et seq.*, 1071; Neuchâtel, arts. 1172, 1173, 1175; Geneva, arts. 1443—1452, and law of November 7th, 1894, art. 5.

(*s*) P. 549, above.

(*t*) See p. 615, below.

(*u*) P. 611, n. (*d*), above.

the wife; and the husband's acceptance entails upon him the obligation of contributing half its value by way of *contrados*. The *dos* is inalienable, except by order of the Court, which is made only in very special cases. It may be valued, in which case it becomes the property of the husband, who is required only to repay the amount of the valuation; if there is no valuation, the husband is entitled to the usufruct of the property contained therein (*x*).

Contractual Régime.—The *régime matrimonial* may in some cantons be varied by contract between the spouses. Thus we have seen that the French Civil Code allows them to choose their own *régime*, provided that certain conditions are satisfied (*y*). This provision is in force in Geneva and the French part of the canton of Bern, and is closely followed by the Codes of Vaud (*z*), Fribourg, Valais, and Ticino (*a*). Again, as we have seen, Neuchâtel and the city canton of Basel allow the spouses to adopt the *régime* of separation of property, but not any other *régime*, instead of the common law *régime* of those cantons. All these cantons follow the French Code in requiring the contract to be drawn up before the celebration of the marriage and forbidding its alteration after that date, except that in Fribourg the community of acquisitions may be subsequently agreed upon. The contract must also be a notarial act, except in the canton of Valais.

The country canton of Basel allows any contract to be made, provided the proper forms are observed. In Thurgau the wife's fortune may be reserved to her as separate property, or security may be given for it by means of a marriage contract, which must be in writing, and is to be laid before the proper public authority and published (*b*). The Grisons (*c*) also allow alterations to be made in the matrimonial *régime* by contract, on the condition that the provisionsas to the husband's control of his wife, the restrictions on her capacity, and so forth, are not infringed. Finally, Zürich (*d*) and Schaffhausen allow marriage contracts only in very exceptional cases, and require the consent of a judicial authority.

By art. 35 of the Federal Code of Obligations, if a married

(*x*) Civil Code of the canton of Ticino, arts. 634—654.

(*y*) Pp. 477, 478, 561, above.

(*z*) Art. 1042.

(*a*) Fribourg, art. 105; Valais, art. 1269; Ticino, art. 632.

(*b*) Thurgau. Civil Code, arts. 87 *et seq.*

(*c*) Civil Code, arts. 47, 48.

(*d*) Civil Code, arts. 615—619.

woman carries on a business or profession on her own account with the consent of her husband, she is liable for any obligations contracted in the ordinary course of the business or profession to the whole extent of her fortune, without regard to the rights of her husband to enjoy and administer it (*e*), and further, in those cantons where the wife's property passes to her husband he is also liable; or if there is a community, the community is liable (*f*).

In case of the bankruptcy of the husband, the wife's claim for the restitution of such of her contributed property as is privileged by cantonal law is entitled to a priority over ordinary creditors (*g*).

II. The Federal Code.

Transitory Provisions.—Upon the coming into force of the Federal Code (*h*) such provisions of the existing cantonal family laws and laws of inheritance as the cantons may think fit to declare part of the law of matrimonial property, with the exception of provisions relating to the extraordinary *régime*, to reserved property, and to marriage contracts, will remain in force as regards the relation to one another of spouses married at that time; but as regards other persons such spouses will be subject to the new law, unless before it comes into force they have handed in a joint declaration in writing of their desire to continue to be governed by their existing *régime*, which declaration is to be entered in the register of matrimonial property. They may likewise by such a declaration to the competent authority put the relations between themselves under the new law.

Marriage contracts concluded before the coming into force of the new Code remain valid after that date, but are effective as against

(*e*) This liability will continue to exist under the Federal Civil Code; see arts. 207, 220. Where there is a community of property, the joint property is also liable.

(*f*) Liability for torts is regulated by the Federal Code of Obligations, arts. 50 *et seq.*, under which it has been decided that a husband is not liable for torts committed by his wife: see Morana *v.* Albrecht and wife (Tribunal Civil de Genève, August 15th, 1885; Revue de la Jurisprudence en matière de Droit Civil Fédéral, iv., 169). Under the Federal Civil Code the wife is liable under any *régime*: see arts. 207, 220, 243. If there is a community of property, the joint property is likewise liable: art. 220. The husband remains immune.

(*g*) See Federal Law of Execution for Debts and of Bankruptcy, art. 219, and the commentaries of Weber and Brüstlein and of Jäger thereon.

(*h*) See Burge, vol. ii., p. v.

third parties only upon condition that before that date notice thereof has been given to the competent authority for registration.

A contract of marriage entered in a public register under the existing law will be registered in the new register.

Changes in the matrimonial *régime* which are caused by the coming into force of the new Code are subject, so far as the liability to third parties is concerned, to the rules of the Code relating to changes of *régime* (*i*).

Federal Code.—By the provisions of the Code itself the spouses are subject to the *régime* of combination of property (*k*), except in so far as they have otherwise agreed by marriage contract or have become subject to the extraordinary *régime* (*l*); and a marriage contract must adopt one or other of the *règimes* provided for in the Code (*m*).

The Ordinary Régime.—The general principles of this have been described above (*n*).

It may be added here that the conditions of the *régime* have been assimilated to those of the community of income and profits by means of a provision that one-third of any increase in the amount of the property of the spouses which may occur during the marriage belongs to the wife or her issue, but any loss is borne by the husband or his heirs unless it is shown to have been caused by the wife (*o*); but these rules may be varied by marriage contract. It is also open to the spouses to approximate the relation between them to the unity of property (*p*) by agreeing (in the form of a marriage contract), within six months after any property is contributed by the wife, that such property shall become the husband's at the amount at which it is valued (*q*). The husband's power of disposition is limited by the provision that, except in so far as the property contributed by the wife has become his property, he may not dispose of property so contributed to an extent exceeding the necessities of ordinary administration, without the consent of his wife, which may however, in general, be presumed by third parties to have been given (*r*). To the extent

(*i*) See final title of the Code, arts. 9, 10, 11.

(*k*) P. 611, above.

(*l*) Art. 178.

(*m*) Art. 179.

(*n*) P. 611.

(*o*) Art. 214. The old principle in many of the cantons was expressed in the words "Frauengut darf weder wachsen noch schwinden."

(*p*) P. 612, above.

(*q*) Art. 199.

(*r*) Art. 202.

of the wife's agency for the common household she has likewise powers of administration and disposition (*s*); and the husband will be liable for debts contracted in the exercise of such powers (*t*); but the wife may not refuse an inheritance without the consent of her husband, from the refusal of which she may appeal to the guardianship authority (*u*). With respect to the amount of the property of each spouse, the burden of proof that anything is part of the wife's property is upon the spouse who maintains that it is (*x*), and either spouse may at any time require an inventory to be made, by way of public record, of the property contributed by him or her, and such an inventory is presumed to be correct if made within six months after the time when the property is contributed (*y*). The inventory may be combined with a valuation, which will be binding if publicly recorded, as regards the duty of either spouse to replace missing property, except in so far as any property has been alienated in good faith during the marriage for a less amount than that at which it is valued (*z*). The wife may require her husband to account to her at any time as regards the property contributed by him, and also to give security for it, subject to the rules relating to the avoidance of such security by the creditors as a fraudulent preference (*a*). Where debts for which the husband's property is liable have been paid out of that contributed by the wife, or *vice versâ*, a claim to reimbursement arises, but cannot be enforced until the termination of the combination property (*b*).

Upon the bankruptcy of the husband, or if execution is levied upon him for debts, the wife's claim for compensation for property contributed by her, after deduction of any set-off due to her husband, ranks as a debt, and if it is not met to the extent of half of its amount by the restitution of property still in existence or by the realisation of securities, the remainder of the half is a preferred

(*s*) Arts. 163—165, 200, 203.

(*t*) Art. 206.

(*u*) Art. 204. For debts due from inheritances accepted by her she is liable to the extent of her whole property without regard to the husband's rights: art. 207.

(*x*) Art. 196. Anything procured during the marriage in replacement of property contributed by her is presumed to be part of her contributed property.

(*y*) Art. 197.

(*z*) Art. 198.

(*a*) Art. 205. See Federal Law of Execution for Debts and of Bankruptcy, arts. 285—292.

(*b*) Civil Code, art. 209.

debt. This preference may not be renounced either wholly or in favour of a particular creditor (*c*).

The Extraordinary Régime arises by operation of law where one of the spouses becomes bankrupt and the creditors are not paid in full, and also by judgment of a Court upon the application of either of the spouses or of a creditor of either who has levied execution for debt and not been satisfied (*d*). The husband is entitled to such a judgment when the wife is insolvent or refuses unjustifiably to give the consent required by law or by the matrimonial *régime* to his dispositions of the matrimonial property, or requires security for the property contributed by her; and the wife is so entitled, if the husband does not properly provide for her maintenance or that of her children, or does not give security for the property contributed by her when required, or where he or the joint property is insolvent (*e*). The extraordinary *régime* is the separation of property.

The Contractual Régimes are the community of property and the separation of property.

A marriage contract may be made either before or during the continuance of the marriage (*f*), subject to the limitation created by the general provision that no arrangement between the spouses or change of *régime* may withdraw any property from liability for any debts of either spouse or of the community, for which it would otherwise have been liable (*g*). It must be made by public record and signed by the parties, and, if either of them is under age or interdicted, by his or her statutory agent, and is effective against third parties only in so far as it is entered in the register of matrimonial property. No person may enter into such a contract if he is deprived of discernment (*h*). With regard to marriage contracts

(*c*) Arts. 210, 211.

(*d*) A creditor whose debt is not fully paid upon bankruptcy or execution is entitled to receive a certificate of loss (*Verlustschein, acte de défaut de biens, certificato di carenza di beni*), which is equivalent to an acknowledgment of debt, confers rights to attach property and to avoid gifts and other transactions, and is not barred as against the debtor by lapse of time: see Federal Law of Execution and Bankruptcy, arts. 149, 265, 271, 285—288.

(*e*) Civil Code, arts. 182—185.

(*f*) Art. 179.

(*g*) Art. 188.

(*h*) Arts. 180, 181, 248—251. Where any person against whom certificates of loss exist is about to contract a marriage, either of the prospective spouses may obtain a separation of property by entry before the celebration in the register of matrimonial property: art. 182.

made after the celebration of the marriage, it must be added that such a contract may not diminish the existing liability of the property to third parties and is subject to the consent of the guardianship authority. The alteration or rescission of a marriage contract is subject to the same rules (*i*).

The Community of Property may be general or it may be limited, either by the exclusion of particular items or classes of property, such as immovables, or by a restriction to income and profits (*j*). The excluded property will be subject to the rules relating to separation of property; but it may also be agreed by marriage contract that it shall be subject to the rules of the combination of property, and such an agreement is presumed where the wife has given the husband the administration and enjoyment of the excluded property (*k*).

The General Community of the Swiss Code is of a universal character, and so nearer to that of the German than that of the French Code, which, as we have seen, excludes certain classes of property. The Swiss community includes all the property and income of the spouses, and neither of them may dispose of his or her share (*l*). The costs of administration are borne by the joint property, which is administered by the husband, subject to the wife's powers of administration (*m*) as agent for household purposes, and is liable for the ante-nuptial debts of both spouses (*n*), and for all other debts contracted during the marriage by the husband or as debts of the community by the wife (*o*). For such debts the husband is also personally liable, and any execution levied for such debts during the marriage is issued against him (*p*). Any dispositions which are outside the ordinary course of administration require the consent of both spouses, which may, however, in ordinary cases be presumed by third parties (*q*).

Upon the death of either of the spouses the survivor takes half the property of the community, and the other half, subject to the survivor's right of inheritance, passes to the heirs of the deceased;

(*i*) Arts. 179, 181.

(*j*) Arts. 237, 239.

(*k*) Arts. 237, 238.

(*l*) Art. 215.

(*m*) Debts arising out of the exercise of this power are borne by the common property, and the husband is also liable for them: art. 219.

(*n*) The wife is also liable for her ante-nuptial debts: art. 220.

(*o*) Arts. 216, 219.

(*p*) Art. 222.

(*q*) Art. 217.

but the survivor's right of inheritance is reduced, if he is unworthy to inherit, to so much as he would be entitled to claim in case of divorce (*r*). This mode of division may be varied by contract, but the issue of the deceased spouse will, notwithstanding any such contract, be entitled to one-fourth of the property of the community existing at the time of death (*s*). Upon a division of the property of the community the surviving spouse may claim that particular property contributed by him or her shall form part of his or her share (*t*). A surviving husband is personally liable for all the debts of the community; a surviving wife may avoid liability by refusing her share of the property of the community, and even if she accepts she will not be liable for any particular debt which she can show that the property which she has received is insufficient to meet (*u*).

Upon the bankruptcy of the husband, or if execution is levied upon property of the community, the wife has a claim for the return of the property contributed by her. This claim is privileged to the extent of one-half of its amount, and the privilege cannot be waived, either generally or in favour of particular creditors (*x*).

During the continuance of the marriage neither spouse may refuse an inheritance without the consent of the other, but in case of refusal of consent he or she may appeal to the guardianship authority (*y*).

Continued Community.—As under the German Code, a community of property may be continued by the surviving spouse in conjunction with the children of the marriage, subject to the consent of the guardianship authority if any of the children are under age (*z*). Such a community includes all the existing property of the former conjugal community, together with the income and earnings of the parties, except reserved property; property which devolves upon the surviving parent or upon the children by way of inheritance or any other gratuitous mode of acquisition is reserved to them, unless otherwise provided (*a*). So long as the

(*r*) Art. 225. As to unworthiness to inherit, see arts. 540, 541, and below, Law of Inheritance; as to rights in case of divorce, see art. 154, and the chapter on that subject.

(*s*) Art. 226.

(*t*) Art. 228.

(*u*) Art. 227.

(*x*) Art. 224. The children have the same rights where the community is continued: art. 233.

(*y*) Art. 218.

(*z*) Art. 229.

(*a*) Art. 230.

children are under age the continued community is administered by the parent; when they are of full age a different arrangement may be made by agreement between them and their parent (*b*). A continued community may be dissolved by the parent at any time; it is dissolved by operation of law upon his death or re-marriage, or upon his bankruptcy or that of the children; and a creditor of any of the members of the community, who levies execution and is not satisfied, may also require a judgment of dissolution. Any or all of the children of full age may retire from the community at any time, or the guardianship authority may make a declaration of retirement of any who are under age; and if either of the children becomes bankrupt, or marries, or gives rise to a claim by a creditor for a dissolution of the community, the remaining members thereof may require him to retire. They have the same right against the issue of a deceased child. If a child dies without issue his share remains part of the property of the community, subject to the rights of heirs who are not members (*c*). Upon the dissolution of a continued community or the retirement of a child the property of the community is divided according to its state at the time, and rights of inheritance from the deceased parent then become due (*d*). The surviving parent retains his rights of inheritance as regards the shares of the children.

A Community of Income and Profits extends to all acquisitions made during the marriage, except by way of replacement of contributed property. Property contributed at the date of the marriage or during its continuance is subject to the rules of combination of property. Upon the dissolution of such a community any increase in the property of the spouses is divided equally between them; any decrease is borne by the husband or his heirs, except in so far as it is shown to have been caused by the wife. But these rules may be varied by marriage contract (*e*).

Separation of Property may arise, as we have seen (*f*), either by operation of law or by the judgment of a Court. It may also be created by marriage contract, and such a contract extends to all the property of the spouses, except in so far as any property is expressly excepted (*g*). Moreover, under the *régime* either of combination of

(*b*) Art. 231.
(*c*) Arts. 232—235.
(*d*) Arts. 229, 236.
(*e*) Arts. 239, 240.
(*f*) P. 619, above.
(*g*) Art. 241.

property or of community of property, property may be reserved (*h*) to either spouse either by contract of marriage, by gift of third parties, or by operation of law. Under the last head fall things serving for the personal use of one of the spouses exclusively, such parts of the wife's property as she uses to carry on a profession or trade, and the earnings produced by her independent labour. These last must, as far as may be necessary, be employed by her for the purposes of the common household (*i*). Any property which comes to a spouse by way of *legitim* (*j*) may not be set apart as reserved property (*k*). Under either *régime* reserved property is subject to the rules of separation of property (*l*), and that of the wife is liable during the continuance of the marriage and after its determination for all debts contracted expressly as binding it, and also for those which are contracted by her without the consent of her husband or in exceeding her powers of agency for the conjugal community (*m*).

Under the *régime* of separation of property each spouse retains the ownership, administration, and enjoyment of his or her property and of any profits arising therefrom or from his or her own labour (*n*), and is liable for ante-nuptial debts and for those contracted by him or her during the marriage. The wife is also liable in case of the husband's insolvency for the debts contracted by him or her for the purposes of the common household (*o*). The wife may authorise her husband to administer her property, but cannot bind herself not to revoke such authority at any time. If she gives such an authority, a presumption arises that he is not liable to account to her during the marriage, and is entitled to the income of the property as her contribution to the charges of her marriage (*p*). The husband has a general right to such a contribution, and if the spouses cannot agree as to its amount it may be fixed, upon the application of either,

(*h*) Such property is described in the three texts of the Code under the names of *Sondergut*, *biens réservés*, *beni riservati*.

(*i*) Arts. 190—192.

(*j*) *Pflichtteil*, *réserve*, *porzione legittima*. See Burge, Law of Inheritance.

(*k*) This provision has been denounced by a Swiss writer as a mere piece of masculine selfishness; K. Schultz, Die privatrechtliche Stellung der Ehefrau (Zürcher Beiträge zur Rechtswissenschaft, No. xxi.), p. 121.

(*l*) Art. 192.

(*m*) Arts. 208, 221.

(*n*) Arts. 242, 245.

(*o*) Art. 243.

(*p*) Art. 242.

by the competent public authority (*q*). Property may also be set aside for this purpose by marriage contract (*Ehesteuer*, *dot*, *dote*), and such property is, unless otherwise agreed, subject to the rules of combination of property (*r*).

Where, under the *régime* of combination of property or that of community of property, debts for which the joint property is liable are paid out of reserved property, or *vice versâ*, a claim to reimbursement arises, which may be set up during the continuance of the marriage (*s*).

(*q*) Art. 246.
(*r*) Art. 247.
(*s*) Arts. 209, 223.

CHAPTER XII.

EFFECT OF MARRIAGE ON THE PROPERTY OF THE HUSBAND AND WIFE UNDER THE LAW OF SCOTLAND.

Communion of Goods.—In Scotland, one of the legal rights consequent on the marriage was a communion of goods between the husband and wife. It was of a more limited character than that which exists under any of the systems of jurisprudence which have been already considered (*a*).

Property of which it Consisted.—It did not extend to *heritable* property, as lands, houses, rights to tithes, or subjects which produce annual profits, *e.g.*, bonds for borrowed money, carrying interest, and therefore producing annual fruits, so long as the debt subsisted (*b*); but was confined to subjects which were of a temporary nature, and produced no yearly profits while they continued, and which were, therefore, said to be *simpliciter* movable or immovable in all respects (*c*). Into the *Communio Bonorum* fell the movable estate of the husband, and, except in so far as it consisted of separate estate, from which the *jus mariti* had been excluded, or of paraphernalia, also the movable estate of the wife. The husband had the absolute control of all the goods in communion, during the marriage, and on the dissolution of the marriage within a year and a day, without the birth of a living child, the common property reverted to the survivor and the representatives of the deceased in the proportions in which it was contributed. It was, however, the practice to exclude this rule, whenever there was a marriage contract between the spouses, and it was definitely abolished by the

(*a*) As to the history of the doctrine of *Communio Bonorum* in Scotland, see Fraser, Husband and Wife, i., pp. 648 *et seq.*; Walton, Husband and Wife, p. 149; and a paper read by Professor F. P. Walton before the International Law Association, at Glasgow, in 1901; on "The Relationship of the Law of France to the Law of Scotland" (Report of Conference, p. 73).

(*b*) Ersk. Inst. b. 2, t. 2, s. 10; Dunlop *v.* Grays (1739), Mor. Dict. p. 5770.

(*c*) Stair, Inst. b. 1, 4, ss. 17 *et seq.*; Ersk. Inst. b. 1, t. 6, s. 12.

Intestate Movable Succession (Scotland) Act, 1855 (*d*). Under the *Communio Bonorum*, the representatives of a wife predeceasing her husband had formerly a right to one-third or one-half of the goods in communion, according as there were, or were not, children of the marriage. This rule also was abolished by the Intestate Movable Succession Act, 1855 (*e*). Moreover, since the Married Women's Property (Scotland) Act, 1881 (*f*), the movable estate of a woman no longer passes, on her marriage, under the *jus mariti* of her husband.

The *Communio Bonorum*, therefore, survives in Scotland only in the *jus relictæ* (*g*), if the *jus relictæ* is a survival of it at all (*h*).

Jus Mariti.—Jus Relictæ.—Bairns' Part.—The husband had at common law both a right of property over (*jus mariti*) and sole right of administering (*jus administrationis*) the subjects of this communion (*i*). The *jus mariti* was defined to be that right or interest arising from the marriage to the husband, in the movable estate, which belonged to the wife either at the marriage, or was acquired by her *stante matrimonio*. It entitled the husband to receive all sums due to the wife which fell under the communion, to grant acquittances to the debtors, to sell, and even give, at his pleasure, her whole movable subjects, by any deed that was to take effect during the marriage, and such subjects might be attached by his creditors for payment of their demands (*k*). He could not, however, and cannot, by any testamentary disposition, or donation *mortis causâ*, prejudice the *jus relictæ*, or widow's part, or the *bairns'* part (*l*). The former, when there are *bairns*, is a third, another third belonging to the *bairns*. If there be no *bairns*, the widow's part is one half; if the wife die before the husband, the *bairns'* part is one half (*m*).

The husband's *jus mariti* was first modified by the Conjugal

(*d*) 18 & 19 Vict. c. 23, s. 7.

(*e*) *Ibid.*, s. 6.

(*f*) 44 & 45 Vict. c. 21.

(*g*) See *infra*, p. 653.

(*h*) Fraser *v.* Walker (1872), 10 Macph. 813; L. P. Inglis.

(*i*) In the original edition of Burge the term *jus mariti* was used as including the *jus administrationis* as well as the *jus mariti* strictly so called. But the two rights are, and ought to be kept, distinct. See Fraser, Husband and Wife, i., pp. 796, 797.

(*k*) Stair, Inst., *supra;* Ersk. Inst., *supra*, s. 13; Campbell *v.* Campbell (1760), Mor. Dict. p. 5944; June 26th, 1760, Fac. Coll.

(*l*) *I.e.*, Legitim; see p. 653.

(*m*) Stair, Inst. b. 3, t. 4, s. 24.

Rights (Scotland) Amendment Act, 1861 (*n*), which obliged the husband to make, out of the property which he acquired in virtue of it, a reasonable provision for his wife's maintenance, and was afterwards, by the Married Women's Property (Scotland) Act, 1881 (*o*), abolished, as to all marriages contracted *after*, and as noted hereafter, with certain exceptions, to a limited extent *before* the passing of the Act (July 18th, 1881) (*p*). Where the *jus mariti* still exists, it carries with it its former consequences.

Effect of Marriage on Property of Wife.—Marriage being, in fact, a legal assignation by the wife to her husband of her whole movable estate, any movable subject, which, after her death, might be discovered to have belonged to her, fell to the surviving husband (*q*). The fruits produced from heritable subjects, *e.g.*, the rents of land, or the interests of money, are movable, and of these the husband was as truly the proprietor as he was of any other of her movable subjects (*r*).

Jus Mariti and Paraphernal Goods.—The *jus mariti* does not extend to paraphernal goods, and the husband has no power over them. He cannot himself alienate them, nor are they liable for his debts (*s*).

Paraphernal Goods.—The law of Scotland uses the term paraphernal to designate certain articles which continue the exclusive property of the wife, and do not pass under the *jus mariti*, notwithstanding the marriage.

Vestitus.—Mundus Muliebris.—The paraphernal goods include the whole *vestitus* and *mundus muliebris*, *i.e.*, not only the lady's body-clothes, and wearing apparel, but all the ornaments of dress proper to a woman's person, as, necklace, earrings, or arm-jewels, given by her husband to her at any time of her life, either before or *stante* the marriage. These are neither alienable by the husband nor affectable by his creditors (*t*).

Articles which may be Used indifferently by Husband or Wife.—Articles which may be promiscuously used by man and wife, *e.g.*, watch, jewels, medals, plate, and even the repositories for holding

(*n*) 24 & 25 Vict. c. 86, s. 16.
(*o*) 44 & 45 Vict. c. 21.
(*p*) *Ibid.*, s. 3, sub-ss. (1), (2).
(*q*) Ersk. Inst. b. 1, t. 6, s. 13.
(*r*) Stair, Inst. b. 1, t. 4, s. 17; Ersk. Inst., *ibid.*
(*s*) Ersk. Inst., *ibid.*, s. 15; Stair, Inst., *ibid.*
(*t*) Ersk. Inst., *ibid.*; Dicks *v.* Massie (1695), Mor. Dict. p. 5821; Fount, December 4th, 1696, and January 15th, 1697.

paraphernalia are not paraphernal (*u*), unless made such by the bridegroom giving them to the bride before or on the marriage day; for if he should make a present to her of a subject not properly paraphernal the next morning after the marriage, the donation is revocable. Articles of this kind are paraphernal only with respect to the husband who made them such, and therefore are esteemed common movables if the wife who had right to them be married to a second husband, unless he shall in like manner appropriate them to her (*x*).

The Lady's Gown.—The present frequently given to a wife by a purchaser of lands, for her renunciation of the life-rent right she had in the lands purchased, which is commonly styled *the lady's gown*, has, by the law of Scotland, the like nature and effects with goods properly paraphernal (*y*).

Owing to the abolition of the *jus mariti*, as already noted, by the Married Women's Property (Scotland) Act, 1881 (*z*), the law of paraphernalia is now of little practical importance in the case of marriages contracted since the passing of the Act.

Exclusion of Property from and Renunciation of Jus Mariti.—Property might be excluded from the *jus mariti* in consequence of a direction by the person by whom it was given (*a*), or impliedly, as from its being given for the maintenance or alimony of the wife (*b*); it may also be renounced in the cases where, under existing legislation, it still survives. This subject may, however, be more conveniently considered in the following paragraphs which deal with the husband's right of administration.

Husband's Right of Administration.—As *caput et princeps* of the family, the husband had the right to administer his wife's entire estate. As a result of this right his consent was necessary to the

(*u*) Wigton *v.* Fleming (1748), Mor. Dict. p. 5771; Ersk. Inst., b. 1, t. 6, s. 15.

(*x*) Ersk. Inst., *ibid.*; Dicks *v.* Massie, *supra*. As to whether marriage presents sent to a wife are now her separate property under the Married Women's Property (Scotland) Act, 1881 see cases noted in Encyclo. Scots Law, vol. ix., p. 109. As to England, see Tasker *v.* Tasker, [1895] P. 1, pp. 718, 720, *post*.

(*y*) Ersk. Inst. b. 1, t. 6, s. 15, n. 1; Lady Pitfirran *v.* Wood (1709), Mor. Dict. p. 5799; Bell's Prin., s. 1560.

(*z*) 44 & 45 Vict. c. 21, *ante*, p. 627. It would still, however, apply to gifts by the husband to the wife of jewels, or other articles of a paraphernal character during the marriage.

(*a*) Ersk. Inst. b. 1, t. 6, s. 14.

(*b*) Ersk. Inst., *ibid.*; Stair, Inst. b. 1, t. 4, s. 9.

validity of his wife's deeds, to any sale of her heritable property, and to any transfer of her movables (*c*). The right of administration differed, however, from the *jus mariti* in this, that the husband was bound to exercise it for the wife's benefit (*d*), and the Courts would dispense with his consent where it was unreasonably withheld (*e*). These common law rules are still in force in regard to the husband's right of administration.

Recent Legislation as to Jus Mariti and Right of Administration.—Both the *jus mariti* and the right of administration were frequently renounced in marriage contracts, and they have now been profoundly affected by the Married Women's Property (Scotland) Act, 1881 (*f*). That statute, as already noted (*g*), abolishes the *jus mariti* over the estate of women married after its enactment, or, if married before that date, whose estate was acquired after it, unless the husband had made a reasonable provision for them by irrevocable deed. It also abolishes the right of administration as regards the income of the wife's movable estate, and the rents of her heritage (*h*): but leaves it intact as regards the capital of her estate, both movable and heritable; and, therefore, it is essential, where it is desired to give the wife the uncontrolled right of disposal of her estate, that the husband should still renounce his right of administration.

The renunciation of the *jus mariti*, or right of administration, may be either express, as in an ante-nuptial or post-nuptial contract, or implied from the circumstances of each case (*i*). Other statutory provisions besides those above referred to have still further restricted the scope of both rights. Under the Conjugal Rights (Scotland) Amendment Act, 1861 (*k*), when a wife has obtained a protection order, property acquired, or succeeded to, by her after desertion, is vested in her exclusive of her husband's *jus mariti* and right of administration. The protection of this provision does not apply to property of which the husband or his assignee had acquired full and lawful possession before the wife's petition, or against which a creditor of his had, before that date, done

(*c*) Ersk. Inst., b. 1, t. 6, s. 27.

(*d*) Fraser, Husband and Wife, i., p. 798; Bryce's Trustees *v.* Bryce and Others (1878), 5 Rettie, 722.

(*e*) Fraser, *ad loc. cit.*, p. 569.

(*f*) 44 & 45 Vict. c. 21.

(*g*) *Supra*, p. 627.

(*h*) 44 & 45 Vict. c. 21, s. 1, sub-s. (2), and s. 2.

(*i*) Wright's Exors. *v.* City of Glasgow Bank (1880), 7 Rettie, p. 527.

(*k*) 24 & 25 Vict. c. 86.

complete diligence (*l*). Both the marital rights in question are also excluded from property acquired by, or coming to, the wife after a decree of judicial separation (*m*), or acquired by a married woman as wages or earnings, or as the fruit of the exercise of her literary, artistic, or scientific skill (*n*).

When both the husband's *jus mariti* and his right of administration are excluded, the wife may deal with her separate estate as if she were unmarried (*o*), and may sue without her husband's concurrence (*p*), but cannot bind herself personally (*q*).

Where the *jus mariti* but not the right of administration is excluded, a married woman cannot deal with her estate without her husband's consent (*r*), which must be exercised, however, for her benefit (*s*), and cannot, as a rule, sue or defend without his concurrence (*t*).

Married Women's Property (Scotland) Acts, 1877 (*u*) **and 1881** (*v*).—It may be useful to summarise, at this point, the provisions of the Married Women's Property Acts, 1877 (*u*) and 1881 (*v*).

The Act of 1877 (*u*).—The *jus mariti* and right of administration of the husband are excluded from the wages and earnings of a married woman "in any employment, occupation, or trade in which she is engaged" (*x*), "or in any business which she carries on under her own name" (*y*), and also from any money acquired by her through the exercise of any literary, artistic, or scientific skill (*z*); all investments thereof are deemed to be her separate property, and her receipts are a good discharge for such property and investments (*z*). The husband's liability for the ante-nuptial debts of his wife is limited to the value of any property which he

(*l*) 24 & 25 Vict. c. 86, s. 4.

(*m*) *Ibid.*, ss. 3, 6.

(*n*) Married Women's Property (Scotland) Act, 1877 (40 & 41 Vict. c. 29), s. 3.

(*o*) Fraser, Husband and Wife, i., p. 813.

(*p*) Mackay, Manual of Practice, p. 146.

(*q*) See *ante*, p. 338. *E.g.*, by granting a bill of exchange as cautioner for a debt: Maclean *v.* Angus (1887), 14 Rettie, 448; or a cash-credit bond: Jackson *v.* Macdiarmid (1892), 19 Rettie, 528.

(*r*) Ersk. Prin., 20th ed., p. 63.

(*s*) See *ante*, p. 629.

(*t*) Mackay, Manual of Practice, pp. 144—147.

(*u*) 40 & 41 Vict. c. 29.

(*v*) 44 & 45 Vict. c. 21.

(*x*) See Ferguson's Trustees *v.* Willis, Nelson & Co. (1883), 11 Rettie, 261; McGinty *v.* McAlpine (1892), 19 Rettie, 935.

(*y*) McGinty *v.* McAlpine, *ubi supra*.

(*z*) S. 3.

has received through her, and the Court is empowered to direct an inquiry to ascertain the nature and value of such property (*a*).

The Act of 1881 (*b*).—The Act does not apply to marriages contracted before its passing (July 18th, 1881) where the husband has, by an irrevocable deed, made provision for the wife in the event of her surviving him (*c*). In the absence of such provision it applies only to estate acquired by the wife after its enactment (*d*). As regards marriages contracted after the passing of the Act, the husband being at the time of the marriage domiciled in Scotland (*e*), the wife's movable estate acquired by her before or during the marriage is vested in her as her separate estate, and is not subject to the *jus mariti* (*f*). The income of such estate is to be payable to the wife on her individual receipt, but she is not entitled to assign the prospective income, or to dispose of such estate, without her husband's consent (*g*). It is only to this limited extent that the husband's right of administration is excluded, and in the absence of any renunciation of such right by the husband in the marriage contract, or other deed, it will apply to the *corpus* of the wife's movable estate.

In the case of marriages after the passing of the Act, the rents and produce of heritable property in Scotland (*h*) belonging to the wife are no longer subject to the husband's *jus mariti* and right of administration (*i*). Both rights (unless renounced) attach as formerly to the *corpus* of the wife's heritage.

The wife's movable property is not to be subject to arrestment or diligence for the husband's debts, if such property (except such corporeal movables as are usually possessed without a written or documentary title) is invested, placed or secured in the name of the wife herself, or in such terms as clearly to distinguish it from the estate of the husband (*k*). Any money or other estate of the wife lent or entrusted to the husband (*l*), or

(*a*) S. 4.

(*b*) See note (*v*), p. 630.

(*c*) S. 3, sub-s. (1).

(*d*) S. 3, sub-s. (2).

(*e*) As to where the husband acquires a Scotch domicil after marriage, see Walton, Husband and Wife, p. 408.

(*f*) S. 1, sub-s. (1).

(*g*) S. 1, sub-s. (2).

(*h*) Heritable property out of Scotland will be governed by the *lex loci rei sitæ*. Fraser, Husband and Wife, ii., 1324; Dicey, Conflict of Laws, 2nd ed., pp. 500 *et seq.*

(*i*) S. 2.

(*k*) S. 1, sub-s. (3).

(*l*) Cf. the English Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 3.

immixed (*m*) with his funds, is to be treated as assets of the husband's estate in bankruptcy, under reservation of the wife's claim to a dividend as a creditor for the value of such money or other estate after, but not before, the claims of other creditors for valuable consideration in money or money's worth have been satisfied (*n*). Nothing in the Act is to exclude or abridge the power of settlement by ante-nuptial contract of marriage (*o*).

Spouses married before the Act are enabled to come under its provisions by registered deed (*p*).

A wife deserted by her husband, or living apart from him by his consent, may obtain judicial dispensation from the necessity of procuring her husband's consent to any deed relating to her estate (*q*).

The Act also confers on the husband a right (*jus relicti*) in his wife's (*r*), and gives to children a right of legitim in their mother's (*s*), movable succession.

Curtesy of Scotland.—The husband's interest in the rents and profits of his wife's real estate continues, even after the death of his wife, if there was a child alive of his marriage with her. This interest is called the curtesy of Scotland, and is the provision which the law makes for the husband out of the wife's heritage. It is defined to be a life-rent, given by the law to the surviving husband, of all the wife's heritage in which she died infeft, if there was a child of the marriage born alive (*t*) and which was heard to cry (*u*).

He may, immediately on the wife's death, enter into the possession of her lands, without any such solemnity of service, or kenning, as is required in the *terce*. His right of curtesy is, upon her death, completed *ipso jure* (*v*). As he had, in consequence of

(*m*) See Anderson *v.* Anderson's Trustee (1892), 19 Rettie, 681; National Bank of Scotland, Ld. *v.* Cowan (1893), 21 Rettie, 4; Adam *v.* Adam's Trustee (1894), 21 Rettie, 676.

(*n*) S. 1, sub-s. (4).

(*o*) S. 1, sub-s. (5); and see *post*, p. 651.

(*p*) S. 4 and Schedule.

(*q*) S. 5.

(*r*) S. 6. See *post*, p. 651.

(*s*) S. 7; and see *post*, p. 651.

(*t*) Ersk. Inst. b. 2, t. 9, s. 52; Stair, Inst. b. 2, t. 6, s. 19. As to curtesy by the law of England, see p. 678, and Pollock and Maitland, Hist. Eng. Law, ii., p. 417.

(*u*) Stair, Inst. b. 1, t. 4, s. 19; b. 2, tit. 6, s. 19; Ersk. Prin., 20th ed., p. 217; Roberton *v.* Moderator of General Assembly (1833), 11 S. 297.

(*v*) Ersk. Inst. b. 2, t. 9, s. 52; Stair, Inst. b. 2, t. 6, s. 19; Fraser, Husband and Wife, ii., 1124.

his *jus mariti*, a right to the rents of his wife's lands, *stante matrimonio*, he continues to retain that right after her death, by an act of the law itself, although under another name (*x*). The curtesy is not affected by the Married Women's Property (Scotland) Act, 1881 (*y*).

Conditions on which Curtesy Depends.—The husband's right of curtesy depends on the birth of issue, and not on the length of time the marriage has continued. It may have subsisted for twenty years, but if no child has been born alive of such marriage, and heard to cry, there is no curtesy (*z*), although the widow, in that case, would be entitled to her *tercc*. On the other hand, if there was born of the marriage a living child, he was and is entitled to the curtesy although the marriage might not have subsisted for a year, and although the child should have expired immediately after its birth, and either before or after the mother's death (*z*). The child born of the marriage must be the mother's heir, in order to entitle the husband to the curtesy; for, if there be a child existing of a former marriage, who is to succeed to her estate, the second husband has no right to the curtesy while that child is alive, notwithstanding there should be also children born of the second marriage. The law confers this right on the surviving husband, as the father of an heir, rather than as the widower of an heiress (*a*).

"Heritage."—"Conquest."—The term "heritage" is used, not in contradistinction to the movable estate of the wife, nor to express that the curtesy attaches on that part of her estate which is not movable, but in contradistinction to "conquest," that is, to real estate, which she has acquired by purchase, donation, or other singular title, and to designate those heritable rights to which she had succeeded as heir of line, tailzie, or provision to her ancestor, whether before or during the continuance of the marriage (*b*).

Property acquired by Wife by Singular Title.—There is no title to curtesy, or to any of its privileges, in respect of property acquired

(*x*) Ersk. Inst. b. 2, t. 9, s. 52; Stair, Inst. b. 2, t. 6, s. 19.

(*y*) 44 & 45 Vict. c. 21.

(*z*) Reg. Maj. l. 2, c. 58, s. 1; Stewart *v.* Anderson (1632), Mor. Dict. p. 3112; Ersk. Inst., *ibid.*, s. 53; Stair, Inst. *ibid.*; Ersk. Prin., 20th ed., p. 217.

(*a*) Darleith *v.* Campbell (1702), Mor. Dict. p. 3113; Fount., December 1st, 1702; Ersk. Inst. b. 2, t. 9, s. 53; Stair, Inst. b. 2, t. 6, s. 19; Fraser, *ad loc. cit.*, ii., 1121.

(*b*) Ersk. Inst. b. 2, t. 9, s. 54.

by the wife by a singular title, as purchase or gift (*c*). Where, however, the wife has been *alioquin successura*, and there has merely been a *præceptio hæreditatis* by a disposition to her, she is not considered as having possessed by a singular title (*d*). Where the wife has succeeded by service, whether as heir of tailzie, or provision, the husband's right to curtesy exists no less than if she had succeeded as heir (*e*).

Effect of Nullities in Wife's Infeftment.—To entitle the husband to curtesy, the wife must have been infeft in the property, but his right is not defeated after the wife's death by alleged nullities in her infeftment, which, had they been alleged during her life, might and would have been supplied (*f*).

Honours and Dignities.—According to the ancient usage of Scotland, the husband enjoyed, as incident to and part of the right of the curtesy, all honours and dignities belonging to the wife, or which would have belonged to her had she been a male, even a seat in Parliament, as a peer. If he was a commoner, he was entitled, not only to the right of curtesy after his wife's death, but even *stante matrimonio* to the capacity of electing and being elected a member of Parliament upon her freehold (*g*).

Burdens preferable to Curtesy.—As the wife's seisin is the ground and measure of the husband's right to curtesy, every real burden and diligence which is preferable to her seisin must also be preferable to the curtesy. The husband's liability in respect of curtesy is greater than that of the wife in respect of her *terce*. It will be seen, that she is in no degree affected by the personal debts of the husband; but the husband, who is entitled to the curtesy, as he enjoys the life-rent of his wife's whole heritage, under a lucrative title, is considered as her temporary representative, and is liable to the payment not only of all the yearly real burdens

(*c*) Lawson *v.* Gilmour (1709), Mor. Dict. p. 3114; Hodge *v.* Fraser (1740), Mor. Dict. p. 3119; Paterson *v.* Ord (1781), Mor. Dict. p. 3121, Feb. 1, 1781, Fac. Coll.; Watts *v.* Wilkin (1885), 13 Rettie, 218.

(*d*) Stair, Inst. b. 2, t. 6, s. 19, note (*c*); Fraser, Husband and Wife, ii., 1123.

(*e*) Ersk. Inst. b. 2, t. 9, s. 54; Gordon *v.* Clerk (1715), Mor. Dict. p. 3116; Paterson *v.* Ord, *supra*; 1 Bell's Comm. p. 60.

(*f*) Hamilton *v.* Boswell (1716), Mor. Dict. p. 3117.

(*g*) 1681, c. 21; 12 Ann. c. 6; Frazer *v.* Woodhouselee, June 19th, 1804, Fac. Coll.; Mackenzie *v.* Mackenzie, Feb. 23, 1811, Fac. Coll.; Ersk. Inst. b. 2, t. 9, s. 54.

charged on the subject, but of the current interest even of personal debts, while his right subsists to the extent of the benefit he enjoys by the curtesy; for he ought to leave the estate in as good a condition as he found it. And were it not for this obligation the wife's estate might be run out before it devolved on her heir, by the growing interest during the life of the husband. A right of recourse, however, is reserved to the husband who has paid up all the interest fallen due in his time against the wife's executors, or others, who succeed to any part of her estate not subject to the curtesy (*h*).

If a husband, whose right of curtesy is perfect without a declarator, has never exercised his right by receiving the rents of his wife's heritage, his executors will have no action for recovering them, because that right is in the nature of a privilege personal to the husband, who, by suffering his wife's heirs to receive the rents during his life, is considered to have renounced his claim in the heir's favour (*i*). If there is ground for apprehending that the husband will destroy or prejudice the subjects of the curtesy he may be required to find caution under the Scots Acts, 1491, c. 25, and 1535, c. 15 (*k*).

Termination of Curtesy.—The husband's right to curtesy will be barred by his divorce (*l*), but does not terminate on his remarriage (*m*).

Terce.—Tercer.—The provision which the law makes for the wife, unless it be excluded by the special contract of the parties, is a life-rent of the third of the heritable subjects in which her husband died infeft. It is styled the *terce*, and the widow the *tercer*, because a third part of the husband's heritable estate has been always the fixed amount of this legal provision (*n*).

Terce is also due to a wife who has divorced her husband and who has herself not been divorced; in this case its

(*h*) Monteith *v.* Creditors (1717), Mor. Dict. p. 3117; Ersk. Inst. b. 2, t. 9, s. 55; Fraser, Husband and Wife, ii., 1126.

(*i*) Macaulay *v.* Watson (1636), Mor. Dict. p. 3112; Ersk. Inst., *ibid.*

(*k*) Ersk. Inst. b. 2, tit. 9, s. 59; Rogers *v.* Scott (1867), 5 Macph. 1078.

(*l*) Where he is the guilty party: Innerwick *v.* Innerwick (1589), Mor. Dict. 329; Fraser, Husband and Wife, ii., p. 1127, 1217; see p. 860, *post*.

(*m*) Fraser, *ibid.*

(*n*) Countess of Findlater *v.* Seafield, Feb. 8, 1814, Fac. Coll.; Reg. Maj. l. 2, c. 16; Ersk. Inst. b. 2, t. 9, s. 44; Stair, Inst. b. 2, t. 6, s. 12. As to the history of *terce*, see Fraser, Husband and Wife, ii., 1079.

amount is regulated by the husband's infeftment at the date of divorce (*o*).

Conventional Provision in Bar of Terce.—The rule of law before the Act of 1681, c. 10, was that the most ample provision by the husband for the wife, in case she survived him, would not bar her *terce*, but that she would be entitled to both, unless the provision was expressed in the settlement to have been made in satisfaction or in full of the *terce*. But by that Act it was enacted, that where a husband grants a special provision to his wife either before or after marriage, she shall be excluded from the *terce*, unless such provision shall contain a clause that she is to have right to both. This enactment creates merely a presumption against the wife's taking the legal as well as the conventional provision, and therefore its operation is excluded wherever it appears to have been intended that she should have right to both (*p*).

Heritable Subjects to which Terce Attaches.—Formerly the wife had a life-rent only of a third of the heritable subjects in which the husband stood infeft at the marriage, and the husband could not have given her more, even by conventional provision (*q*). Her provision might be greatly disproportioned to the husband's estate, if he had, subsequent to the marriage, acquired any other heritage (*q*).

The later practice has, with greater justice and equality, fixed the *terce* at a third of the lands, in the property of which the husband stood seised at his death, whether acquired before or during the subsistence of the marriage (*r*).

Husband's Seisin a Measure and Security of Terce.—The husband's seisin is both the measure and the security of the widow's *terce*. Every right, therefore, which excludes the husband's seisin is preferable to, and must diminish the *terce*, so far as it extends. On

(*o*) Fairlie *v.* Fairlie, June 15th, 1819, Fac. Coll.; Ersk. Prin., 20th ed., p. 215.

(*p*) Jankouska *v.* Anderson (1791), Mor. Dict. pp. 6457, 15,868; Ross *v.* Aglianby, January 20th, 1797, Fac. Coll., as reversed in the House of Lords (1797), Mor. Dict. p. 4631, Appen. *voce* Foreign, n. 5; Ersk. Inst. b. 2, t. 9, s. 45; Stair, Inst. b. 2, t. 6, s. 17; Fraser, Husband and Wife, ii., 1112—1116. The widow may be put to an election between conventional provisions and her claim to *terce*. And see Craik *v.* Penny (1891), 19 Rettie, 339, 343.

(*q*) Reg. Maj. l. 2, c. 16, ss. 5, 6, 7; Ersk. Inst. b. 2, t. 9, s. 45.

(*r*) Ersk. Inst., *ibid.*

the other hand, whatever is excluded by the husband's seisin cannot affect the *terce* (*s*).

What Debts prevail over Terce.—Such debts only as constitute a real burden on the *terce* lands will prevail over the *terce*, which is in no respect affected by the personal debts of the husband. Thus, neither an heritable bond nor a disposition of lands granted by the husband, if death has prevented him from giving seisin to the creditor or disponee, can prejudice the *terce*, nor an adjudication which has not been completed by seisin before the husband's death, though a charge had been given on it to the superior, since an adjudication is no better than a legal disposition, until seisin proceed on it (*t*). It follows, therefore, that no *terce* is due out of lands in which the husband was not seised at his death; except in the case of fraud or wilful omission (*u*). Fraud is presumed where the husband, having made no provision for his wife by marriage contract, divests himself in favour of his eldest son or other heir; or where a father is by his son's marriage contract obliged to infeft him in certain lands, and has not fulfilled his obligation (*x*). But as the widow cannot in either of these cases be served to her *terce*, because it cannot be found by the inquest according to the exigency of the brieve, that the husband died infeft in the lands, her only remedy is a personal action against her father-in-law, or her husband's representatives. The onerous creditors, therefore, of the father-in-law or husband will, in a competition with the widow, be preferred to her in the lands out of which the *terce* is claimed (*y*).

Exceptions to Rule that Right to Terce depends on Husband's Infeftment in Fee.—The general rule, that the right of *terce* depends exclusively on the husband's infeftment in fee, is subject to exceptions (*z*).

Nominal Infeftment.—Thus, where the infeftment, though *ex facie* absolute, is in reality nominal or in trust, the right of *terce* is

(*s*) Ersk. Inst. b. 2, t. 9, s. 46.

(*t*) Ersk. Inst., *ibid.*; Carlyle *v.* Creditors (1725), Mor. Dict. pp. 147, 15,851; Campbell *v.* Campbell (1776), 5 Br. Sup. 627; followed in Rossborough *v.* Rossborough (1886), 16 Rettie, 157; Fraser, Husband and Wife, ii., 1094.

(*u*) Carruthers *v.* Johnston (1706), Mor. Dict. p. 15,846; Fount, January 29th, 1706; Ersk. Inst., *ibid.*

(*x*) M. Annandale *v.* Scott (1711), Mor. Dict. p. 15,848; Fount, December 1st, 1711.

(*y*) Ersk. Inst., *ibid.*

(*z*) Stair, Inst. b. 2, t. 6, s. 16, note (*b*).

excluded (*a*); or where the property has been only disponed in security of a debt, though absolutely, the disponee being merely under a personal obligation to re-convey, the right of *terce* belongs not to the widow of the disponee, but to that of the disponer, the disponee's infeftment being regarded as a trust for the disponer, subject to the burden of the debt (*b*). The right to *terce*, however, is not excluded by a disposition followed by actual possession, but not with infeftment (*c*).

Widow of Reverser dying before Redemption of Wadset.—The widow of a reverser who dies before the redemption of the wadset has no right to a *terce* out of the subject (*d*). The widow's claim is a preferable burden on the lands even in the possession of a singular successor from the date of his purchase, and therefore he is entitled to retain part of the price till the subject is disencumbered (*e*).

Greater and Lesser Terce.—The *terce* which is due out of lands already charged with a prior or subsisting *terce* of the widow of some of the husband's ancestors or authors in the lands, is called the lesser *terce*, and the prior or subsisting one is called the greater *terce*. If the liar, whose lands are already charged with a *terce*, should die, leaving a widow, who is also entitled to a *terce*, the last widow cannot claim her *terce* out of all the lands in which her husband died infeft, for a full third of them is, by an antecedent right, set apart for the first *tercer*. The last is entitled to the life-rent only of a third of the two-thirds which remain unaffected by the first *terce*. But on the death of the first widow, the lesser *terce* becomes enlarged, as if the first had never existed; because after that period, the husband's seisin upon which the measure of the widow's right depends, is no longer burdened with any prior *terce* (*f*).

Right of Widow as regards Servitudes, &c.—The right of the widow to the *terce* lands is as ample as that of the heir to the remaining two-thirds, and therefore, if those lands have a right of

(*a*) Cumming *v.* King's Adv. (1756), Mor. Dict. p. 15,854. But see Morris *v.* Tennant (1855), 27 Jur. 546; McLaren, Wills and Succession, p. 91.

(*b*) Bartlet *v.* Buchanan, February 21st, 1811, Fac. Coll.

(*c*) Macculloch *v.* Maitland (1788), Mor. Dict. p. 15,866; see also Monteir *v.* Baillie (1773), Mor. Dict. p. 15,859.

(*d*) Macdougall *v.* Macdougall, July 3rd, 1801, Fac. Coll.

(*e*) Boyde *v.* Hamilton (1805), Mor. Dict. p. 15,874; Stair, Inst. b. 2, t. 6, s. 16, note (*b*).

(*f*) Reg. Maj. l. 2, c. 16, s. 64. Ersk. Inst. b. 2, t. 9, s. 47; Stair, Inst. b. 2, t. 6, s. 16.

pasturage or other servitude on a neighbouring tenement, the widow is entitled to a third of it as appurtenant to the lands in which the husband died infeft (*g*), and her right is not confined to the lands themselves, but extends to the houses built on them, to the tithes of land when constituted by seisin, though tithes are in other respects considered as a separate subject from the stock, to infeftments of annual rent forth of lands, to rights in security, and to wadsets, whether proper or improper (*h*). In improper wadsets, the *terce* is the life-rent of a third of the sum contained in the wadset. In proper wadsets, the *tercer* enjoys, in life-rent, a third of the wadset lands, while the right subsists, and after redemption from the husband's heir, a third of the redemption money (*i*). If the husband had two manor places, or country seats, the widow was entitled to the second, or worse of the two. If he had but one, it was, according to the *Regiam Majestatem* (*k*), excluded from the *terce* as a subject incapable of partition. But, in the opinion of Craig, the widow ought to have a third of it (*l*). Yet the heir, according to practice, was entitled to the sole possession of it, but if he choose to reside elsewhere, the widow might claim it preferably to any other tenant, upon payment to him of a reasonable rent for his two-thirds. These ancient rules and customs are no longer observed (*m*).

Rights of Reversion.—There is no *terce* of rights of reversion (*n*), superiority (*o*), or patronage, because they have not any fixed yearly profits, and, therefore, are not proper funds for the widow's maintenance; or of leases, because they are not a feudal right; or of feudal duties, because they cannot be separated from the right of superiority (*p*).

Burgage Tenements.—Burgage tenements, whether of lands or

(*g*) Ersk. Inst., *ibid.* s. 48; Mackenzie (1628), Mor. Dict. p. 15,838.

(*h*) Ersk. Inst., *ibid.*; Dunfermline *v.* Dunfermline (1628), Mor. Dict. p. 15,839.

(*i*) Cr., lib. 2, Dieg. 22, s. 26; Ersk. Inst., *ibid.*

(*k*) L. 2, c. 16, ss. 62, 63.

(*l*) Lib. 22, Dieg. 22, s. 29; Logan *v.* Galbraith (1665), Mor. Dict. p. 15,842; Montier *v.* Baillie (1773), Mor. Dict. p. 15,859; Mead *v.* Swinton (1796). Mor. Dict. p. 15,873.

(*m*) Ersk. Prin., 20th ed., 221.

(*n*) Ersk. Inst. b. 2, t. 9, s. 49; Stair, Inst. b. 2, t. 6, s. 16; Macdougall *v.* Macdougall, July 3rd, 1801, Fac. Coll.

(*o*) Ersk. Inst., *ibid.*; Stair, Inst., *ibid.*

(*p*) Dunfermline *v.* Dunfermline (1628), Mor. Dict. p. 14,707; Ersk. Inst., *ibid.*; Stair, Inst., *ibid.*

houses, were not at common law subject to *terce* (*q*). But *terce* is now due from all lands, whether formerly burgage or not (*r*).

Service of Widow to Terce.—The widow cannot receive her third of the rents by virtue of the *terce* until she be served to it under the Scots Act of 1503, c. 77. For this purpose a brief is obtained from the Chancery, directed to the sheriff of the shire where the lands are situated, by whom a jury of fifteen men are summoned, and sworn, to inquire, first, whether the widow was lawful wife to the deceased. The statute directs that the service shall proceed, if it appear that she was held and reputed to be his lawful wife, though the heir should offer to prove that she was not lawfully married (*s*); and if the heir dispute the validity of the marriage, it must be afterwards discussed before the Court of Session (*t*). The second inquiry is, whether the husband died seised in the lands specified in the brief. The service entitles the widow to sue the tenants for her just third of the rents of every farm (*u*), and to possess the lands jointly with the proprietor *pro indiviso*, but she cannot remove tenants, nor possess any lands exclusive of the heir, until the sheriff ken her to her *terce*, by dividing the land between the heir and her (*x*).

In practice, however, both service and kenning are superseded, the widow's right, being commonly settled by agreement or by submissions in which the arbiter assigns to her a portion of the estate, or a fixed sum, out of the rents, either being properly secured against the creditors of the heir (*y*).

Service relates back to Term of Husband's Death.—Although the widow cannot enforce payment of the rents until she be served, yet the service has relation to the term immediately ensuing the husband's death, and she is entitled to the full payment of her third, with the exception of rents recovered *bonâ fide* and by onerous

(*q*) Cr., lib. 2, Dieg. 22, s. 34; Stair, Inst., *ibid.*; Ersk. Inst., *ibid.*, s. 50.

(*r*) See Conjugal Rights (Scotland) Amendment Act, 1861 (24 & 25 Vict. c. 86), s. 12 (repealed by Statute Law Revision Act, 1892 (55 & 56 Vict. c. 19); Conveyancing (Scotland) Act, 1874 (37 & 38 Vict. c. 94), s. 25 (abolishing the distinction between burgage and feu).

(*s*) 1503, c. 77.

(*t*) See Craik *v.* Penny (1891), 19 Rettie, 339.

(*u*) Relict of Veitch (1632), Mor. Dict. p. 16,087.

(*x*) Stair, Inst. b. 2, t. 6, ss. 13, 14; Ersk. Inst., *ibid.*

(*y*) Encyclo. Scots Law, tit. Terce, vol. xii., at p. 244.

title (*z*), from that term downwards, preferably to any real rights or burdens which may have affected the lands in the intermediate period between his death and her own service (*a*).

Waste by Tercer.—Under the Scots Acts, 1491, c. 25, and 1535, c. 15, a *tercer* may be restrained from waste (*b*).

Exclusion of Terce (*c*).—1st, by a decree, declaring the marriage null. 2ndly, formerly by the dissolution of the marriage before the year and day, without issue, unless there were a special clause in the marriage contract providing the contrary (*d*). But, according to the weight of authority, the provision in s. 7 of the Movable Succession Act, 1855 (*e*), that "where a marriage shall be dissolved before the lapse of a year and day from its date, by the death of one of the spouses, the whole rights of the survivor and of the representatives of the predeceaser shall be the same as if the marriage had subsisted for the period aforesaid," applies to *terce* (*f*). 3rdly, on account of the wife's adultery, or wilful desertion; and, in Craig's opinion (*g*), her abandoning her husband's house and cohabiting with the adulterer, although there should be no decree or sentence of conviction (*h*). 4thly, if the widow accepts a conventional provision in lieu of and without reservation of her right to *terce* (*i*). Lastly, it has been already observed, that the *terce* is excluded by every deed by which the husband is divested of the fee. But the superior cannot plead that it is excluded by the non-entry of the heir of the deceased husband; because the *terce* being a legal provision, has the same effect as if the superior had expressly consented to it (*k*).

Transmission of Terce.—The widow whose right to the *terce* has been once declared by service, transmits it, on her death, to her

(*z*) Hamilton *v.* Wood (1770), Mor. Dict. 15,858; Ersk. Prin. (20th ed.), 217.

(*a*) Ersk. Inst. b. 2, t. 9, s. 50; Stair, Inst. b. 2, t. 6, s. 15; Semple *v.* Crawford (1624), Mor. Dict. pp. 15,837, 15,858.

(*b*) Fraser, Husband and Wife, ii., 1109, 1110.

(*c*) Fraser, Husband and Wife, ii., 1110 *et seq.*

(*d*) Ersk. Inst. b. 1, t. 6, s. 38, b. 2, t. 9, s. 51.

(*e*) 18 & 19 Vict. c. 23.

(*f*) See Fraser, Husband and Wife, ii., 1083.

(*g*) Lib. 2, Dieg. 22, s. 35.

(*h*) Ersk., *ibid.*, s. 51. See also Scots Act, 1573, c. 55; Johnstone-Beattie *v.* Johnstone (1867), 5 Macph. 340; 6 *ibid.*, 333; Harvey *v.* Farquhar (1870), 8 Macph. 971; (1872) 10 Macph. 26.

(*i*) Scots Act, 1681, c. 10.

(*k*) Ersk., Inst., *ibid.*, s. 51; Stair, Inst., b. 1, t. 6, s. 17.

executors, who may sue the possessors of the *terce* lands in an action, for recovering her third of the rents (*l*). But an assignee of a widow who dies without having served has no right to the rents she might have exacted (*m*).

Judicial Ratification of Wife's Acts on Oath.—It has been a long-established practice to have the acts of the wife judicially ratified by her on oath before a magistrate. Such ratification is not necessary in order to render the deed granted by her valid, but it prevents her afterwards attempting to reduce it on the ground of having been overawed by her husband. The ratification ought, therefore, to be made in his absence (*n*). But a ratification itself extorted would not protect a deed similarly obtained.

Husband's Liability for Wife's Debts Stante Matrimonio.—The husband is still liable (where the Act of 1877 (*o*) does not apply) during the marriage for the wife's ante-nuptial debts, which are movable by nature, *i.e.*, which, if they had been due to her, instead of by her, would have fallen under his *jus mariti* (*p*), even if he received no fortune with his wife, or has renounced the *jus mariti* (*q*).

As the *jus mariti* extended to all the movable estate of the wife, the husband became liable, *stante matrimonio*, to the payment of all the movable debts contracted by her before the marriage. Under the Married Women's Property (Scotland) Act, 1877 (*o*), however, the husband's liability for the ante-nuptial debts of his wife is, in the case of marriages after the commencement of the Act (January 1st, 1878), limited to the value of property which he has received through her. But as this liability was at common law and, in its restricted form, under the statute, still is incurred by contracting the marriage, it ceases on its dissolution (*r*).

On the Dissolution of the Marriage.—The wife's creditors must then recover payment, either by a demand upon her repre-

(*l*) Ersk. Inst., *ibid.*, s. 55. See Fraser, Husband and Wife, 1101.

(*m*) MacLeish *v.* Rennie (1826), 4 Shaw, 485; Borthwick *v.* Pringle (1870), 8 Macph. 622; Bell's Prin. s. 1602.

(*n*) Ersk. Inst. b. 1, t. 6, ss. 33, 34; A. *v.* B. (1612), Mor. Dict. 16,481; cf. Grant *v.* Balvaird (1642), Mor. Dict. p. 16,483.

(*o*) 40 & 41 Vict. c. 29, s. 4.

(*p*) Osborn *v.* Young (1696), Mor. Dict. 5785; Fraser, Husband and Wife, i., 588.

(*q*) Simpson *v.* McLellan (1682), Mor. Dict. p. 5852; Fraser, Husband and Wife, i., 592.

(*r*) Ersk. Inst., i., t. 6, s. 16; Fraser, Husband and Wife, i., 593.

sentatives, if she have any, or by legal diligence against her separate estate (*s*).

But if the wife's creditors had used complete diligence against the husband's estate, real or personal, while the wife was living, he must relieve it from the burden with which it has thereby become charged. But the diligence must have been complete, for if she dies before they have obtained a decree of adjudication, or of forthcoming, his liability ceases (*t*). Even although a decree has been obtained against him during her life, yet if it does not relate to the land, by her death the decree and the diligence thereon fall, and cannot be further prosecuted against him (*u*).

When the Husband is Lucratus.—Apart from the Married Women's Property Act, 1877 (*v*), and the limited liability which it established (*x*), the husband may continue liable to the creditors of the wife, after her death, for such part of her debts as her separate estate has been insufficient to satisfy, so far as he has enriched himself or become a gainer by the marriage. He is not liable *in solidum* for these several debts, but only in *quantum lucratus est.*

He is not deemed *lucratus* if he has received no more than an ordinary tocher with his wife, that is, a portion suited to the rank and fortune of the husband and wife, for a tocher is given for an onerous cause, *ad sustinenda onera matrimonii.* It is therefore the excess only which is *lucrum* (*y*). But when he is *lucratus* he is not liable in the first instance, but only *subsidiarie*, if her own separate estate be insufficient; and, therefore, before any action can be sustained against him as *lucratus*, the wife's representatives, who are the primary debtors, must be discussed (*z*). If the husband makes payment, he is entitled to relief against his wife's separate estate (*a*).

(*s*) Stair, Inst. b. 1, t. 4, s. 17; Ersk. Inst. b. 1, t. 6, s. 16.

(*t*) Wilkie *v.* Stewart (1678), Mor. Dict. p. 5876; Bryson *v.* Menzies (1698), Mor. Dict. p. 5869; Fraser, Husband and Wife, i., 596; Stair, b. i., t. 4, s. 17; Ersk., b. i., t. 6, s. 17.

(*u*) Burnet *v.* Lepers (1665), Mor. Dict. p. 5863; Douglas *v.* Stirling (1623), Mor. Dict. p. 5861; Stair, Inst. *ibid.*; Ersk. Inst. *ibid.*

(*v*) 40 & 41 Vict. c. 29.

(*x*) S. 4.

(*y*) Burnet *v.* Lepers (1665), *supra*; Drummond *v.* Stewart (1740), Mor. Dict. p. 5858; Ersk. Inst. *ibid.*; Stair, Inst. *ibid.*; Fraser, Husband and Wife, i., 598.

(*z*) Wilkie *v.* Stewart (1678), Mor. Dict. p. 5868; Leven *v.* Montgomery (1683), Mor. Dict. p. 3217; Ersk. Inst. b. 1, t. 6, s. 17; Stair, b. 1, t. 4, s. 17; Fraser, Husband and Wife, i., 602.

(*a*) Fraser, Husband and Wife, i.,

Liability of Husband for Wife's Ante-nuptial Debts.—The husband is not liable for those debts contracted by the wife before the marriage, which, if they had been owing to her, would not have been subject to the *jus mariti*. He is not liable on bonds heritable by a clause of infeftment, nor for the principal sums on movable bonds bearing interest, but only for the interest remaining due at the marriage, or which accrued due during the marriage. The husband would only have been entitled to the interest on such bonds if they had been due to the wife, and his obligation for his wife's debts ought not to exceed the right which he has in her estate (*b*). But he may be liable even for the principal sums contained in such bonds. First, when the *universum jus* of the wife, heritable as well as movable, has been assigned to him by the marriage contract; for if the husband be liable to pay his wife's movable debts, in consequence of the legal right which he acquires by marriage to her movable estate, he ought, upon the same principle, to be subjected to her whole debts when he accepts of a present conventional right to her whole estate (*c*). 2ndly, the husband, where he is *lucratus*, is bound for his wife's debts, of whatever kind, in *quantum lucratus est*, if she has no separate estate for the payment of her creditors; for the principle on which that obligation is founded is equally strong, whether it be applied to debts which carry interest, or to those that are simply movable (*d*).

Rents of Wife's Property.—Where the husband, *jure mariti*, uplifts and appropriates the rents of property belonging to his wife, on which property an annuity is heritably secured, he takes the rents *cum suo onere*, and becomes debtor in the annuity during the period of his intromissions, so that on the subsequent dissolution of the marriage by his death, his representatives are liable for any arrears then due (*e*).

The liability incurred by the husband for the debts of the wife,

p. 596; Leven *v.* Montgomery, *supra;* Gordon *v.* Inglis (1681), Mor. Dict. p. 5924.

(*b*) Osborn *v.* Young (1696), Mor. Dict. p. 5785; Gordon *v.* Davidson (1708), Mor. Dict. p. 5789; Ersk. Inst. b. 1, t. 6, s. 18; Stair, Inst. b. 1, t. 4, s. 17.

(*c*) Dick *v.* Cassie (1738), Mor. Dict. p. 5857; Weir *v.* Parkhill (1738), Mor. Dict. 5857; Fraser, Husband and Wife, i., 599; Ersk. Inst., *ibid.*; Stair, Inst., *ibid.*

(*d*) Leslie *v.* Wallace (1708), Mor. Dict. p. 5853; Ersk. Inst. b. 1, t. 6, s. 18.

(*e*) Nixon *v.* Borthwick, February 18th, 1806, Fac. Coll.

to the extent of his curtesy, and by the wife in respect of her *terce*, has been already stated (*f*).

Discharge in Bankruptcy.—*Semble*, the husband will be released from his liability for his wife's ante-nuptial debts by his discharge in bankruptcy (*g*).

Conveyances to Husband and Wife.—Conveyances in feudal rights and in the *quasi-feuda* of bonds to the husband and wife receive a construction different from that which would be given to the same conveyances if they were made to strangers (*h*).

Conjunct Fees.—Thus conjunct fees would, in the case of strangers, be considered as giving to each an equal interest in the fee of the subject, descendible to his heir, but a conjunct infeftment to husband and wife, unless it expresses to be to the longest liver (*i*), or unless the right was originally derived from the wife (*k*), and a life-rent only intended to be reserved to the husband (*l*), constitutes the husband fiar, and gives only a life-rent to the wife (*m*). Accordingly, a wife having charged upon a bond granted to her husband and her, and the longest liver, was held to have no right to uplift the sum, or to insist for the same without concourse of the man's heir, or his

(*f*) *Supra*, pp. 634, 637.

(*g*) Fraser, Husband and Wife, i., 595; and cf. Bankruptcy Act, 1856 (19 & 20 Vict. c. 79), s. 147.

(*h*) See Ersk. Inst. b. 3, t. 8, 35, 36; Fraser, Husband and Wife ii., 1427; McLaren on Wills and Succession, 606.

(*i*) Or to the survivor of them and "their heirs," or "the heirs of the survivor." In these cases, the wife, on surviving her husband, will take the whole fee, and her heirs will exclude those of her husband: Ferguson *v.* McGeorge (1739), Mor. Dict. 4202; Boyd *v.* King's Adv. (1749), Mor. Dict. 4205; Burrowes *v.* McFarquhar's Trustees (1842), 4 Dunlop, 1484. *Aliter*, where the substitution is to "the heirs of the marriage." These are the husband's heirs, and the widow has merely a life-rent: Neilson *v.* Murray (1732), 1 Pat. 65; MacKellar *v.* Marquis (1840), 3 Dunlop, 172; Madden *v.* Currie's Trustees (1842), 4 Dunlop, 749.

(*k*) Murray *v.* Blair (1739), 1 Pat 251; Wordie *v.* Sampson (1750), Mor. Dict. 4207; Sinclair *v.* Anderson (1771), Mor. Dict. 4241; Smith Cunninghame *v.* Anstruther's Trustees (1869), 7 Macph. 689. Or given as "tocher": Gairns *v.* Sandilands (1671), Mor. Dict. 4230; Smith Cunninghame *v.* Anstruther's Trustees, *ubi supra*.

(*l*) In cases of doubt as to which of the spouses was intended to have the fee, regard is had to the question which has the power to dispose of the property; an absolute power of disposal will carry the fee: Dunfermline (Earl of) *v.* Callender (Earl of) (1676), Mor. Dict. 4244; so will a conveyance to "heirs and assignees": Fead *v.* Maxwell (1709), Mor. Dict. 4240.

(*m*) Stair, Inst. b. 2, t. 3, s. 41; Laws *v.* Tod (1697), Mor. Dict. 4236.

being called; if the sum were insecure, it might be consigned to be re-employed, to the wife in life-rent, and to the heir in fee (*n*). Even a clause in a bond, importing a sum borrowed from husband and wife, and payable to the longest liver of them in conjunct fee, and to the heirs betwixt them, and their assignees, whom failing to the heirs and assignees of the last liver, was found to constitute the husband fiar and the wife life-renter, although she was the survivor, whereby her heirs of line (failing heirs of the marriage) became heirs of provision to the husband, and liable to his debts (*o*). And a clause in a contract of marriage obliging the husband to take the "conquest to him and his future spouse, and the heirs betwixt them, whilks failing, the heirs of the man's body, whilks failing, the wife's heirs whatsoever," was found not to constitute the wife fiar, but life-renter, and the husband fiar, thus failing heirs of the marriage and of the man's body, the wife's heirs of line were heirs of provision to the man; for by this clause of conquest, it is evident that the means were to come by the man (*p*). Yet an obligement by the man, "bearing that, whatsoever lands or sums of money he should purchase during the life of him and his future spouse (their present debts being first paid), the wife should be secured therein, in conjunct fee; and in case of no issue or children, the one half therefore to be disponed as the wife shall think fit," was found to make the conquest divide betwixt the heirs of the man and the wife, and that her power to dispone the half was not a personal faculty, but made her fiar in that half, and took off the presumption of the preference of the husband, seeing no mention was made of the heirs of either party (*q*).

Conjunct Fees to Strangers.—Where an interest is made, or any right conceived in favour of two strangers, in conjunct fee and life-rent, and their heirs, the two are equal fiars during their joint lives, as if they had contributed equally to the purchase. But after the death of the first, the survivor has the life-rent of the whole; and after the survivor's death, the fee divides equally between the heirs of both. If, however, it be made to husband and wife, and the

(*n*) Kinross *v.* Hunthill (1661), Mor. Dict. p. 8262; Stair, Inst. b. 2, t. 3, s. 41.

(*o*) Stair, Inst., *ibid.*; Justice *v.* Stirling (1668), Mor. Dict. 4228; Gairns *v.* Sandilands (1671), Mor. Dict. 4230.

(*p*) Cranstoun *v.* Wilkinson (1667), Mor. Dict. p. 4227; Stair, Inst., *ibid.*

(*q*) Dunfermline (Earl of) *v.* Callender (Earl of) (1676), Mor. Dict. 4244; Stair, Inst., *ibid.*

longest liver of *them*, and their heirs, the law presumes that the husband's heirs are intended, and the wife takes only a life-rent (*r*). The general rule is, that the husband is, from the prerogative of his sex, the sole fiar, as the *persona dignior* (*s*).

Relaxation of Rule as to Persona Dignior.—This rule has been, in modern times, relaxed in favour of the wife, although the principle still obtains, that, in doubtful cases, the preference is always to be given to the husband, so that the fee is in him, and a life-rent only in the wife. When the property comes by the wife, the fee is, from presumed intention, generally held to be in her (*t*). If, however, it be conveyed *nomine dotis*, the fee is in the husband, because whatever is given in tocher is his property. So, if his heirs be substituted, the fee is in the husband, according to the maxim, *fiar cujus hæredibus maxima prospicitur* (*u*). On the other hand, if the wife's heirs be substituted, the fee is in her (*x*). In the cases referred to, the property came by the wife, and the fee was held to be in her (*y*).

If the right be taken to the wife's assignees, the law considers her as fiar, for it is the essence of a fee to dispose of the subject at pleasure, and those heirs are deemed to be the most favoured on whom the last termination falls (*z*). Where there are no intermediate substitutions between the heirs of the marriage and the heirs of the spouse, the spouse on whose heirs the succession is settled in the last place is the fiar, because they are presumed to

(*r*) Stair, Inst. b. 2, t. 6, s. 10; Ersk. Inst. b. 3, 8, s. 36.

(*s*) Stair, Inst., *ibid.*; Ersk. Inst., *ibid.*; Johnston *v.* Cunningham (1667), Mor. Dict. p. 4199.

(*t*) Ersk. Inst., *ibid.*; Wordie *v.* Sampson (1750), Mor. Dict. p. 4207; Wilson *v.* Forrest & Maxwell (1759), Mor. Dict. p. 4208.

(*u*) Earneslaw *v.* Douglases (1705), Mor. Dict. p. 4223; Elliot's Crs. *v.* Elliot (1720), Mor. Dict. p. 4244; Edgar *v.* Edgar (1727), Mor. Dict. p. 4202; Edgar *v.* Sinclair (1713), Mor. Dict. p. 4201; Watson *v.* Johnston (1766), Mor. Dict. p. 4288; Bruce and Henderson *v.* Henderson (1790—1791), Mor. Dict. p. 4215; and see *supra*, p. 645, n. (*i*).

(*x*) Angus *v.* Ninian (1733), Mor. Dict. p. 4244; Fead *v.* Maxwell (1709), Mor. Dict. p. 4240.

(*y*) Grays *v.* Wood, &c. (1773), Mor. Dict. p. 4210; Paterson &c., *v.* Balfour (1780), Mor. Dict. p. 4212; Rollo *v.* Shaw (1832), 11 Shaw, 132; Dewar *v.* Mackinnon (1825), 1 W. & S. 161; Stair, Inst., *ibid.*; Ersk. Inst., *ibid.*

(*z*) Ersk. Inst., *ibid.*; Fead *v.* Maxwell, *supra*. An unlimited power to borrow is not equivalent to a power of disposal: Boustead *v.* Gardner (1879), 7 Rettie, 139; Bryson *v.* Munro's Trustees (1893), 20 Rettie, 986.

be the most favoured. Thus, a sum of money assigned by the wife in tocher to her husband, in conjunct fee and life-rent, and the *bairns* of the marriage, whom failing, to the wife's heirs, was adjudged to belong to the wife (*a*). But where there are intermediate substitutions, that spouse is deemed fiar whose heirs are first called after the heirs of the marriage, though the succession should be settled ultimately upon the heirs of the other, because the heirs first called are undoubtedly favoured above those who are only substituted in default of the first (*b*). Although the husband is thus preferred to the fee, in feudal rights, and in the *quasi-feuda* of bonds taken jointly to him and his wife, yet, in the rights to movable goods, the heirs of the husband and wife succeed equally (*c*).

Donations inter Conjuges.—Deeds granted by the wife to the husband, or by him to the wife, which import a donation, are indeed valid, but they may be revoked at any time during the donor's life (*d*). If, however, they are executed by the husband or wife to a third party, they are not revocable, although they may be gratuitous (*e*). Neither is the ratification by the husband of a disposition granted by the wife in favour of her children of a former marriage revocable (*f*), because these are not donations between the two spouses. But when the only real intention of a deed is to convey a gratuitous right from one of the spouses to the other, although it be granted nominally, or in trust, to a third party, it is, notwithstanding this disguise, subject to revocation (*g*). On the other hand, an obligation, though it should be granted by

(*a*) Ersk. Inst., *ibid.*; Angus *v.* Ninian (1733), Mor. Dict. p. 4244.

(*b*) Ersk. Inst., *ibid.*; Cranston *v.* Wilkinson (1667), Mor. Dict. p. 4227; Elliot's Crs. *v.* Elliot (1720), Mor. Dict. p. 4244.

(*c*) Ersk. Inst., *ibid.*; Bartilmo *v.* Hassington (1632), Mor. Dict. p. 4222.

(*d*) The common law of Scotland as to donations between husband and wife is saved by s. 8 of the Married Women's Property (Scotland) Act, 1881 (44 & 45 Vict. c. 21).

(*e*) Unless the conveyance to a third party is intended merely as a cloak for a donation, the consideration for which is unequal: Glasford *v.* Dowling (1634), Mor. Dict. p. 6106; Jardine *v.* Currie (1830), 8 Shaw, 937.

(*f*) Hamilton *v.* Bain (1669), Mor. Dict. p. 6107; Murray *v.* Murray (1671), Mor. Dict. 5689; Muir *v.* Stirling (1663), Mor. Dict. p. 6107.

(*g*) Sanders *v.* Dunlop (1728), Mor. Dict. p. 6108; Scott *v.* Cranston (1776), *ibid.*; Stewart *v.* Mitchell (1769), Mor. Dict. p. 6100; Foggo *v.* Watson (1769), Mor. Dict. p. 6102; Watson *v.* Gordon (1774), Mor. Dict. p. 6103; Steven *v.* Dunlop, February 1st, 1809, Fac. Coll.; and see above, n. (*e*).

one of the spouses directly to the other, and even really intended for the benefit of the grantee, is, nevertheless, irrevocable, if it contain a right even gratuitous in favour of a third party (*h*). It would seem, therefore, that a pledge by the wife of her paraphernalia, as a security for a debt contracted by her husband, which, in effect, amounts to a donation by her to her husband, cannot be revoked, because, by the pledge, the husband's creditor acquires a direct interest (*i*).

Donations, when Revocable.—The donations which are revocable are grants proceeding from the mere liberality of the donor without any antecedent cause or obligation. But those which are mutual remuneratory grants between the spouses, made in consideration of each other, are not revocable, if there be any reasonable proportion between the value of the two (*k*). The equality of the deed, or of the grant, must not be too scrupulously weighed. The leaning is to support mutual deeds, though they should seem unequal (*l*).

Unilateral Deeds.—An unilateral deed will be sustained where it is remuneratory and the grant not excessive (*m*).

Provision for Wife.—As it is the husband's duty, where there has been no previous written contract, to make a reasonable (*n*) provision for his wife, in the event of her surviving him, such provision is not revocable; and if it should be immoderate it would be revoked only *quoad excessum* (*o*). But where the interests of the

(*h*) Heisleid *v.* Lindsay (1591), Mor. Dict. p. 6087.

(*i*) Clerk *v.* Sharp (1717), Mor. Dict. p. 5996; Ersk. Inst. b. 1, t. 6, s. 29; Stair, Inst. b. 1, t. 4, s. 18.

(*k*) Chisholm *v.* Brae (1669), Mor. Dict. p. 6137; Ersk. Inst. b. 1, t. 6, s. 30; Stair, Inst. b. 1, t. 4, s. 18. A renunciation by a wife of her legal or conventional rights, unless in exchange for a fair equivalent, is a revocable donation: Rae *v.* Nielson (1875), 2 Rettie, 676; Cooper *v.* Cooper (1888), 13 A. C. 88.

(*l*) Hepburn *v.* Brown (1814), 2 Dow, p. 342; Mitchell *v.* Mitchell's Trustees (1877), 4 Rettie, 800; Melville *v.* Melville's Trustees (1879), 6 Rettie, 1286; Beattie's Trustees *v.* Beattie, &c. (1884), 11 Rettie, 840.

(*m*) Lindoris *v.* Stewart (1715), Mor. Dict. p. 6126, *v.* "Husband and Wife," div. x., ss. 3, 4, 5, 6, 7.

(*n*) *I.e.*, "reasonable" as at the date of the dissolution of the marriage, and it is as at that date that the value of the rights of the spouses is to be estimated: Fraser, Husband and Wife, ii., 928.

(*o*) Short and Birnie *v.* Murray (1724), Mor. Dict. p. 6124. This was, however, a special case, inasmuch as the husband had reserved his own liferent. See Dunlop *v.* Johnston, *infra*, p. 650, n. (*q*), at p. 116; Ersk. b. 1, t. 6, s. 30; Craig *v.* Galloway (1861), 4

husband and wife have been settled by ante-nuptial contracts, post-nuptial deeds are revocable in so far as they either add to or diminish the provisions of the first contract, without a valuable consideration on the other side. Every provision adding to the wife's prior settlements is a donation by the husband to her, and every deed by which the wife renounces the least share of her former provision is a donation by her to the husband (*p*).

When a husband, not having it in his power to make any provision for his wife, had, on that ground, in a post-nuptial deed, renounced his *jus mariti* in favour of her and her children of the marriage, and there had been an actual possession of the fund, the subject of the provision by trustees who had paid it to the children after the wife's death, it was held that the husband could not after the dissolution of the marriage revoke the renunciation, as a *donatio inter virum et uxorem*, and come forward to claim the sums which the trustees had paid to the children in fulfilment of his own deed (*q*). This case was, however, a special one, and it does not affect the general rule of Scots law that grants by a husband in favour of his wife, to take effect *stante matrimonio*, are revocable, in the absence of exceptional circumstances, which might confer upon them an irrevocable character (*r*).

It is probable that the same rule would be applied to post-nuptial provisions by the wife in favour of the husband (*s*). A post-nuptial

Macq. 267 ; Gibson's Trustees *v.* Gibson (1877), 4 Rettie, 867; Melville *v.* Melville's Trustees (1879), 6 Rettie, 1286.

(*p*) Dirl. 368 ; Ersk. Inst., *ibid.* A man cannot, however, by post-nuptial contract, make a provision to take effect *stante matrimonio* to the detriment and defeating of his creditors : Learmouth *v.* Miller (1875), L. R. 2 Sc. & Div. 438. And see Rae *v.* Nicolson (1875), 2 Rettie, 676 ; Jardine *v.* Currie (1830), 8 Shaw, 937 ; Fraser, Husband and Wife, ii., 938.

(*q*) Macpherson *v.* Graham (1750), Mor. Dict. 6113, as explained in Dunlop *v.* Johnston (1867), L. R. 1 Sc. & Div., *per* Lord Colonsay, at p. 116; Kilk. Husband and Wife, n. 16.

(*r*) Dunlop *v.* Johnston, *ubi supra.*

(*s*) Ersk. i., t. 6, s. 30 ; Fraser, Husband and Wife, ii., 943 ; Chalmers *v.* Creditors (1710), Mor. Dict. 6056 ; Stirling *v.* Crawfurd (1716), Mor. Dict. 6111. A married woman may by the law of Scotland, as well as by that of England, make an effectual gift of her separate income to her husband, with this difference, that by Scots law she has the privilege of revoking the donation, even after her husband's death, and reclaiming the subject of her gift in so far as it has not been consumed. The same circumstances which are in England (see p. 722) held to imply donations between husband and wife are sufficient to sustain a similar inference in Scotland. But a

contract of marriage between labouring persons, providing that the longest liver shall *bruik all*, has been found to be revocable, as *donatio inter virum et uxorem*, where the whole property of any consequence, both at the date of the contract, and at the dissolution of the marriage, consisted of a house belonging to the husband (*t*).

Every bond or disposition granted by the husband to the wife is not presumed to be gratuitous, for many instances occur in which a husband may become *bonâ fide* his wife's debtor, *e.g.*, by intermeddling with such of her effects as fall not within his *jus mariti*, &c. If it were to be held that the husband could not by any deed or declaration establish a charge against himself, in such cases the consequence must be, that the wife would be under the necessity of accepting one for her curator, who could not by any deed effectually bind himself to account for his intromissions. In a question, therefore, concerning the validity of such a bond or obligation, the mention in the recital of any probable occasion by which he became his wife's debtor, is sufficient to support it as onerous and not revocable by the grantor, if the fact be not disproved by legal evidence (*u*).

Revocation of Donations inter Conjuges.—Donations between husband and wife may be revoked either expressly or tacitly. They are expressly revoked by an explicit declaration of the donor's will to revoke. Where the donation is constituted by writing, it ought also to be revoked by writing. This revocation may be signed *etiam in articulo mortis*, and at whatever time it may have been signed, whether upon death-bed, or in a state of health, there is no necessity for the donor to make it known to the other spouse (*u*). A donation may be tacitly revoked by any deed of the donor inconsistent with the gift, *e.g.*, if the donor make over absolutely to another the subject of the donation, for he is truly understood to resume the property, and in the character of the proprietor, to transfer the right to another (*x*). But a right of annual rent, or other security, with which the donor has charged the subject to

wife who allows her husband during a long course of time to deal with the income of her separate estate as if it were his own money cannot revoke money *bonâ fide* consumed in this manner: Edwards *v.* Cheyne (No. 2) (1888), 13 A. C. 385; and cf. Standard Property Investment Co. *v.* Cowe, &c. (1877), 4 Rettie, 695.

(*t*) Steven *v.* Dunlop, February 1st, 1809, Fac. Coll.

(*u*) Ersk. Inst. 1, t. 6, ss. 30, 31.

(*x*) Ersk. Inst., *ibid.*; Inglis *v.* Lowry (1676), Mor. Dict. 6131.

a creditor or any third person, imports not a total revocation of the gift, for the law, which presumes always *in dubio* for the donation (*x*), considers the donor to have in that case resumed the property to himself only in so far as was necessary for charging the subject with the rights granted to the third party. The donee takes the *res donata* subject to the burden (*y*). Revocation is not presumed from a disposition *omnium bonorum* being made by the donor in favour of a stranger (*z*), for the general clause in such a disposition cannot be construed to include any special subject of which the grantor had formerly divested himself (*a*). No such presumption arises from the donor having subsequently contracted a debt. Creditors, subsequent to such donation, if the debtor has no other estate sufficient to pay their demands, may plead upon the faculty of revocation competent to him, which the law will transfer to those creditors from the debtor, if he cannot be prevailed on to revoke voluntarily (*b*), but the representatives of the donor cannot plead upon debts subsequently contracted as a tacit revocation of the gift (*c*). It has been decided that the husband's right of revoking a contract of voluntary separation from his wife cannot be attached by his creditors. The wife's provision under such contract having been heritably secured by the husband while solvent, is effectual in a competition with the creditors, there being no suspicion of fraud (*d*).

Defeasance of Donations inter Conjuges.—Although a donation between man and wife is not null, yet the donee holds it under the tacit condition that it may be defeated by the donor during his life. The donee cannot, therefore, alienate the subject, nor charge it with any burden to the prejudice of the donor, who, upon his revocation, resumes the full property of the subject, free from the consequences of all the intermediate deeds of the donee in favour of the creditors, or singular successors of the latter, *resoluto enim jure dantis, resolvitur jus accipientis* (*e*).

(*x*) See note (*x*) on preceding page.

(*y*) Kinloch *v.* Rait (1674), Mor. Dict. p. 11,345; Johnstone's Trustees *v.* Johnstone (1896), 23 Rettie, 538; Ersk. Inst., *ibid.*

(*z*) Handyside *v.* Handyside (1699), Mor. Dict. p. 11,349. The question is, however, one of intention in each case: Walker's Executors *v.* Walker (1878), 5 Rettie, 965.

(*a*) Ersk. Inst., b. 1, t. 6, s. 31.

(*b*) Ersk. Inst., *ibid.*

(*c*) Ersk. Inst., *ibid.*

(*d*) M'Gregor's Trustee *v.* M'Gregor January 22nd, 1820, Fac. Coll.

(*e*) Ersk. Inst., b. 1, t. 6, s. 32.

Right of Revocation Personal to Donor.—This right of revocation is personal to the donor, and therefore, if he himself (*f*) do not exercise it, his heirs or representatives cannot (*g*), and the subject of the donation becomes, after the donor's death, the absolute property of the donee, *morte donantis donatio confirmatur* (*h*). But creditors of the donor may revoke even after his death (*i*).

Effect of Ratification by Wife.—Ratifications by the wife, although they bar reductions founded on the force or fear of the husband, do not exclude her right of revoking donations which she has made, or of setting aside deeds which she may have granted to third parties on the head of violence or menaces used against her by the grantees (*j*).

Effect of Dissolution of Marriage.—If the marriage were dissolved by death within a year and day, and there had been no child of the marriage born alive, all grants made in consideration of the marriage formerly became void and things returned to the same condition in which they were before the marriage (*k*). But now under the Movable Succession Act, 1855, where a marriage is dissolved before the lapse of a year and day from its date by the death of one of the spouses, the whole rights of the survivor and of the predeceaser are to be the same as if the marriage had subsisted for that period (*l*).

On the dissolution of the marriage the surviving husband becomes the irrevocable proprietor of the tocher, and the wife, in case she survive, is entitled to all the provisions secured to her in that event, whether legal or conventional. Where the interests of the spouses have not been regulated by marriage articles they are entitled to certain rights by the disposition of the law itself.

Jus Relictæ.—Legitim.—Jus Relicti.—Besides those of curtesy and *terce*, which have been already considered, a particular share of the movable estate of the husband falls to the surviving wife in virtue

(*f*) The *curator bonis* of an insane person may exercise the right of revocation for him: Blaikie *v.* Milne (1838), 4 Dunlop, 18.

(*g*) Dunlop *v.* Greenlee's Trustees (1863), 2 Macph. 1; (1865), 3 Macph. (H. L.) 46; Edwards *v.* Cheyne (No. 1) (1888), 13 A. C. 373.

(*h*) *Ibid.*

(*i*) Honeyman and Wilson *v.* Robertson (1886), 14 Rettie, 163.

(*j*) Gordon *v.* Maxwell (1678), Mor. Dict. p. 6144; Richardson *v.* Michie and Marshall (1685), Mor. Dict. p. 6147; Borthwick *v.* Scott (1724), Mor. Dict. p. 6149; Ersk., b. 1, t. 6, s. 35.

(*k*) Ersk. Inst., b. 1, t. 6, s. 38.

(*l*) See *ante*, p. 626; 18 & 19 Vict. c. 23, s. 7.

of her *jus relictæ*, and another to the children in the right of *legitim*. And now a surviving husband takes the same share and interest in his deceased wife's movable estate (*jus relicti*) which is taken by a widow in her deceased husband's movable estate, and children are entitled to *legitim* out of their mother's movable property (*m*).

Alimony of Widow.—When the widow's legal provisions of *terce* and *jus relictæ* are insufficient, the Court will grant her an additional aliment out of her husband's estate (*n*).

As the widow upon the husband's death has no present fund for the subsistence of herself and her family, she has a claim against her husband's representatives for alimony from the day of his death to the first term of payment of her provision, whether legal or conventional. Its amount is to be fixed with reference not to the extent of that provision, but to the husband's quality and fortune and the number of servants left by him in his family when he died (*o*). She has also a legal claim to mourning for her husband suitable to his quality (*p*), and in case of a posthumous child she may recover from the husband's representatives the expense incurred by her on the occasion of the birth or baptism of the child (*q*). But none of those articles, except the widow's mourning, can be claimed if her husband's estate be insufficient for the payment of all his onerous creditors (*r*).

If the wife survive, the paraphernal goods continue her property and cannot be attached by the husband's creditors. If the wife die first, they go to her children or her other next of kin (*s*).

The parties may, by their marriage contract, renounce the provisions made by the law, and by it regulate the respective interests which they shall take in the property of each other.

Construction of Marriage Settlements.—It may be useful to make

(*m*) 44 & 45 Vict. c. 21, ss. 6, 7.

(*n*) Thomson *v.* McCulloch (1778), Mor. Dict. p. 434; Young *v.* Campbell (1790), Mor. Dict. p. 400; Smith *v.* Smith, March 11th, 1812, Fac. Coll.

(*o*) Scot *v.* Kerr (1713), Mor. Dict. p. 5916; Boswell *v.* Boswell (1737), Mor. Dict. p. 5916; Palmer *v.* Sinclair, June 27th, 1811, Fac. Coll.; De Lonay (Baroness) and Others *v.* Oswald's Reps. (1863), 1 Macph. 1147.

(*p*) Wilkie *v.* Morrison (1765), Mor. Dict. p. 5923; Ersk. Inst., b. 1, t. 6, s. 41.

(*q*) Kerr *v.* Hastie (1671), Mor. Dict. p. 5922; Ersk. Inst., *ibid.*

(*r*) Ersk. Inst., *ibid.*; Sheddan *v.* Gibson, May 15th, 1802, Fac. Coll.; 1 Bell's Comm. p. 679.

(*s*) Ersk. Inst., *ibid.* And see *ante*, p. 627.

some few observations on the construction of the ordinary marriage settlements and on the legal import of certain provisions which they contain.

A provision by a husband to his wife of the life-rent of all his goods and gear movable has been held to exclude her legal right to the property of the third or half of his movables, for the life-rent of the whole is presumed to have been granted in full satisfaction of her *jus relictæ* (*t*). But as a general rule no provision to a wife will exclude her *jus relictæ* unless she is a party to the deed making it, or else, in the full knowledge of all the facts, she homologates the excluding deed (*u*). A provision to her for her life-rent use of all the goods and gear which shall be acquired by the husband is to be understood only of free gear, *deductis debitis*, and therefore the husband's creditors are not thereby excluded from attaching the subject of that provision (*x*).

Ordinary Provisions in Marriage Contracts.—According to the ordinary provisions in a marriage contract, the father settles the lands or other subjects expressed in it upon himself and his wife, in conjunct fee and life-rent, and on the heirs of the marriage in fee. If there be sons of the marriage, the eldest is the sole heir of provision, or of the marriage, where the subject provided is heritage. In the case of daughters only, all of them are heirs-portioners of provision. If, in a marriage contract providing an heritable subject to the heirs male of the marriage, a special provision be granted to a daughter, in default of, or failing such heirs male, the daughter is entitled to it, though a son should exist of the marriage, unless he also shall survive the father, for *nemo potest esse hæres viventis*. The plain intention of the parties by such a stipulation is, that the daughter shall have the right, unless the subject of the provision shall actually devolve upon the son, as heir male, on his father's predecease (*y*).

Effect of.—Heirs of a marriage are more favourably regarded than heirs substituted in a simple destination, for the latter, being

(*t*) Young *v.* Buchanan (1664), Mor. Dict. p. 6447; Riddell *v.* Dalton (1781), Mor. Dict. p. 637; Ersk. Inst., b. 3, t. 3, s. 30.

(*u*) Hope *v.* Dickson (1833), 12 Shaw, 222; Faulds *v.* Faulds' Trustee (1843), 5 Dunlop, 483; Thomson *v.* Smith (1849), 12 Dunlop, 276.

(*x*) Smith *v.* Muire (1668), Mor. Dict. p. 9858; Ersk. Inst., *ibid.*

(*y*) Maconochie *v.* Greenlee (1780), Mor. Dict. p. 13,040, January 12th, 1780, Fac. Coll.; Ersk. Inst., b. 3, t. 8, s. 38.

gratuitous, gives only the hope of succession, and may be altered by the maker, or any of the members who succeed before the substitute; but marriage contracts are onerous deeds, by which the bride and her friends stipulate that special provisions therein mentioned shall be made good by the father to the heir, or other issue of the marriage, in consideration of the tocher or fortune brought with her. The heir of a marriage, therefore, unites two distinct characters. He is not only heir, but *quodammodo* creditor to his father. By the marriage articles, the father is under an implied obligation not to defeat those provisions by any gratuitous deed, and therefore the heirs in whose favour the provision is made have an action against the father, if the subject of the provision has been exhausted by onerous creditors, or if he has done any deed to the prejudice of his obligation to discharge incumbrances or to make their provisions effectual in the event of his death (*z*); or they may set aside gratuitous deeds made by him to their prejudice upon the Statute 1621, even although they should have been granted in favour of the heir's own mother (*a*), or of a second son of the same marriage (*b*). For this purpose, the heir of a marriage need not serve heir to his father, the grantor of the deeds which are challenged (*c*).

Spes Successionis.—Although the father, when marriage contracts are expressed in these general terms, is restrained from making gratuitous deeds to the prejudice of the heir of the marriage, yet the heir's right is not a right of proper credit, but of succession, whether the provision be of money or of land (*d*). If, therefore, a father become bound to pay a particular sum to the children of the marriage, at the first term after the decease of himself and his wife, the children have merely a right of succession (*e*). Being only

(*z*) Fraser *v.* Fraser (1677), Mor. Dict. pp. 12,859, 12,944; Fotheringham *v.* Fotheringham (1734), Mor. Dict. p. 12,929; Macintosh *v.* Macintosh (1717), Mor. Dict. p. 12,881; Ersk. Inst., b. 3, t. 8, s. 38.

(*a*) Carnegie *v.* Clark, &c. (1677), Mor. Dict. p. 12,840; Ersk. Inst., *ibid.*

(*b*) Fea *v.* Trail (1718), Mor. Dict. p. 12,926; Dykes *v.* Dykes, February 9th, 1811, Fac. Coll.; Hyslop *v.* Dickson, November 15th, 1821, Fac. Coll.; Wood *v.* Miller, December 4th, 1823, Fac. Coll.

(*c*) Moncrieff *v.* Moncrieff (1759), Mor. Dict. p. 12,871; Porterfield *v.* Gray (1760), Mor. Dict. p. 12,874; Ogilvy *v.* Ogilvy, December 16th, 1817, Fac. Coll.; Douglas *v.* Thomson (1870), 8 Macph. 374.

(*d*) 1 Bell's Comm., 5th ed., 639; Ersk. Inst., *ibid.*, s. 39.

(*e*) Strachan *v.* Strachan (1754), Mor. Dict. p. 996; 5 Br. Sup. 274; Fac. Coll. 1, n. 109; Ersk. Inst., *ibid.*

heirs of provision, they cannot come in competition with their father's onerous creditors, notwithstanding his undoubted solvency at the time of the settlement (*f*). Nor is it material in that case whether the sum be or be not actually lent according to the father's obligation of provision (*g*). The father is understood to reserve to himself the fee, notwithstanding such provisions, and, of course, retains the power to charge the subject with just debts, and even to alienate it for onerous causes (*h*).

Sale of Settled Property.—Upon the sale by the father of the estate settled by his contract of marriage and the purchase by him of other lands with the price, the heir is not entitled to the purchased lands as a *surrogatum*, neither can he claim as a creditor of his father for the value of the estate sold, but at his father's death can recover only the price which had been actually obtained (*i*).

Father's Power of Administration.—The father, notwithstanding his settlements upon the heir of the marriage, also retains a power of administration, so as to subject him to such reasonable restrictions as may be requisite for the preservation of the family (*k*).

Thus, if the heir had plainly discovered a disposition by his prodigality to dissipate, &c., property, the father might limit its enjoyment with irritant and resolutive clauses, provided that these clauses were pointed against him alone, and that the order of succession settled on the other heirs of the marriage was preserved (*k*).

A father, being bound by his contract of marriage to dispone certain lands, and such other lands as he should acquire during the marriage to the heirs of the marriage, and the son being prodigal and bankrupt, conveyed the lands to the son's children, burdened only with a life-rent to him. In a reduction at the instance of the son's creditors, the Lords sustained the deed, and assoilzied (*l*).

(*f*) Napier *v.* Irvine (1697), Mor. Dict. p. 12,898; Fount, July 24th, 1696, and June 17th, 1697.

(*g*) Graham *v.* Rome (1677), Mor. Dict. p. 12,887.

(*h*) Cunynghame *v.* Cunynghame (1804), Mor. Dict. p. 13,029; Fotheringham *v.* Fotheringham (1734), Mor. Dict. p. 12,929.

(*i*) Cunninghame *v.* Cunninghame, December 20th, 1810, Fac. Coll.; Wemyss (Earl of) *v.* Haddington (Earl of), February 28th, 1815, Fac. Coll.; Hyslop *v.* Dickson, November 15th, 1821, Fac. Coll.

(*k*) Craik *v.* Craik (1728), Mor. Dict. p. 12,984; Trail *v.* Trail (1737), Mor. Dict. p. 12,985; Ersk. Inst. b. 3, t. 8, s. 39.

(*l*) Thomson *v.* Thomson (1762), Mor. Dict. p. 13,018; December 8th, 1790, Fac. Coll.; Farquhar-Gordon *v.*

Obligation to Settle Estate not Discharged by a Tailzie.—The question whether a father has sufficiently discharged an obligation to settle an estate upon the heir of the marriage by making the settlement in the form of a tailzie, containing prohibitory, irritant, and resolutive clauses, seems to have been set at rest by an unanimous opinion of the Court that it was incompetent to do so (*m*).

Liability of Cautioner.—Although settlements executed in the ordinary form are postponed to the onerous debts of the grantor, notwithstanding they have been subsequently contracted, yet they are effectual against a cautioner who has engaged himself in the marriage contract, for the father's performance of his obligation; and the heir of the marriage has his claim against the cautioner, not as heir to his father, but as creditor to the latter (*n*). Where a father executes a bond of provision to a child actually existing, whether such child be the heir of a marriage or not, a proper debt is thereby created, which, though gratuitous, is not reducible at the instance of prior onerous creditors if the father was solvent at the time of granting it (*o*).

Provisions may Confer Jus Crediti.—Marriage settlements may be so expressed as to give to the heir a proper right of fee in the land estate, or a proper right of credit in the special sum provided to him, and if secured by proper diligence, or perfected by seisin, may give the heir a preference against all the subsequent deeds of the father, even onerous (*p*).

Thus in a money provision, if the father be bound not merely to provide the heir or children of the marriage in a sum, but to make payment of it at a term which may arrive before the father's death, or if the provision be made in return for renunciation of legal rights, the children have a proper *jus crediti*, which entitles them

Gordon (1790), Mor. Dict. p. 13,028; Ewing *v.* Ewing (1799), Mor. Dict. p. 12,997; Spiers *v.* Dunlop (1778), Mor. Dict. p. 13,026.

(*m*) Munro *v.* Munro, February 13th, 1810, Fac. Coll.; Douglas *v.* Johnston, December 5th, 1804, Fac. Coll.; Graham *v.* Coltrain (1743), Mor. Dict. p. 13,010; Stewart *v.* Stewart, March 2nd, 1815, Fac. Coll.

(*n*) Dickson *v.* Mill (1707), Mor. Dict. p. 12,938; Fount, December 19th, 1707; Fotheringham *v.* Fotheringham (1734), Mor. Dict. p. 12,941; Crawfurd *v.* Kennoway (1677), Mor. Dict. p. 12,934.

(*o*) Ersk. Prin., 20th ed., p. 479.

(*p*) Douglas *v.* Douglas (1724), Mor. Dict. p. 12,910; Creditors of Marjoribanks *v.* Marjoribanks (1682), Mor. Dict. p. 12,891; Wilson's Trustees *v.* Wilson (1856), 18 Dunlop, 1096.

to come in competition with the father's onerous creditors, and the preference will be determined according to the nature of their rights, and the priority of the diligences used upon them (*q*).

Clause of Conquest.—The conquest, during the marriage, or a certain portion of it, is frequently settled either on the heir, or on the issue of the marriage. In such provisions, the term "conquest" bears a sense different from that in which it is used in questions between the heir of line, as contra-distinguished from the heir of conquest. It is applied to the estate which the father may acquire during the marriage by his own industry, or by singular title, and not as heir to an ancestor, or as executor to a person deceased, or as legatee, or *jure mariti* (*r*). It consists only of such addition as has been made during the marriage to the father's property. If he has sold one estate, and with the price purchased another, the price of the estate sold must be first deducted from the purchase (*s*).

An obligation of conquest does not bind the father so strongly as a special provision. The subject may be affected not only by the father's onerous or rational deeds, but even by those which are gratuitous, provided they be granted for small sums, as in favour of a child of another marriage (*t*). But any deed merely gratuitous, alienating the whole or a considerable part of the conquest to the prejudice of the heir to whom it was provided, which has no rational consideration to support it, is to be regarded as granted *in fraudem* of the provision of the contract, and is therefore subject to reduction. The father retains this ample right of fee, as to the conquest, notwithstanding the dissolution of the marriage, in favour of the issue of which the conquest was provided. No action, therefore,

(*q*) Creditors of Easter-Ogle *v.* Lyon (1724), Mor. Dict. p. 8150; Henderson *v.* Henderson (1759), Mor. Dict. p. 12,919; Mactavish *v.* Mactavish (1787), Mor. Dict. p. 12,922; November 15th, 1787, Fac. Coll.; Mackenzie *v.* Mackenzie (1792), Mor. Dict. p. 12,924; February 2nd, 1792, Fac. Coll.; Douglas *v.* Douglas (1724), Mor. Dict. 12,910; Gordon *v.* Murray (1833), 11 Shaw, 368; Herries, &c. *v.* Brown (1838), 16 Shaw, 948; Goddard *v.* Stewart (1844), 6 Dunlop, 1018.

(*r*) Stair, Inst. b. 3, t. 5, s. 52; Mercer *v.* Mercer (1730), Mor. Dict. 3054; Rae *v.* Rae, January 23rd, 1810, Fac. Coll.; Ersk. Inst. b. 3, t. 8, s. 43; Diggens *v.* Gordon (1865), 3 Macph. 609; affirmed (1867), 5 Macph. (H. L.), 75.

(*s*) Stair, *ibid.*, s. 52.

(*t*) Cowan *v.* Young, &c. (1669), Mor. Dict. p. 12,942; Murrays *v.* Murrays (1677), Mor. Dict. p. 12,944; Cumming *v.* Kennedy (1697), Mor. Dict. p. 6443.

can be sustained, at the suit of the child entitled to the conquest, against the father himself to obtain a liquidation thereof, and consequently the conquest is estimated *quoad* the father, as at the time, not of the dissolution of that marriage, but of his death (*u*). It is not now usual to make provisions of conquest in marriage contracts, but where it is done a sum is generally stated which, being deducted from the free estate at the dissolution of the marriage, shall be held to show the amount of conquest (*x*).

Clause of Substitution.—A clause of substitution is that by which the succession of any subject is declared by the grantor to devolve on the substitute in default of the institute, and such clauses are frequent in marriage contracts and bonds of provision to children (*y*). Substitutes called after the heirs of the marriage have only a *spes successionis* (*z*).

Clause of Return.—A clause of return is that by which a sum in a bond, or other right, or any part of it, is provided in a particular event to return to the grantor and his heirs. It is, therefore, truly a species of substitution, by which the grantor provides that the right shall, in default of the grantee, go not to a third person, as in a common substitution, but to himself (*a*).

Words with Fixed Legal Meaning.—Words which have a fixed legal meaning ought, when used in settlements or securities, to be understood in that meaning; thus, where lands are provided in a marriage contract to the heir male, and in default of him, to the heirs female, to be procreated of the marriage, the appellation of heirs female, which is a known legal term, denoting the heirs at law after the failure of the lineal male issue, must be so understood as to prefer the daughter of a son of the marriage to the eldest immediate daughter, because the immediate daughter is not in such case the heir-at-law. Yet as all entails ought to be governed by the will of the maker, when clearly expressed, if it shall appear from other expressions in the deed that he did not, by that

(*u*) Anderson *v.* Anderson (1684), Mor. Dict. p. 12,960; Fount, November 27th, 1684; Cruickshanks *v.* Cruickshanks (1685), Mor. Dict. p. 12,964; Fount, February 24th, 1685.

(*x*) Ersk. Inst. b. 3, t. 8, s. 43, n. (*a*); Hunter's Trustees *v.* Campbell (1839), 1 Dunlop, 817.

(*y*) Ersk. Inst. b. 3, t. 8, s. 44.

(*z*) Macdonald *v.* Hall (1893), 20 Rettie (H. L.) 88; McMurdo's Trustees *v.* McMurdo (1897), 24 Rettie, 459; Turner's Trustees *v.* Turner (1897), 24 Rettie, 619.

(*a*) Ersk. *ubi cit. supra*, s. 45.

description, mean an heir female, in the proper sense, the certain intention of the maker ought to prevail over the legal meaning of the term (*b*). Upon this ground, lands provided to the *bairns* of a marriage do not descend to the heir in heritage, though the subject provided be heritable, but divide equally among all the children, if no division be made by the father, because the appellation of *bairns* is a known term, used to denote the whole issue, and is, therefore, so interpreted as to cut off the exclusive right of the eldest son (*c*).

Apportionment of Provisions.—As a general rule provisions granted to the children, or issue of a marriage, give no right of credit to each child in particular till the death of the father, before which period the right does not become special to any one of them. For the right is given *familiæ*, to the whole issue taken together, and, therefore, though the father is, by his obligation, restrained from executing gratuitous deeds to strangers *extra familiam*, he has a power *jure parentis*, of distributing the provision among his own issue in such proportions as he judges proper (*d*). He may convert the subject, if it be movable, into a land estate, descendible to the eldest son alone, provided he burden it with provisions to the other children (*e*). If the power be not exercised, equal division takes place (*f*). A disposition by a father after marriage, to which he was not bound by the marriage articles, if it be granted to children yet unborn, is no better than a simple destination, which, therefore, can neither oblige the father himself nor stand good in a competition with creditors; for such disposition is not only gratuitous, because not grounded on a marriage contract, but is given without any special regard to the disponees, who were at the date of the right *nonentia* (*g*).

Second Marriage.—Upon the dissolution of the marriage there

(*b*) Dalyell, &c. *v.* Dalyell, May 30th, 1809, Fac. Coll.; Ersk. Inst. b. 3, t. 8, s. 48, n. 475.

(*c*) Kinloch *v.* Kinloch (1678), Mor. Dict. p. 12,841; Fount, January 11th, 1678.

(*d*) Edmonstone *v.* Edmonstone (1706), Mor. Dict. p. 3219. But see Beattie's Trustees *v.* Cooper's Trustees (1862), 24 Dunlop, 519; Romanes *v.* Riddell, &c. (1865), 3 Macph. 348; Hunter's Trustees *v.* Carleton (1865), 3 Macph. 514; affirmed (1867), 5 Macph. (H. L.), 151.

(*e*) Campbell *v.* Campbell (1738), Mor. Dict. p. 13,004.

(*f*) Ersk. Inst. b. 3, t. 8, s. 49; Sivwright *v.* Dallas, January 27th, 1824, Fac. Coll.; Stein *v.* Stein (1826), 5 Shaw, 101; Watson *v.* Robertson, &c., (1837), 15 Shaw, 586. But see Douglas *v.* Douglas (1724), Mor. Dict. p. 13,002 (a very exceptional case).

(*g*) Ersk. Inst. b. 3, t. 8, s. 49.

is no restriction as to the period when the survivor may again marry.

A father may, notwithstanding a prior marriage contract, settle a jointure upon the second wife, or make provisions on the issue of the second marriage, which will be effectual against the heir of the first, though such settlements or provisions encroach on the subject provided to him by his mother's prior contract, if the father had no other fund out of which he could provide for the second wife and children (*h*). Such provision, must, however, be suitable to his circumstances, for he cannot make such exorbitant settlements on a second marriage as would too much encroach upon the prior *jus crediti* acquired by the children of the first (*i*). If the provision be not exorbitant, the heirs of the first marriage are liable, as heirs, to fulfil the settlement made by the father upon the wife and issue of the second marriage. But if it exceed the just measure of his circumstances, they are, *quâ* creditors to their father, entitled to challenge it as a fraudulent or gratuitous deed (*k*). Not only the heir of the first marriage may reduce a settlement in favour of a second marriage, *quoad excessum*, but the heirs of the wife of the first marriage may reduce it, in case any sum or subject should be left to them by a substitution in the first marriage contract (*l*). Where onerous or rational deeds are thus granted by a father, diminishing the provisions to the heir of a marriage, he has an action of recourse against the father, in case he shall afterwards acquire a separate fund which may enable him to fulfil both obligations (*m*).

The heir of the marriage for the time being and his parent acting jointly have the full disposal of the estate. Accordingly the heir may release his parent of the provision and the parent may propel the estate to the heir. But the heir cannot, without his parent's consent, transfer his right to a third party so as to be effectual should he predecease his parent (*n*).

(*h*) Ersk. Inst., *ibid.*, s. 42 ; Wilson's Trustees *v.* Wilson (1856), 18 Dunlop, 1096.

(*i*) Bruce *v.* Glen (1761), Mor. Dict. p. 13,036.

(*k*) Wood *v.* Miller, December 4th, 1823, Fac. Coll.

(*l*) Laws *v.* Tod (1697), Mor. Dict. p. 12,899 ; Fount, January 19th, 1697.

(*m*) Ersk. Inst. b. 3, t. 8, s. 42 ; Henderson *v.* Henderson (1730), Mor. Dict. p. 12,928.

(*n*) Maconochie *v.* Greenlee (1780), Mor. Dict. p. 13,040 ; Ersk. Prin., 20th ed., p. 480.

Bankruptcy.—To secure the marriage contract provisions against reduction in the event of the father's bankruptcy they must, if contained in an ante-nuptial contract, be reasonable in amount (*o*); if in a post-nuptial contract, the provisions must not only be reasonable, but have been granted during the solvency of the father and take effect only after his death (*p*).

(*o*) 1 Bell, Comm., p. 637; Carplin *v.* Clapperton (1867), 5 Macph. 797; Watson *v.* Grant's Trustees (1874), 1 Rettie, 882; Ersk. Prin., 20th ed., p. 558.

(*p*) Dunlop *v.* Johnston (1867), 5 Macph. (H. L.) 22; Learmouth *v.* Miller (1875), 2 Rettie (H. L.) 62; Ersk. Prin., *ibid.*

CHAPTER XIII.

EFFECT OF MARRIAGE ON THE PROPERTY OF THE HUSBAND AND WIFE UNDER THE LAW OF ENGLAND (AND IRELAND).

The law of England does not allow as the consequence of marriage any such disposition as the *communio bonorum* or *communio quæstuum*. The law of Ireland is the same as that of England as regards both the common law and the general character of the statute law (*a*).

Different Kinds of Property.—There are some distinctions peculiar to English law which formerly materially affected the interests of the husband and wife in the property of each other.

The division of property into real and personal is accompanied by other divisions. By the law of England, personal property comprises something more than movables. It adopts, therefore, the term "chattels," to include everything which is not wholly real estate. Again, chattels are distributed into two kinds, chattels personal and chattels real. In the latter are included terms for years of land, the next presentation to a church, estate by a statute merchant, statute-staple, elegit, or the like, and these are called real chattels, as being interests issuing out of or annexed to real estates, of which they have one quality, viz., immobility, which denominates them *real*, but want the other, viz., a sufficient legal indeterminate duration, and this want it is that constitutes them chattels.

Property in chattels personal is either in possession or in action. Choses in action are debts, arrears of rents, legacies, residuary personal estate, money in the funds, trust funds, stock, shares, patents, copyrights, all personal chattels not in possession (*b*)

(*a*) The following Acts apply in Ireland: Fines and Recoveries (Ireland) Act, 1834 (4 & 5 Will. IV. c. 92); Married Women's Reversionary Interests Act, 1857 (20 & 21 Vict. c. 57); Married Women's Property Acts, 1870 (33 & 34 Vict. c. 93), 1874 (37 & 38 Vict. c. 50), 1882 (45 & 46 Vict. c. 75), 1893 (56 & 57 Vict. c. 63), 1907 (7 Edw. VII. c. 18). See also 40 & 41 Vict. c. 56, s. 65, and 45 & 46 Vict. c. 39, ss. 7 (1)—(3), 5, as to acknowledgments.

(*b*) Colonial Bank *v.* Whinney (1886), 11 App. Cas. 440.

which are recoverable by action at law, or by suit in equity. When they are recoverable in a Court of Law, they are called legal, and when they can only be recovered by suit in a Court of Equity, they are called equitable choses in action.

Choses in action, with the exception of negotiable securities, are not assignable at law, but they are in equity for valuable consideration. Since 1873 debts and legal choses in action can be assigned, if the assignment is absolute, and not purporting to be by way of charge only, by writing under the hand of the assignor on giving express written notice to the debtor, trustee, or person liable, subject to equities which would have had priority over the right of the assignee by the former law (*c*).

At Common Law.—The provisions of the common law on this subject are now only applicable to the case of a wife married before January 1st, 1883 (*d*), in respect of only such property of hers as accrued to her before that date, not being wages or earnings acquired by her after August 9th, 1870 (*e*), in any employment, occupation or trade carried on by her separately from her husband or any money or property acquired by her through the exercise of any literary, artistic, or scientific skill and all investments of them; nor being property of a wife deserted by her husband or who has obtained a judicial separation from him with regard to which she has obtained a protection order from the Court (*f*); nor her separate property under the recent statutes as described hereafter. But these statutes have not wholly superseded the former law, and reference is still necessary to it as being not only part of the present law, but also as being the basis of the English system, and of the derivative systems of many of the British Colonies and the United States.

Heads of Subject.—The subject is here treated under the following heads:

(i.) Rights of the husband in the property of the wife, (a) during her life, (b) after her death (*ff*).

(ii.) Rights of the wife in the property of the husband, (a) dower out of real property, and (b) personal property.

(*c*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25 (6); Walker *v.* Bradford Old Bank (1884), 12 Q. B. D. 515, 517; Encycl. Eng. Law, tit. Assignment of Choses in Action, i., 555.

(*d*) M. W. P. A., 1882 (45 & 46 Vict. c. 75).

(*e*) M. W. P. A., 1870 (33 & 34 Vict. c. 93).

(*f*) Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 21.

(*ff*) See p. 666.

(iii.) The power of the wife over her own property, during her life, and after her death.

(iv.) Ante-nuptial debts and acts of the wife and separate legal personality of the spouses (*g*).

(v.) The wife's separate estate.

(vi.) Restraint on anticipation.

(vii.). Separate trading by wife.

(viii.) Contracts of married women.

(ix.) Contracts and proceedings between husband and wife.

(x.) Torts of the wife during marriage.

(xi.) Pin money.

(xii.) Paraphernalia.

(xiii.) Other proprietary relations between spouses.

(xiv.) Gifts *inter conjuges*.

(xv.) Marriage settlements.

I. (a) Rights of Husband in Wife's Property during her Life.—Choses in Possession.—At common law marriage is an absolute gift to the husband of all the goods, personal chattels, and estate, of which the wife was actually and beneficially possessed at the time of the marriage, in her own right, or which at that time were in the possession of a third person; and of such other goods and personal chattels as come to her during the marriage (*gg*). He may dispose of them without her consent in his lifetime, or by his will, and if he make a disposition of them, they will vest in his personal representatives. The only exception to this rule is the wife's paraphernalia or personal ornaments given to her which the husband could dispose of in his lifetime, but if not they passed to his wife.

So if they accrue *during* the coverture, the interest vests in the husband, though he has not possession of them before the death of his wife (*h*).

Choses in Action.—Marriage is only a *qualified* gift to the husband of his wife's choses in action—viz., upon condition that he reduce them into possession during its continuance; for if he die before his wife, without having reduced such property into possession, she, and not his personal representatives, will be entitled to it (*i*).

(*g*) See p. 700.

(*gg*) Co. Litt. 300 a. Negotiable instruments are not choses in possession of the husband: Sherrington *v.* Yates (1844), 12 M. & W. 855; Lush, 68.

(*h*) Com. Dig. Bar. & Fem. E. 3.

(*i*) Co. Litt. 351; Scawen *v.* Blunt

But if the husband survive the wife, and exercise his right of administering to her estate, he will be entitled to all her personal estate, which continued in action, or unrecovered, at her death, And although he die before all such property be recovered, yet his next of kin will be entitled to it in equity (*j*).

A mere intention to reduce the wife's choses in action into possession will be insufficient to bar her right to them by survivorship. The acts by which this can be effected must be such as to change the property in them, or in other words, to divest the wife's right, and to make that of the husband absolute, such as a judgment recovered by him and his wife, or his receipt of the money, or a decree in equity for payment of the money to him, or to be applied for his use (*k*).

To constitute possession the husband must have absolute dominion over it for some amount of time without any concurrence of the wife (*l*). A wife who has obtained a judicial separation from her husband is entitled absolutely to her choses in action (reversion in personalty) not reduced into possession though she has previously mortgaged them jointly with her husband (*m*). The same rule holds good where the marriage has been dissolved, or the wife has obtained a protection order on the ground of the husband's desertion (*n*). On the wife's death her undisposed-of choses in action went to the husband (as they still do) (*o*).

Right of Action to Acquire Wife's Property.—The husband may commence proceedings at law in his own name only, for all the personal estate in action which accrued to his wife, or to her and him jointly, during the marriage, and in respect of all personal contracts or covenants made or entered into with them during that period (*p*).

(1802), 7 Ves. 294; Langham *v.* Nenney (1797), 3 Ves. 467; Jakeman's Trusts (1883), 23 Ch. D. 344, 351; Lush, 66.

(*j*) Squib *v.* Wyn (1751), 1 P. Wms. 378; Humphrey *v.* Bullen (1737), 1 Atk. 458; Elliott *v.* Collier (1747), 3 Atk. 526; Lush, 66.

(*k*) Packer *v.* Wyndham (1715), Pre. Ch. 412, 418.

(*l*) Nicholson *v.* Drury Buildings Estate Co. (1877), 7 Ch. D. 48; Lush, 69. For what is reduction into possession, see Hornsby *v.* Lee (1816) 1 Wh. & Tud. L. C. Eq. 157, n.

(*m*) 20 & 21 Vict. c. 35, s. 25; 21 & 22 Vict. c. 108, s. 8; Re Insole (1865), L. R. 1 Eq. 470, 1 Wh. & Tud. 165, n.

(*n*) 1 Wh. & Tud. 166, n.; citing statutes and cases.

(*o*) 1 Wh. & Tud. 703.

(*p*) Hilliard *v.* Hambridge (23 Car. I.). Aleyn, 36; Owen, 82; 2 Mod. 217; Aleberry *v.* Walby (1718), 1 Stra. 230; Cro. Jac. 399; Ankerstein *v.* Clarke (1792), 4 Term Rep. 616; Philliskirk *v.* Pluckwell (1814), 2 M. & S. 393.

In actions arising from contract subsequent to the marriage, where the promise is made to the wife alone, or to the husband and wife, and where the consideration moves wholly or in part from the wife, or where she is, as it has been expressed, the meritorious cause of action (*q*), the husband may assent to give her an interest in the contract, and join her with him in the action.

But for such debts, &c., as were due to the wife before the marriage, and continue unaltered, as the husband cannot disagree to her interest in them, and as he has only a qualified right to them—viz., by reducing them into possession during her life—he is unable to maintain an action for such property, without making his wife a party (*qq*).

But the case of a bill of exchange or promissory note, payable to the wife *dum sola*, is an exception to this rule (*r*).

If, however, the contract, or nature of the demand, be altered after the marriage, as by taking a new security, the husband may sue alone (*s*).

A Court of Equity will not permit agreements entered into between her, or her friends acting for her, and her husband, *pendente lite*, to be obligatory upon her, and an arrangement which, pending a suit, may be so made, by which it is agreed that, upon certain terms, he shall have the residue of her property, will not, without the sanction of the Court, bind her. Notwithstanding, therefore, such an agreement, if the title of the husband's representatives rest solely upon it, the wife's right by survivorship will take place (*t*).

If the husband receive the money, legacy, or duty, which was owing to his wife, or if he alone, or he and his wife, authorise a person to receive, who actually obtains it, either of those receipts will change the wife's interest in the property, and be a reduction of the chose in action into the possession of the husband, divested

(*q*) Rose *v.* Bowler (1789), 1 H. Bl. 108; Dippers of Tunbridge Wells Case (1769), 2 Wils. 414, 424.

(*qq*) Hardy *v.* Robinson (14 & 15 Car. II.), 1 Keb. 440; Tirell *v.* Bennet, (18 Car. II.), 2 Keb. 89; Noy, 70; Milner *v.* Milnes (1790), 3 Term Rep. 627; Rumsey *v.* George (1813), 1 M. & S. 176.

(*r*) M'Neilage *v.* Holloway (1818), 1 B. & Ald. 218; Ex parte Barber (1821), 1 G. & J. 1.

(*s*) Yard *v.* Ellard (2 Ann.), 1 Salk. 117.

(*t*) Macauley *v.* Phillips (1798), 4 Ves. 15.

of her title to it by survivorship, and he may maintain an action for the money so received by the person so authorised (*u*).

But the husband's receipt or possession of his wife's choses in action must be in the character of husband, and not of trustee or executor in order to defeat his wife's title to them upon surviving him (*u*).

Husband's Power over Wife's Personal Property.—With respect to the wife's personal property, over which her husband has the sole and complete legal power of disposition, he may, as it seems, assign it at his pleasure.

The interests, among others, which are assignable at law are, the personal chattels of the wife in possession, legal terms for years, elegits upon judgments issued before the marriage; and he has, in equity, the same power of assigning terms held in trust for her, and debts, or sums of money secured by such terms, or decrees made in favour of the wife, *dum sola*, for money (*x*).

Money due to the wife, and secured by a mortgage in fee, is not equally in the husband's power, as money secured by a mortgage for a term of years. The husband cannot dispose of the former. The estate, continuing in the wife, carries to her surviving the money along with it (*y*).

The husband may transfer money in the funds, standing in the name of his wife (*z*), and may indorse bills of exchange, or promissory notes, given to her before or after marriage (*a*). He may also assign a mortgage for a term of years vested in her (*b*). With respect, therefore, to property of this description, he has an absolute power of disposition.

Her Equitable Choses in Action.—With respect to her equitable choses in action—*i.e.*, trust funds, legacies, debts due to trustees for her, and other property which must be sued for in equity—if they be immediately recoverable by suit, the husband may assign them for valuable consideration, and such assignment will be binding, if

(*u*) Roll. Abr. 342, 350; Moor, 452; Goulds, 160; Doswell *v.* Earle (1806), 12 Ves. 473; Baker *v.* Hall (1806), *ibid.* 497.

(*x*) Roper, Husband and Wife, c. 5, s. 2; Pre. Ch. 418; Lord Carteret *v.* Paschal (1733), 3 P. Wms. 200. Cf. p. 665, *ante*; Lush. 58, 59.

(*y*) Prec. Ch. 418.

(*z*) Pringle *v.* Hodgson (1798), 3 Ves. 619; Wildman *v.* Wildman (1803), 9 Ves. 176.

(*a*) 1 Roper, 214.

(*b*) *Ibid.*, 177.

she survives. But if he assigns them without valuable consideration, her right by survivorship will continue (*c*).

Her Legal Choses in Action.—With respect to the legal choses in action of the wife—*i.e.* those of her choses in action which are recoverable at law—the husband has not the power of assigning them at law, with the exception of mortgages for terms of years, and negotiable securities. If the husband assign them, the assignee standing in his place may, during his life, sue for them, in the name of husband and wife. But if the husband died without having released them, and before the assignee has reduced them into possession, the legal right of action will survive to the wife (*d*).

Of those parts, therefore, of the wife's personal estate, whether in possession or remainder, to which her husband's assignment passes a complete *legal* title, the conveyance will bind his wife, although she survive him; and it will make no difference, whether the assignees claim under Acts of Parliament, or under assignments made by himself, for or without value; because, by such dispositions, the contingent interest of the wife is destroyed, and there is no equity for her against the legal consequences of these transactions, for *æquitas sequitur legem*, and in those instances, although the husband die before his assignees recover the property assigned to them, they will nevertheless, for the reason last mentioned, have a right to recover and enjoy it against any claim of the widow in respect of her general title by survivorship (*e*).

But when the property of the wife assigned by her husband is not of *legal* cognizance, but merely equitable, so that the assignment of it could only be enforced in a Court of Equity, in such and the like cases, assignees of the husband, if he be bankrupt, or his assignees claiming under the Insolvent Debtors Acts, or his

(*c*) Bates *v.* Dandy (1741), 2 Atk. 207; Earl of Salisbury *v.* Newton (1759), 1 Eden, 370; Wright *v.* Rutter (1795), 2 Ves. 673; Becket *v.* Becket (1760), 1 Dick. 340, 342, 343; Johnson *v.* Johnson (1820), 1 J. & W. 472; Stamper *v.* Barker (1820), 5 Mad. 157. For assignment of equitable choses in action generally, see Row *v.* Dawson (1749), Ryall *v.* Rowles (1750), 1 Wh. & Tud. Eq. L. C. 93—151, nn.

(*d*) Burnett *v.* Kinaston (1700), Prec. Ch. 118; 2 Vern. 401; 2 Freem., 239 (S. C.); Packer *v.* Wyndham (1715), Prec. Ch. 412; Gilb. Eq. Rep. 98. See p. 665, *ante*. Since the fusion of law and equity by the Judicature Act equitable doctrines of assignment prevail, but the power of assignment given by the Judicature Act only applies to legal choses in action.

(*e*) Oswell *v.* Probert (1795), 2 Ves. 680, 682; 1 Roper, 227.

assignees under a deed of trust to pay his debts (*f*), take the property, subject to all the wife's equities upon it against her husband (*g*).

Her Reversionary Choses in Action.—The *reversionary* interests of the wife in choses in action cannot be assigned by her husband, even for value, so as to bar her title by survivorship, unless the property fall into her possession during the husband's life (*h*).

The husband cannot, at law, either dispose of or release such part of her personal property as cannot possibly accrue during the coverture; therefore, where a woman stipulates, in the event of surviving her husband, that her property shall become her own, reserving no power of disposition over it during the marriage, neither her husband can dispose of it by sale, or otherwise, nor can she do so during his life, either by deed, will, consent, or charge. And the principle is the same when personal property is so given or left to her (*i*).

In the case of the wife's reversionary choses in action—*e.g.*, a legacy payable to her after a previous life interest—the wife could not deal with it till after the husband's death, and if the husband assigned it his assignee had to realise it in the husband's lifetime, or lost his right to it. This led to the passing of Malins' Act (*j*), by which a wife was enabled to dispose of future or reversionary interests whether vested or contingent in any personal estate to which she or her husband in her right should become entitled under any future instrument (*k*), except her marriage settlement, or to release a power over such personal estate by a deed acknowledged by her and concurred in by her husband under the Fines and Recoveries Act. She could probably also deal with a reversion of personalty by a contract acknowledged by her and concurred in by her husband, or by having herself deprived of it for fraud, or by electing to give it up in order to obtain other property so as to

(*f*) Pryor *v.* Hill (1782), 4 Bro. C. C. 139; 2 Atk. 422.

(*g*) Gayner *v.* Wilkinson (1773), 2 Dick. 491; 2 Mad. 16; Mitford *v.* Mitford (1803), 9 Ves. 87.

(*h*) Hornsby *v.* Lee (1816), 2 Mad. 16; Purdew *v.* Jackson (1824), 1 Russ. Rep. 1; Honner *v.* Morton (1828), 3 Russ. 65; 1 Wh. & Tud. L. C. Eq. 162.

(*i*) Richards *v.* Chambers (1805), 10 Ves. 580; Lee *v.* Muggridge (1812), 1 V. & B. 118; O'Keate *v.* Calthorp (1739), cited in 8 Ves. 177; 1 Roper, Husband and Wife, 250. See 1 Wh. & Tud. L. C. Eq. 161—169.

(*j*) Married Women's Reversionary Interests Act, 1857 (20 & 21 Vict. c. 57.

(*k*) In re Elcom, [1894] 1 Ch. 303.

bind her interest in equity (*l*), but not by will, including proceeds of sale of real estate in reversion. Acknowledgment is no longer required except for reversionary personal interests accruing before 1883 (*m*).

It has been observed, that the husband may assign, at his pleasure, such choses in action of the wife as are assignable at law; and that persons claiming such species of his wife's personal property, by conveyance from him, either as volunteers, or for valuable consideration, will be entitled to hold it exempt from any right of his wife to a settlement, since a Court of Equity will not interfere at her instance, in order to procure a provision for her out of such assigned property (*n*).

Wife's Equity to a Settlement.—But if the husband, or his assignee, have no title at law to recover the wife's property, as where it is an equitable interest, and consequently recoverable only in a Court of Equity, that Court will (except in the instance of a trust-term) (*o*) impose terms upon them. It will stipulate, as the consideration for lending its assistance, that a provision shall be made for the wife and children out of the fund, or out of the husband's other property (*p*).

The wife's equity to a settlement now only arises where the marriage took place before 1883 and the property accrued before then (*q*). This equity to a settlement was, after the Judicature Act, enforced by the King's Bench Division as well as the Chancery Division (*r*). It attaches to pure personalty, terms of years equitable or legal, but not an estate in fee, nor property limited to husband and wife for their joint lives and the life of the survivor, nor a

(*l*) Encycl. Eng. Law, vi., 649; Greenhill *v.* N. B. Merc. I. C., [1893] 3 Ch. 474; and see In re Batchelor (1873), L. R. 16 Eq. 481; her survivorship preferred to right of retainer.

(*m*) Lush, 77.

(*n*) Oswald *v.* Probert (1795), 2 Ves. 680, 682. As to assignment of wife's choses in action generally, see Hornsby *v.* Lee (1816), 1 Wh. & Tud. L. C. Eq. 152—169, nn.; and as to the rights of husband and wife in the latter's reversionary interests in personalty if the wife is domiciled abroad, see Gnepratte *v.* Young (1851), 4 De G. & Sm. 217.

(*o*) Sir E. Turner's Case (1681), 1 Vern. 7.; Pitt *v.* Hunt (1681), 1 Vern. 18; Tudor *v.* Samyne (1692), 2 Vern. 270.

(*p*) Milner *v.* Colmer (1731), 2 P. Wms. 639.

(*q*) See Elibank *v.* Montolieu (1801), 5 Ves. 737; Murray *v.* Lord Elibank (1804) 1 Wh. & Tud. L. C. Eq. 621—653, nn.; Lush, 77—78, for the subject generally.

(*r*) Ency. Eng. Law, vi. 649.

husband's estate by the curtesy (*s*). It attaches to legal and equitable interests equally (*t*).

This is an equity originating in and personal to the wife; so that, if she be entitled to an equitable interest and dies, leaving a husband and children, the latter being unprovided for by settlement, and he files a bill to recover such interest, his children cannot oblige him to make a provision for them out of it (*u*).

The right of the children, however, attaches on a bill being filed during the wife's life, relative to the trust-fund. If the wife dies pending the suit they will have the benefit of it, and may prosecute against the husband an order for laying before the master proposals for a settlement, which had been obtained in the wife's lifetime and which she had not waived before her death (*v*).

The children's right, however, under such order continues, according to Lord Eldon's opinion, to be at the disposal of the wife, until the business be completed, so that, if between those periods she appear in Court, and consent that her husband shall have the fund wholly and absolutely, it will be so ordered, and the children deprived of any provision out of it (*w*).

The separate examination of the wife is necessary to give effect to this arrangement (*x*).

The Court, when its ward is married without its leave, requires from the husband a settlement more strict in its terms than would be imposed in any other case (*y*). It is governed by the circumstances attending each case, in the proportion of the

(*s*) Hanson *v.* Keating (1844), 4 Hare, 1; Boxall *v.* Boxall (1884), 27 Ch. D. 220; In re Bryan (1880), 14 Ch. D. 516; Smith *v.* Matthews (1860), 3 De G. F. & J. 139; Encyclo. Eng. Law, vi., 649; Lush, 81, 82. See 1 Wh. & Tud. 632.

(*t*) Fowke *v.* Draycott (1885), 29 Ch. D. 996, 1003.

(*u*) Scriven *v.* Tapley (1765), Amb. 509; Lloyd *v.* Williams (1816), 1 Mad. 462; Stienmetz *v.* Halthin (1820), 1 G. & J. 67; Lush, 84.

(*v*) *Ibid.*, and Rowe *v.* Jackson (1783), 2 Dick. 604; Lush, 84. Children by former marriage can be so provided for: Conington *v.* Gilliatt, [1876] W. N. 275; 1 Wh. & Tud. 637.

(*w*) Murray *v.* Lord Elibank (1804), 10 Ves. 84, 88, 90; 1 Wh. & Tud. 644 n.; Lloyd *v.* Williams (1816), 1 Mad. 450. See also, in relation to the wife's consent, 1 Wh. & Tud. L. C. Eq. 644, nn.

(*x*) *Ibid.* If wife is abroad, her consent must be taken by commissioners from the Court or a competent Court abroad—*e.g.*, before a foreign magistrate: Minet *v.* Hyde (1788), 2 Bro. Ch. 663.

(*y*) Like *v.* Beresford (1797), 3 Ves. 506.

interest or capital of the wife's fortune which it allows to the husband (*z*).

If, however, a man of no property marry a ward without the leave of the Court, and fortune is his only object, in such a case the Court will visit his offence by not permitting him to have any part of it (*a*).

The equity prevails against the husband, his trustee in bankruptcy, his assignee for the benefit of creditors, and his assignee for valuable consideration (*b*), except in respect of an equitable life interest of hers when she is living with and is maintained by her husband, including an equitable life interest where she is deserted by her husband, or where she is not being maintained by her husband as against a particular assignee of her husband for value taking previously to his insolvency or desertion of her (*c*). The wife is entitled to her equity to a settlement in respect of a legacy in priority to the rights of executors to retain it for a debt due from her husband to the testator (*d*). The equity will be lost by fraud (*e*). The equity was also barred by an adequate settlement being made on the wife by the husband (*f*). This equity cannot be enforced by the wife if it is not recognised by the law of her husband's domicil, though claimed in respect of a reversionary interest in a legacy vested at the time of the marriage (*g*). In such a case the Court will allow a transfer of the whole fund to the husband, on proof, which is a question of fact to be proved in each case (*h*), that the law of the domicil gives him this right without

(*z*) See 1 Wh. & Tud. 639. Fowke *v.* Draycott (1885), 29 Ch. 996. The Court has judicial discretion as to amount, sometimes whole paid to husband : Giacometti *v.* Prodgers (1873), L. R. 8 Ch. 338; two-thirds settled on wife, whose husband, a bankrupt, was contributing to her support : Callow *v.* Callow (1886), 55 L. T. 154. The general rule was one-half : Murray *v.* Lord Elibank (1804), 1 Wh. & Tud. L. C. Eq. 621, 639.

(*a*) Ball *v.* Coutts (1813), 1 V. & B. 303.

(*b*) Encyclo. Eng. Law, tit. Husband and Wife, vi., 650; Scott *v.* Spashett (1851), 3 Mac. & G. 599.

(*c*) Tidd *v.* Lister (1852), 10 Hare 140, 3 De G. M. & G. 857, 1 Wh. & Tud. 635, 652 nn.

(*d*) In re Briant (1888), 39 Ch. D. 471.

(*e*) Lush's Trusts (1869), L. R. 4 Ch. 591 ; 1 Wh. & Tud. 650 n.

(*f*) 1 Wh. & Tud. 649, 650 n. For doctrine of equity of "fraud on marital rights" (now obsolete) see Countess of Strathmore *v.* Bowes (1789), 1 Wh. & Tud. L. C. Eq. 613—620 nn.; Lush, 89.

(*g*) Re Marsland (1886), 55 L. J. Ch. 581.

(*h*) McCormick *v.* Garnett, below, p. 279; Re Todd (1854), 19 Beav. 582.

requiring the consent of the wife (*i*), and the husband, if by such law the wife's personal estate vests absolutely in him, can have real property in England settled in trust for sale conveyed to himself (*k*). But if the wife be a ward of chancery the Court is bound to take care that proper provision is made for her before parting with the fund (*l*) belonging to her, though if the wife be an alien and were domiciled here the fact of money being paid to her account in an action to which she is not a party will not make the Court treat her as a ward of Court (*m*).

The equity to a settlement is of no practical importance in England since the Married Women's Property Act, 1883.

Husband by Settlement on Wife will acquire all her Choses in Action.—Although marriage is not an absolute gift to the husband of his wife's *choses* in action, but the law gives him the power of making them his own, either by receipt or by assignment of them for value, or by a release of them, yet, by making a valid settlement on her, he may acquire the sole and absolute interest in them. But to entitle him to the whole of her fortune there must be an agreement for that purpose either expressed or implied.

The wife's *choses* in action which the husband does not purchase by settlement will be subject to her rights of survivorship, and of provision by settlement, which have been before considered.

Husband's Power over Wife's Chattels Real.—The common law confers on the husband only a qualified title to the chattels real, of which the wife at the time of, or during the marriage, may be possessed. He has, in right of his wife, an interest in them, with a power of alienation during the coverture. They were liable for his debts, and would vest in his trustee or assignee in bankruptcy (*n*). He may defeat her right of survivorship by disposing of her terms for years by a complete act in his lifetime, but if he has not made any disposition of them, and survive her,

(*i*) Sawyer *v.* Shute (1792), 1 Anst. 65, Prussian law; Campbell *v.* French (1797), 3 Ves. 321, American law; McCormick *v.* Garnett (1854), 5 De G. M. & G. 278, Scotch; Anstruther *v.* Adair (1834), 2 My. & K. 513, Scotch; Re Letts (1881), 7 L. R. Ir. 132, New York; Re Molyneux (1856), 5 Ir. Ch. Rep. 346, Scotch; 1 Wh. & Tud. L. C. Eq. 647, 651.

(*k*) Hitchcock *v.* Clendinen (1850), 12 Beav. 534.

(*l*) Tweedale's Settlement (1859), Johns. 109.

(*m*) Brown *v.* Collins (1883). 25 Ch. D. 56; 1 Wh. & Tud. 647 n.

(*n*) Lush, 56.

the law confers them on him, not as representing his wife, but *jure mariti*, and it is not necessary for him to take out administration to her (*o*). If, however, the wife survive him, and the terms remain *in statu quo*, she, and not her husband's representatives, will be entitled to them. He cannot, therefore, dispose of them by his will against her surviving him because as his will does not take effect until after his death, the law takes precedence, and vests the terms in the wife immediately upon his decease; but if he be the survivor, then his testamentary disposition of them will be good (*p*).

When the husband, by surviving his wife, becomes entitled to her terms for years, he succeeds to them, subject to all the charges and equities with which they were affected in her possession. If, before marriage, she had subjected them to any incumbrance, and her husband, either after her marriage, or after her death, renewed the leases, or surrendered the old and took new leases, the incumbrances in equity will attach upon such new leases, and the creditors will not be bound to contribute towards fines and expenses incurred in consequence of these transactions (*q*).

Husband's Power over Wife's Equitable Chattels Real.—It seems that the husband's assignment of the wife's equitable chattels real defeats her right by survivorship, although made without consideration (*r*).

As an agreement to do an act is considered in equity the same as if the act were done, if the husband agree or covenant to dispose of his wife's term for years, or any part of it, such agreement or covenant will, it seems, be enforced against her surviving him (*s*).

An alienation by the husband of a part of his wife's interest is valid. If she had a lease for forty years, a sub-demise by him for twenty years will be good against her, although she survive him, and the residue of the term will belong to her, as undisposed of by the husband. If he alienate the whole of the term possessed by

(*o*) In re Bellamy, Elder *v.* Pearson (1883), 25 Ch. D. 620; Encyclo. Eng. Law, tit. Husband and Wife, vi., 648.

(*p*) Co. Litt. 351; Lush, 56. The chattels real of a wife married before 1883 are not merged by the husband purchasing the reversion: Hurley *v.* Hurley, [1908] 1 Ir. 393; [1910] 1 Ir. 86.

(*q*) Moody *v.* Mathews (1802), 7 Ves. 174.

(*r*) Mitford *v.* Mitford (1803), 9 Ves. 87, 99, *quære* if consideration is not necessary. See Macaulay *v.* Phillips (1798), 4 Ves. 15, 19; Franco *v.* Franco (1799), 4 Ves. 515, 528.

(*s*) Bates *v.* Dandy (1741), 2 Atk. 207; Steed *v.* Cragh (9 Geo. I.), 9 Mod. 43; Druce *v.* Denison (1841), 6 Ves. 385; Lush, 56.

him in right of his wife, upon condition that the grantee pay a sum of money to his executors, and he then dies, and the condition is broken, upon which his executors enter on the lands, the alienation by the husband will be a sufficient disposition to bar the wife of her interest in the term, it having been wholly disposed of by him during his life, and vested in the grantee (*t*).

If the husband pledge a term of years of his wife for a debt, and he either assigns, or agrees to assign, all or part of such term to the creditor, it has been seen that the transaction will bind the wife (*u*).

The power of the husband over his wife's term for years may be taken advantage of by his creditors, during the marriage. If then he be possessed of such a term in right of his wife, it may be sold under a *fieri facias* (*v*).

But although it may be extended or sold, for the satisfaction of his debts, yet if that be not done during his life, and his wife survive him, the term in her possession will be discharged from the demands, because she claims it paramount to her husband, and, therefore, exempted from the claims of all persons deriving title under him.

Husband's Power over Wife's Freeholds.—The husband, by the intermarriage, acquires a freehold interest, during the joint lives of himself and wife, in all freehold property of inheritance of which she was at that time seised, or of which she might become seised during the coverture, and he becomes entitled to receive, for his own use, the rents and profits of such property (*x*).

As a necessary incident to this seisin of the husband, the common law conferred on him a power by alienation of converting her interest into a mere right. His right of possession enabled him by his alienation of it without her joining or consent to prejudice her right of property defeasible by action only. Such an alienation is termed a discontinuance (*y*).

To demise her lands (except under a power) the concurrence of her husband was necessary and the deed must be acknowledged by

(*t*) Sym's Case (1584), Cro. Eliz. 33; 1 Roll. Ab. 344, p. 10; 1 Roper, *ibid.* 181.

(*u*) Bates *v.* Dandy (1741), 2 Atk. 207.

(*v*) Co. Litt. 351; Miles *v.* Williams (1714), 1 P. Wms. 258.

(*x*) Robertson *v.* Norris (1848), 11 Q. B. 916; Lush, 43; Ex parte Rogers (1884), 26 Ch. D. 31, husband entitled to possession of title-deeds during marriage.

(*y*) Tennent v. Welch (1888), 37 Ch. D. 622, 633.

the wife (*z*). But at her death he ceased to have any power over them, and if he continued to hold them he was liable as a trespasser (*a*).

This and the preceding provisions of the common law and statutes prior to 1883, as already mentioned, are only applicable to marriages contracted before that date and to property which accrued before that date. The estate by curtesy (which existed previously to 1883 in respect of all lands of the wife, whether separate property or not, subject in the latter case to her not having devised them by will) is an exception, and continues under the modern law, though it can be defeated at the pleasure of the wife.

(b) **Rights of Husband in Wife's Property after her Death.—Estate by Curtesy.**—It has been seen that at common law the husband on his marriage acquires an estate in his wife's real property, during the joint lives of himself and his wife. He will, however, if he have issue by her, also acquire an estate for his own life. The latter estate which he thus acquires is called an estate by the curtesy of England (*b*).

This title of the husband is an estate for life in such lands and tenements of his wife, as she was solely seised of in fee simple or fee tail, upon having issue by her born alive, that may by possibility inherit the estate by descent from her (*b*).

All such persons may be tenants by the curtesy who are legally married, and are permitted by the laws to hold and enjoy real estate.

The species of property subject to curtesy are manors, lands, and tenements, of which actual seisin may be obtained by the wife; and of various hereditaments, such as rents, tithes (*c*), commons, advowsons (*d*), offices of inheritance, trusts, equities of redemption, &c. (*e*).

But there can be no curtesy of a mere right, title, condition, personal inheritance, &c. (*f*). Nor of copyhold lands, except by special custom of the manor. Under the Copyhold Act, 1894, land enfranchised under it is not subject to any custom as to tenancy by curtesy, but is subject to the general law of freehold land, except in the case of persons married before enfranchisement.

(*z*) Lush, 47. See *post*, p. 694.

(*a*) 6 Anne, c. 18, s. 5; Williams, Real Property, 21st ed., 309.

(*b*) Lush, 100.

(*c*) Co. Litt. 29, 30.

(*d*) *Ibid.*

(*e*) Litt. s. 35; Perk. ss. 457, 463; Plowd. 379.

(*f*) Co. Litt. 29; Perk. ss. 457, 463.

In all cases where actual seisin by the wife can be acquired, as of lands and tenements, it must be obtained in order to found the husband's claim to curtesy (*g*).

As actual seisin of the inheritance by the wife of her lands and tenements is required to entitle her husband after her death to curtesy; that estate will not arise, unless there be an entry in her lifetime (*h*).

With regard to other realty seisin in law is sufficient—*e.g.*, for an advowson. As regards lands it is not clear how far actual seisin is required to establish the estate (*i*). The reason given by Coke that seisin in deed is necessary in order to trace the descent from the person last seised seems no longer to apply since the provision of the Wills Act that descent is to be traced from the last purchaser (*j*), and perhaps in the case of lands which the wife takes as purchaser actual seisin is no longer necessary to found the estate, just as it is not necessary where actual seisin cannot be obtained (*k*). In equity the Court allowed the husband a similar right in his wife's equitable estate in lands held for her separate use, provided that some act corresponding to actual seisin is done (*l*), and if the wife has not disposed of it by deed or will he has it (*m*). A wife having an estate of inheritance to her separate use can exclude her husband's right by disposing of the estate (*n*).

If his wife be seised of a less estate than that of inheritance, his title to curtesy will not arise. When, therefore, she is only tenant for *life*, or *pour autre vie* or at *will*, no curtesy attaches.

The seisin of the wife must be of the *entire* inheritance at some period during the marriage.

Her seisin, therefore, of a reversion in fee upon an estate for life, will not entitle her husband to curtesy, except that estate determine during the marriage (*o*).

(*g*) The King *v.* Gt. Farringdon (1796), 6 Term Rep. 679, 680; Buckworth *v.* Thirkell (1784), cited in Doe *v.* Hutton, 3 Bos. & Pull. 643; Williams, 308.

(*h*) Co. Litt. 29; Perk. s. 458; Eager *v.* Furnivall (1881), 17 Ch. D. 115, 119, Jessel, M.R.

(*i*) Challis, Real Property, 315.

(*j*) 3 & 4 Will. IV. 106, s. 2.

(*k*) Eager *v.* Furnivall (1881), 17 Ch. D. 115.

(*l*) Parker *v.* Carter (1844), 4 Hare, 400, 413; Lush, 103; Williams, 313.

(*m*) Cooper *v.* Macdonald (1877), 7 Ch. D. 288; Appleton *v.* Rowley (1869), L. R. 8 Eq. 139; Moore *v.* Webster (1866), L. R. 3 Eq. 267.

(*n*) Cooper *v.* Macdonald, *supra;* Encyclo. Eng. Law, tit. Curtesy, iv. 269.

(*o*) Co. Litt. 29a; Lush, 103; Williams, 307.

If lands be given to two sisters, and the heirs of their two bodies, and one marries, has issue, and dies, leaving the other sister, the husband is tenant by the curtesy, upon the principle that the sisters were tenants in common in tail in possession (*p*). But this construction seems to be shaken by Littleton, in s. 283, for he says, that if lands be given to two men, and the heirs of their two bodies, they shall be joint tenants during their lives, with several inheritances in tail, and the case of the sisters is mentioned by Lord Coke in his Commentary upon that section. If therefore the two sisters took interests during their lives only in point of tenancy, the husband could not be entitled to curtesy, and with this agrees the case in Rolle (*q*).

Although there can be no curtesy of lands holden in joint tenancy, yet the husbands are entitled to curtesy of lands holden by their wives as coparceners, or as tenants in common, because their wives have several inheritances, and there is no survivorship amongst them as amongst joint tenants (*r*).

Since the possession of one tenant in common is the possession of all the rest, the seisin of the one will be sufficient to entitle the husband of another, a married woman, to be tenant by the curtesy (*s*).

When there is a manifest intention apparent that the husband shall have no interest in the estate settled upon his wife—*e.g.*, by a declaration to that effect in the settlement or will—and she is converted into a *feme sole* during her life, in such case, whether the equitable inheritance devolve on her as heir, or by limitation immediately, or after intermediate limitations, her husband will not be entitled to curtesy (*t*). Otherwise it is not clear that the wife, by declaration, can exclude the right (*u*).

In order to entitle the husband to be tenant by the curtesy, there must be issue born alive during the marriage. It has been said, that if, by the death of the wife in child-bed, it became necessary to resort to the Cæsarean operation, the birth of such child would not entitle the husband to curtesy, because the issue was not born during the coverture, *or the wife's life*, and the land descended in

(*p*) Co. Litt., 30.

(*q*) 2 Roll. Abr. 90, pl. 50; 1 Roper, Husband and Wife, 13.

(*r*) Litt. s. 35; 1 Roper, Husband and Wife, 13.

(*s*) 1 Roper, 13.

(*t*) 1 Roper, 21.

(*u*) Encyclo. Eng. Law, tit. Curtesy, iv. 269.

the meantime, and the estate of tenant by the curtesy ought not to take away the immediate descent, and in pleading it is necessary for him to allege that he had issue during the marriage, which in this case he cannot do (*b*).

It has been observed, however, that if such a question arose at this day, a different decision would probably be given; a child in *ventre sa mere* being now considered *in esse*, not only for its own benefit, but for other purposes (*c*), and as they are held to be included under the description of children born to the husband, it might, perhaps, be alleged in pleading, that he *had issue born during the marriage* (*d*). One of the difficulties, however, stated by Lord Coke (if it can be considered substantial) still exists. The estate during the short interval after the death of the wife descends to her next heir, and is not divested *ab initio* by the subsequent birth of the child (*e*).

The issue, when born alive, must be inheritable to the estate from the mother, either immediately or by possibility. If land be given to a woman and the heirs *male* of her body, and she have issue only a *daughter*, and die, or if the limitation be to her and the heirs *female* of her body, and she have issue only a *son*, in neither of these cases can the husband claim curtesy, because in neither of them was there issue born who could by possibility inherit the estates (*f*).

By the custom of *gavelkind* a husband may be tenant by the curtesy without having issue by the wife (*g*); but his estate only extends to a moiety of the lands and ceases on his remarriage (*h*).

To entitle the husband to curtesy, it is sufficient if the issue be born at any period during the marriage, and for this purpose it is immaterial whether the issue come into existence before the seisin of the wife or afterwards (*i*).

He is, as other tenants for life are, entitled to emblements, and may dispose of them by his will, or if he make no such disposition, they will belong to his executor or administrator (*k*).

(*b*) Paine's Case (1587), 8 Co. 34 a; Co. Litt. 29 b.

(*c*) Thellusson *v.* Woodford (1799), 4 Ves. 227, 323, 324.

(*d*) 1 Roper, Husband and Wife, 31, n. (*a*).

(*e*) *Ibid.*

(*f*) Co. Litt. 29 b; Williams, Real Property, 308.

(*g*) Lush, 103; 1 Roper, 33.

(*h*) Encyclo. Eng. Law, iv. 268.

(*i*) Co. Litt. 29 b.

(*k*) 1 Roper, 35.

The estate by curtesy is considered in many respects as a continuation of the estate of the wife, and consequently the husband takes it after her death with all the incumbrances which would affect it in her possession, if she were alive, and is entitled to all the rights and privileges which she might have exercised, and which were annexed to the estate.

The husband's title as tenant by the curtesy will be defeated by the recovery of the estate by a stranger under a good prior title (*l*).

If the possession by the wife be defeated by the birth and entry of her brother, a *posthumous* son, the title of the husband to curtesy must fail. Yet, if the brother die without issue before the wife, and the husband re-enter during the marriage, this will revive his right to curtesy (*m*).

The husband's title to curtesy will be extinguished by his own conveyance during the marriage, as well as by that in which he and his wife join (*n*).

The husband will not by adultery forfeit his curtesy; although adultery will be a forfeiture of the wife's dower (*o*).

Curtesy under Present Law.—Under the present law, although the real property of a woman married before 1883, and real property acquired after it by a woman married before it is held by her as a *feme sole*, the estate of the husband in it by curtesy still exists, and arises in case of the intestacy of the wife (*p*), as it did formerly, whether the property was separate or not, unless the wife had devised it if separate by her will (*q*). Under the Settled Land Act, 1882, and Settled Estates Act, 1877 (*r*), a tenant by the curtesy has the powers of a tenant for life (*s*), and the Settled Land Act of 1884 declares that for the purposes of the former Act the estate of a tenant by the curtesy is an estate arising under a settlement made by the wife (*t*). Now the wife can dispose of any separate estate by will or deed unless restrained from anticipation, and defeat the

(*l*) 1 Roper, Husband and Wife, p. 37.

(*m*) 2 Bro. Curtesy, fo. 219 b, pl. 13; 1 Roper, Husband and Wife, 37, 38.

(*n*) 1 Roper, 44.

(*o*) Lush, 105; 1 Roper, 45.

(*p*) Hope *v.* Hope, [1892] 2 Ch. 336; Encyclo. Eng. Law, iv. 268, citing Challis and Wolstenholme; In re Derbyshire (1905), 75 L. J. Ch. 95.

(*q*) Cooper *v.* Macdonald (1877), 7 Ch. D. 288; Lush, 104; Williams, 316.

(*r*) Ss. 46, 47.

(*s*) S. 58 (1) (viii.).

(*t*) 47 & 48 Vict. c. 18, s. 8; Williams, Real Property, 309.

estate by curtesy (*u*). The husband can contract to forego it by clause in the marriage settlement (*v*).

Attainder of the husband before 1870 deprived him of the right of curtesy, and the wife's attainder might or might not, according as issue was born before or after the attainder. Attainder was abolished in 1870; but persons convicted of treason or felony are disabled from suing for property or from alienating or charging any property or making any contract, and their property vests in administrators appointed by the Crown, who preserve it for them and their representatives (*w*).

The right is also lost by divorce, judicial separation, and a protection order being obtained (*x*).

Husband's Right to Wife's Personalty on her Death.—The Statute of Frauds provided that with regard to the estates of married women dying intestate, their husbands might demand and administer their rights, credits, and other personal estates, and recover and enjoy the same as they might have done before the Statute of Distributions, which should not extend to them. This right of the husband still continues unaffected by the Married Women's Property Acts, and applies to the separate estate of a wife, dying intestate, acquired before 1883, which he will take *jure mariti* without administration (*y*). But as regards property of the wife acquired since 1882, the husband must take out administration in order to make it vest in him. If the spouses are judicially separated and the wife has obtained a protection order for desertion, property acquired by the wife during such time devolves on her death, as if the husband were dead (*z*). If the parties have been divorced, this and all other rights of the husband as to the wife's property, acquired before or after the decree nisi, cease (*a*).

II. Rights of Wife in Husband's Property.—The wife had no rights in the property of her husband during his life apart from the

(*u*) Cooper *v.* Macdonald, *ante;* Shurmur *v.* Sedgwick (1883), 24 Ch. D. 597.

(*v*) Lush, 105.

(*w*) 1870, 33 & 34 Vict. c. 23, ss. 1, 9, 10.

(*x*) Lush, 106.

(*y*) Lush, 99, 168, 169; Lambert's Estate (1888), 39 Ch. D. 626; Surman *v.* Wharton, [1891] 1 Q. B. 491; Hope *v.* Hope, [1892] 2 Ch. 336.

(*z*) Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), ss. 21, 25, 26.

(*a*) Wilkinson *v.* Gibson (1867), L. R. 4 Eq. 162; Prole *v.* Soady (1868), L. R. 3 Ch. 220; Encyclo. Eng. Law, vi. 651.

provisions of a marriage settlement; and till 1881 neither could convey or assign property to the other (*b*).

By the intermarriage the wife becomes entitled to an estate for life, upon surviving her husband, in a third part of all such estates of inheritance of which he was solely seised (*c*) at any time during the coverture, and to which any issue she had might by possibility have been heir. It is termed her dower (*d*). This right attached to the lands paramount to any alienation by the husband and to his debts, even Crown debts (*e*).

(a) **Dower.—Common Law.**—If the wife was an alien, she was excluded from dower, except she was *Queen-consort*. But if the alien were naturalised by an Act of Parliament, she became entitled to dower out of all the lands whereof her husband was seised during the coverture; if she was created a denizen her title to dower was restricted to lands whereof her husband was seised at the time she was created a denizen (*f*). She can now claim dower on real property in England and Ireland, except where the right accrues under a disposition made before 1870, or by devolution of law on the death of a person dying before 1870 (*g*).

The widow must be of the age of nine years at her husband's death. The reason assigned is *quia junior non potest dotem promereri, neque virum sustinere* (*h*).

She will not be excluded from dower, however far advanced in years she may be at the time of her marriage, because the law cannot fix upon the precise period when she is no longer capable of having issue (*h*).

Dower may be claimed out of all corporeal hereditaments, and out of all incorporeal hereditaments that savour of the realty—*i.e.*, which issue out of corporeal ones—or which concern, or are annexed to, or may be exercised within the same, as rents, estovers, common appendant, or in gross (*i*), except it be a common *sans nombre* without stint, advowsons, fairs, bailiwicks, profits of a

(*b*) Conveyancing Act, 1881, s. 50 (1); Lush, 38, 207; see *post*, Gifts *inter vivos*.

(*c*) Not the husband's equitable estates, including equity of redemption, Dawson *v.* Bank of Whitehaven (1877), 6 Ch. D. 218.

(*d*) Gilb. "Dower," 363; Litt. s. 36; 2 Bl. Com. 130.

(*e*) Williams, 323.

(*f*) Co. Litt. 31 b. (n. 9), 33; 2 Bl. Com. 131; 13 Rep. 23; 1 Roper, 340.

(*g*) Naturalization Act, 1870 (33 Vict. c. 14), s. 2.

(*h*) Litt. 36 b, 53; Co. Litt. 33, 40.

(*i*) Co. Litt. 32 a; *ibid.*, 32 b, n. 2; 1 Roper, 311.

park-keeper, profits of courts, tithes, woods, mills, piscaries, tolls arising from public navigable rivers (*j*), and the like (*k*), and money representing realty subject to dower (*l*).

She is dowable of mines and minerals, which were worked in the husband's lifetime, but not of mines, &c. unopened (*k*), though she can prevent a remainderman from opening them (*m*).

The common law gives to the widow the proportion of one-third part of the lands in her dower; but particular customs furnish exceptions (*n*).

Gavelkind.—By the particular custom which established the tenure of *Gavelkind*, the widow is entitled to a moiety of the estate so long as she continues chaste and unmarried. This custom she cannot waive, and resort to her third part at common law, it being a maxim that *consuetudo tollit communem legem* (*o*).

Borough-English.—Another exception to the common law rule occurs in the instance of the custom of *Borough-English*, according to which, the widow is entitled to take the *whole* of her husband's lands holden by that tenure for her dower (*p*).

Copyholds—In copyhold lands, by custom of the manor, a widow has a similar right known as Freebench in copyhold estates of her husband, generally a life interest in one undivided third part, sometimes a life interest in the whole, and it is paramount to the husband's debts (*q*).

Seisin in Law required.—To entitle the wife to dower, the husband must have been seised in law—that is, have had the legal property by descent, although he may not have taken actual possession before his death—or he must have been seised in fact. If he had only a right of entry, which he had not exercised during the marriage, so as to obtain seisin of the inheritance, she had no title to dower (*r*).

(*j*) Buckeridge *v.* Ingram (1795), 2 Ves. 652, 663; Drybutter *v.* Bartholomew (1723), 2 P. Wms. 127 (shares in New River Co. declared to be real estate): 1 Roper, 342.

(*k*) 2 Bl. Com. 131; Co. Litt. 32; Lush, 114; 1 Roper, 342.

(*l*) Gleeson *v.* Byrne (1890), 25 L. R. Ir. 361.

(*m*) Dicken *v.* Hamer (1860), 29 L. J. Ch. 778 (no dower of royalties). For further details as to property liable, see Burge (1st ed.), pp. 495—499; Lush, 114 *et seq.*; 1 Roper, 342 *et seq.*

(*n*) 2 Bl. Com., p. 84; Roper, i., 351.

(*o*) *Ibid.*; Williams, 324; Lush, 112.

(*p*) 2 Bl. Com. 82; 1 Roper, 351.

(*q*) Williams, 495.

(*r*) 1 Roper, 384.

Dower Act, 1834, Changes.—Important alterations in the law of dower were made by the statute 3 & 4 Will. IV., c. 105, which extends to all widows who were married after the January 1st, 1834, and applies to freehold and gavelkind lands and probably also lands held in borough-English, but not to copyholds (*s*).

The first of these is, that which gives dower to the widow, notwithstanding the husband had not made an entry, or recovered possession (*t*).

Secondly, before the passing of that statute, the seisin of the husband must have been a legal seisin ; and, therefore, the widow was not dowable out of a trust estate. Upon this principle she was not entitled to dower out of the husband's equity of redemption in a mortgage in fee (*a*). But the statute extended it to the equitable interests of the husband (*b*).

The seisin must be of an estate of inheritance (*c*).

It must be of the *entire* inheritance, at some time during the marriage, and not expectant upon the determination of a freehold interest carved out of it. If, therefore, the husband be merely seised of a *reversion* or *remainder* in fee upon an estate for *life* during the coverture, his wife will not be entitled to dower (*d*).

But if the intermediate estate, instead of being for life, had been for a *term of years*, the wife would have been dowable, because this chattel interest does not exclude the present seisin of the husband of the entire freehold and inheritance in the estate, the possession of the grantee of the term being considered the possession of the owner of the freehold (*e*).

If an estate be limited to such uses as the husband shall appoint, and, in default of appointment, to him in fee, it is settled, that he is *seised* of the inheritance until he exercise the power (*f*). His widow, therefore, will be entitled to dower, if the power remain unexecuted; but if he exercise the power of appointment, the inheritance will vest in the appointee, discharged from her right of dower (*g*).

(*s*) Farley *v.* Bonham (1861), 30 L. J. Ch. 239 ; Smith *v.* Adams (1854), 5 De G. M. & G. 712; Lush, 112.

(*t*) 3 & 4 Will. IV. c. 105, s. 3.

(*a*) Dixon *v.* Saville (1783), 1 Bro. C. C. 326; Dawson *v.* Bank of Whitehaven (1877), 6 Ch. D. 218.

(*b*) 3 & 4 Will. IV. c. 105, s. 2; In re Michell, [1892] 2 Ch. 87.

(*c*) 1 Roper, 359.

(*d*) *Ibid.* See Anderson *v.* Pignet (1872), L. R. 8 Ch. 180.

(*e*) 1 Roper, 360, 361.

(*f*) 1 Roper, 366.

(*g*) *Ibid.*

The widow is not entitled to dower out of an estate held by her husband in joint-tenancy, if he die before the other joint-tenant; because the surviving joint-tenant claims paramount to the widow's title—viz., by survivorship under the original conveyance (*h*). If severed, the widow has dower out of his undivided moiety (*i*). A severance by the husband of the joint-tenancy, will not entitle the wife to her dower, if the act by which it is effected at the same time passes the fee of his moiety (*k*).

But dower attaches to a tenancy in common, and to lands held in coparcenary (*l*).

The law requires a seisin in the husband of the freehold and the inheritance, *semel et simul*, and it has been seen, that, if the freehold and the inheritance in the husband be separated by an interposed estate for life, which continues during the marriage, and is not waivable by the tenant for life, such a separation will prevent a title to dower arising for the widow. If, however, the interposed estate be merely a *chattel* interest, as such an interest will not prevent the union of the freehold and the inheritance in the husband, his widow will be entitled to dower.

Thus, if the husband be seised for life, remainder to A. for a term of years, remainder to himself in fee, or in tail, or if, at the time of the marriage, the estate be subject to any other chattel-interest, his widow will be entitled to dower, subject to that interest.

The widow is entitled to a third of the reserved rent (*m*).

If the terms outstanding be satisfied, the widow is entitled to dower immediately in equity against an heir or devisee. But if they be unsatisfied mortgage terms, she must keep down one-third of the interest (*n*).

Thirdly, before the passing of the statute (*o*), it was not necessary to the wife's perfect title to dower that the husband's seisin should continue until his death, although there are some copyholds where the custom of the manor gave free bench to the widows of such copyholders only as died seised (*p*). It was sufficient if he were

(*h*) Co. Litt. 30; Litt., ss. 35, 45; 1 Roper, 366.

(*i*) Reynard *v.* Spence (1841), 4 Beav. 103; Lush, 113.

(*k*) Co. Litt, 31 b; 1 Roper, 367.

(*l*) Litt., s. 45; 1 Roper, 367.

(*m*) 1 Roper, 371.

(*n*) *Ibid.*

(*o*) 3 & 4 Will. IV. c. 105, s. 4.

(*p*) 1 Roper, 374; Burge, 1st ed., i., 505.

beneficially seised of a lawful estate of freehold inheritance, at any period during the marriage, and if for an instant only (*q*).

But if the instantaneous seisin were merely *transitory—i.e.* when the very same act by which the husband acquires the fee takes it out of him, so that he is merely the conduit for passing it, and takes no interest—such a momentary seisin would not entitle his widow to dower. Thus, if lands were granted to the husband and his heirs by fine, who immediately, by the same fine, renders them back to the conusor, the husband's widow would not be entitled to dower of such an instantaneous seisin (*r*).

From the favour shown by the law to the title of dower, the dowable estate, although it has naturally determined, will be considered still to subsist, in order that the widow may hold her dower of it during her life (*s*)—*e. g.*, in the case of the husband being tenant in tail.

If the husband be seised in fee, and die without heirs, the wife will be entitled to dower as against the lord by escheat (*t*).

No dos de dote.—If there be two widows dowable, and lands be assigned to the first widow as her dower, the second widow's right to dower out of the lands so assigned is defeated (*u*). But she will be entitled to dower out of the remaining two-thirds. It is a maxim of the law of England that *dos de dote peti non debet.* This maxim only applies when dower has been actually assigned.

The second widow surviving the first, will not be excluded from dower of the third part of the estate assigned to the first widow, unless the husband of the first died seised of the inheritance.

It might happen that the husband becomes seised of the same estate at two or more distinct periods during the marriage. In these instances the widow is at liberty to elect of which seisin she will be endowed. Thus, if he were seised in fee, and conveyed away the estate, and then took it back again in fee, or in tail, his widow might elect whether she would be endowed upon the first or second seisin (*x*).

If the widow precluded herself of this right of election by joining with her husband in the alienation of the estate, and he take back

(*q*) 1 Roper, 373.
(*r*) 1 Roper, 374.
(*s*) 1 Roper, 376.
(*t*) 1 Roper, 377.
(*u*) Co. Litt. 31; Bustard's Case (1603), 4 Rep. 121 a.
(*x*) Co. Litt. 33.

the same estate in fee or in tail, she will be entitled to dower of this second seisin (*y*).

Fourthly, by the common law the wife's right commenced with the marriage, or the subsequent acquisition of property by the husband, and it was not defeated by his alienation; for she might compel the purchaser after her husband's death to assign her dower (*z*).

The widow also, at common law, held her dower discharged from all incumbrances created by her husband after the marriage, because upon the husband's death, the title of the wife being consummate, had relation back to the time of the marriage, and to the seisin which the husband then had, both of which precede such incumbrances. And dower was even protected from distress for a debt contracted by the husband to the Crown during the marriage (*a*).

The statute above mentioned altered the common law in both these last respects. It enabled the husband to defeat by deed or will the wife's right to dower, by enacting that no widow shall be entitled to dower out of any land which shall have been absolutely disposed of by her husband in his lifetime, or by his will, and this extends to freebench in copyholds (*b*). And it further enacted that all partial estates and interests, and all charges created by any disposition or will of a husband, and all debts, incumbrances, contracts, and engagements, to which his land shall be subject or liable, shall be valid and effectual as against the right of his widow to dower (*c*). This is the most important alteration made by the statute, for the result of it is to confine the operation of dower to lands belonging to an intestate at the time of his death. It is questionable whether there are any women still alive who were married before 1834, to whom the old law of dower still applies.

No Birth of Issue Necessary.—It is not essential to the widow's title to dower, as it is to the husband's right to curtesy, that there should be any issue born. But the issue which might have been born must be such as by possibility might have inherited the estate (*d*).

(*y*) *Ibid.*, n. 5.

(*z*) Co. Litt. 31 a, 32 a; Doe d. Riddell *v.* Gwinnell (1841), 1 Q. B. 682; Lush, 109, 110.

(*a*) Co. Litt. 31 a, 46 a; 1 Roper, 411. Burge, 1st ed., 505.

(*b*) Dower Act, 1833 (3 & 4 Will. IV. c. 105), s. 4; Lacey *v.* Hill (1875), L. R. 19 Eq. 346.

(*c*) Dower Act, 1833 (3 & 4 Will. IV. c. 105), s. 5.

(*d*) 2 Bl. Com. 131; Litt., s. 53; Amcotts *v.* Catherich (1622), Cro. Jac. 615; Lush, 109; Roper, 342. It has

Attainder.—The wife's title to dower might have been barred by her attainder for treason or felony; but if pardoned, she might then demand it, though her husband should have alienated his lands in the mean time, for when this impediment was once removed, her capacity to be endowed was restored (*e*). Now attainder is abolished (*f*).

Adultery.—If a wife willingly leave her husband, and continues with an adulterer, she is barred of her action to demand dower, if she be convicted thereupon, except her husband willingly, and without coercion of the Church, be reconciled to her, and suffer her to dwell with him, in which case she shall be restored to her action (*g*). This is so whether it is with his consent or because of his cruelty that she is living apart from him. Her right ceases after a decree of divorce, but not after one of separation (*h*).

There is a curious case in the Rolls of the English Parliament, where a man by deed granted his wife to another with whom she eloped, and lived in adultery. It was determined: (1) that it was a void grant; (2) that it did not amount to a licence—or, at least, it was a void licence; (3) that after elopement there should not be any averment, *quod non fuit adulterium*, though she married the adulterer, after her first husband's death, therefore that she was barred of dower (*i*).

She forfeits her dower if she detains from the heir the charters which belong to the estate out of which she claims dower.

A wife may also deprive herself of the right to claim dower by her joining with her husband in the alienation of the estate (*k*), by agreement in the marriage settlement (*l*), by contract with her husband during marriage (*m*), or she may waive her right to it after the husband's death (*n*).

been held (but Lush doubts, 116) that the widow's right to dower or freebench precedes simple contract debts of the deceased, the dowable portion not being "lands subject to dower": Spyer *v.* Hyatt (1855), 20 Beav. 621; Northern Banking Co. *v.* McMackin, [1909] 1 Ir. R. 374.

(*e*) 1 Roper, Husband and Wife, 559.

(*f*) See p. 683, *ante*.

(*d*) *Ibid.*, 13 Edw. I. (Westminster 2), c. 34.

(*h*) Hetherington *v.* Graham (1829), 6 Bing. 135; Woodward *v.* Dowse (1861), 10 C. B. N. S. 722; Frampton *v.* Stephens (1882), 21 Ch. D. 164; Lush, 121.

(*i*) 30 Edw. I.; Coot *v.* Berty (1698), 12 Mod. Rep. 232; 1 Roper, 560.

(*k*) Williams, 323.

(*l*) Lush, 119; Gurly *v.* Gurly (1842), 8 Cl. & F. 743.

(*m*) *Ibid.*

(*n*) *Ibid.* See Meek *v.* Chamberlain (1881), 8 Q. B. D. 31.

Fifthly, dower may since the statute be excluded by declaration. By another provision of the statute above mentioned, she 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 by any deed executed by him, it is declared that his widow shall not be entitled to dower out of such land (*o*).

Neither is she entitled to dower out of any land of which her husband dies wholly or partially intestate, when by his will, duly executed for the devise of freehold estates, he declares his intention that she shall not be entitled to dower out of such land, or out of any of his lands (*p*).

The right of a widow to dower is, by this statute, made subject to any conditions, restrictions, or directions, which are declared by the will of her husband, duly executed (*q*). If the husband devises land or any interest or estate therein out of which his widow would have been dowable to or for her benefit, she is not dowable out of any of his land unless a contrary intention appears in his will—*e.g.*, a devise to trustees in trust to sell and pay an annuity out of the proceeds (*r*). No gift or bequest out of personal estate or out of land not subject to dower will defeat the widow's right to dower unless a contrary intention is expressed in the will (*s*). An agreement by the husband not to bar his wife's right to dower will be enforced by the Court (*t*). The former rule that if a legacy were given in satisfaction of dower it took priority over simple legacies is, perhaps, continued by the statute, but applies only where the widow would have been entitled to dower if she had not accepted the legacy in satisfaction (*u*).

The effect of jointures and settlements in barring dower, and of provisions in wills in satisfaction of it, and the alteration made in these respects by this statute, will be referred to in a subsequent part of this chapter (*v*).

The widow is not entitled to take possession of any land for her dower, but the assignment is to be made by the heir; and if he neglect it or do it unfairly, she can compel a just assignment by

(*o*) 3 & 4 Will. IV. c. 105, s. 6.
(*p*) *Ibid.*, s. 7.
(*q*) *Ibid.*, s. 8.
(*r*) *Ibid.*, s. 9; Lacey *v.* Hill (1875), L. R. 19 Eq. 346; In re Thomas (1886), 34 Ch. D. 166.
(*s*) 3 & 4 Will. IV. c. 105, s. 10.
(*t*) *Ibid.*, s. 11; Lush, 117, 118.
(*u*) *Ibid.*, s. 12; In re Greenwood, [1892] 2 Ch. 295.
(*v*) See pp. 723, 724, *post*.

legal process, and generally recover compensation. The wife's remedy to enforce dower is now by ordinary action begun by writ endorsed with notice that the claim is for dower, in place of the old writ of dower given by 20 Hen. III. c. 1 (*w*). The action must be brought within twelve years (formerly twenty years) from the time that the right of action accrued (*x*), and only six years arrears can be recovered (*y*).

Widow's Quarantine.—She is entitled to be endowed immediately after her husband's death, and her dower ought to be assigned to her within *forty* days after the happening of that event; in the mean time she is entitled at the common law, confirmed by *Magna Charta* (*z*), to remain in her husband's capital messuage, or other dwelling-house, of which she is dowable, for the space of forty days and to be supported *de bonis viri*. This title of residence is called the widow's *quarantine*. But if she marry during these days, or depart from her husband's house (to which she will not be permitted to return for the remainder of the time), her right to quarantine determines (*a*).

The assignment of dower required by the common law is of one-third part of the lands or tenements of which the widow was dowable, and to be set out by *metes* and *bounds*, where it is practicable, to be held by her for life. Hence it appears that the endowment must be *parcel* of the lands and tenements themselves (*b*).

Position of Tenant in Dower.—The interest of tenant in dower is an estate for life. Like other tenants for life, she is answerable for waste committed by herself, or by a stranger, whilst she continues tenant in dower (*c*).

She is entitled to emblements, since by the Statute of Merton (*d*) a tenant in dower is empowered to dispose of the corn growing

(*w*) Com. Law Proc. Act. 1860 (23 & 24 Vict. c. 126), s. 26; Judicature Acts, R. S. C., Ords. 1, 2, Appendix A., Part iii., s. 4.

(*x*) Real Property Limitation Act. 1874 (37 & 38 Vict. c. 57), s. 6; and see Williams *v.* Thomas, [1909] 1 Ch. 713; Lush. 121.

(*y*) Real Property Limitation Act, 1833 (3 & 4 Will. IV. c. 27), s. 41.

(*z*) Chap. 7.

(*a*) Co. Litt. 32 b, 34 b; Roper, 388; Lush, 122.

(*b*) 1 Roper, Husband and Wife, 392 *et seq.*

(*c*) Co. Litt. 53, 54; 1 Roper, 416; Lush, 122. She can exercise powers of leasing (twenty-one years, England; thirty-five years, Ireland) of tenant for life under Settled Estates Act, 1877, ss. 45, 46; Williams, 329; Encyclo. Eng. Law, vi. 645.

(*d*) 20 Hen. III. c. 2; 1 Roper, Husband and Wife, 426.

upon her estate at the period of her death; that Act having been passed to remove the doubt which previously existed upon the subject.

As her interest is a continuation of her husband's seisin, she is liable, as standing in his place, to one-third of all the duties and services to which the estate was subject in his possession, and for which one-third she is answerable to the person entitled to the reversion of the property (*e*).

If the estate be subject to a mortgage for a term of years, granted before the husband became entitled to it, she must keep down one-third of the interest (*f*).

At common law, damages for the detention of dower were recoverable only from the time she obtained judgment; but by the Statute of Merton they are given, if the husband died seised. If, however, he did not die seised, having alienated the lands, the widow would not be entitled at law to *mesne* profits, damages, or costs, because such a case is not within the provisions of the Statutes of Merton and Gloucester, and by the common law she was only entitled to recover one-third of the lands, and of their value from the time she obtained judgment for her dower (*g*).

But if the heir alien the lands after the husband's death, and the widow recover dower against the alienee, she will be entitled to *mesne* profits, and damages against him, to be computed from her husband's death (*h*).

When the husband dies seised, his heir succeeds to his estate by legal right, so that his entry and enjoyment of it being under a lawful title, he does no wrong in retaining possession of the whole, until he be demanded by the widow to assign and deliver up to her a third part of it for her dower. Previously to such demand the widow's title to damages under the Statute of Merton is defective, for it only gives them to such widows who cannot obtain their dower *sine placito—i.e.*, without suit, after a prior demand (*i*).

The rules of dower are now of very little practical importance. If a claim for dower should arise, which must be a very rare occurrence, it would be most convenient to meet it, if possible, by a money payment to the widow.

(*e*) 1 Roper, 427, 428.
(*f*) 1 Roper, 371.
(*g*) 1 Roper, 437—440.
(*h*) *Ibid.*
(*i*) *Ibid.*, 444.

(b) **Wife's Interest in Husband's Personal Estate.**—On intestacy of a husband his personal estate, after satisfying his funeral expenses and debts, is distributed between his widow and children or their representatives in the proportion of one-third and two-thirds respectively. If there are no children or representatives of them, the widow takes one-half and the next of kin the other half. If there are no next of kin, the widow takes half and the Crown half. Since 1890, on intestacy, where there is a widow and no issue, she obtains a preferential share of £500 in addition to her share in the residue remaining after deduction of that sum (*k*). Neither husband nor wife are "next of kin" to each other within the Statute of Distribution (*l*).

The wife may claim, and is in practice generally granted, administration of her husband's effects in preference to the next of kin, except for good cause to the contrary—*e.g.*, living separate from him up to the time of his death, or having barred her right by contract, or having been divorced from him, but re-marriage is not such a cause (*m*). As his administratrix she can retain a debt due to herself lent by her to him for the purposes of his business though he is insolvent (*n*).

III. **Power of Wife over her Own Property.**—The wife had no power to dispose of her freehold estates (being separate property) by her own deed alone or by will (*o*). Unless a power of appointment was reserved to her she could only dispose of her lands by a fine or recovery, or bargain and sale, and the husband had to join in the fine, and she was separately examined to see if her consent was *bonâ fide* given (*p*).

Acknowledged Deeds.—Fines and recoveries were abolished in 1833, and more simple modes of assurance of lands of any tenure substituted (*q*)—namely, by deed—in which the husband concurs,

(*k*) 53 & 54 Vict. c. 29. This sum of £500 is charged on the real and personal estates in proportion to their value. The Act does not apply to cases of partial intestacy: In re Twigg's Estate, [1892] 1 Ch. 579. If the estate is not more than £500 the widow takes the whole: Lush, 123, 124.

(*l*) Lush, 100, 124.

(*m*) Lush, 125, citing Goddard *v.* Goddard (1821), 3 Phill. Eccl. Rep. 637, and other decisions; and see Testaments, *post*.

(*n*) In re Ambler, [1905] 1 Ch. 697.

(*o*) 34 Hen. VIII. c. 8; Wills Act, 1837 (1 Vict. c. 26); Taylor *v.* Meads, (1865), 34 L. J. Ch. 203; In re Bacon, [1907] 1 Ch. 475.

(*p*) Lush, 44, 45; Williams, 310; see Roper, 139, 140.

(*q*) Fines and Recoveries Act, 1833 (3 & 4 Will. IV. c. 74), ss. 77

and which must be produced and acknowledged by the wife as her act and deed before commissioners, or a commissioner, who must examine her, apart from her husband, touching her knowledge of such deed, and shall ascertain whether she freely and voluntarily consent to it, and unless she freely and voluntarily consent to such deed, shall not permit her to acknowledge the same; and in such case, such deed shall, so far as relates to the execution thereof by such married woman, be void (*r*). Under the same provision and Malins' Act a wife could release or extinguish any power over lands of any tenure or money alleged to be invested in land, or over reversionary personalty, but with the same requirements as to concurrence and acknowledgment (*s*).

The husband's concurrence was necessary, and his bankruptcy did not affect its validity, but it could be dispensed with by leave of the Court—*e.g.*, if he were insane or an infant, or living apart from his wife, or the place of his residence was unknown and the wife could then convey as a *feme sole* without acknowledgment (*t*). The King's Bench Division properly exercised the jurisdiction; and such a dispensation does not deprive the husband of his common-law right to receive the wife's rents (*u*). In this way the wife's realty, whether vested or contingent, in possession, remainder or reversion, could be disposed of (*v*). She could also bindingly deprive herself of her realty without an acknowledged deed if she committed fraud, and would benefit thereby, or if she elected to give it up in order to obtain property given to her on that condition (*x*). Previously to the emancipating legislation of 1882 (*y*), and apart from whether the property was separate estate (*z*) or not, a wife had been given power to dispose of real property settled on her after separate examination under the Settled Estates Act, 1877, by leave of the Court, even though she were restrained from anticipation (*a*); and under the Settled Lands Act, 1882, where

et seq. See Conveyancing Act, 1882 (45 & 46 Vict. c. 39), s. 7. For separate examination, see Tennent *v.* Welch (1888), 37 Ch. D. 622, 632, 633; Lush, 45.

(*r*) See last note.

(*s*) See p. 671, *ante*, and Lush, 95.

(*t*) Fines and Recoveries Act, 1833 (3 & 4 Will. IV. c. 74), s. 91; Ex parte Thompson, [1884] W. N. 28; In re Giles (1894), 70 L. T. 757; Lush, 51.

(*u*) Fowke *v.* Draycott (1885), 29 Ch. D. 996.

(*v*) Encycl. Eng. Law, vi. 647.

(*x*) Cahill *v.* Cahill (1883), 8 App. Cas. 420, 426; Lush, 48, 49.

(*y*) Married Women's Property Act (45 & 46 Vict. c. 75).

(*z*) See pp. 701 *et seq.*, *post*.

(*a*) See pp. 705 *et seq.*, *post*.

a wife is entitled, otherwise than for her separate use, to settled land, she and her husband are given jointly all powers of a tenant for life under that Act (*b*). Under the Vendor and Purchaser Act, 1874, where land is vested in a wife as a bare trustee she is enabled to convey it as if unmarried, and she can now pass the legal estate in such trust land, without the formalities of acknowledgment or the husband's concurrence (*c*). She can likewise reconvey to a mortgagor property conveyed to her on mortgage to secure her separate property, without her husband's concurrence (*d*).

IV. **Ante-nuptial Debts and Acts of Wife.**—At common law, immediately on his marriage, and during the coverture, the husband is liable to all debts contracted by his wife, *dum sola*, whatever their amount may be, although she did not bring him a portion of one shilling (*e*), but if such debts are not recovered during the coverture, the husband, as such, is not chargeable, let the fortune he received with his wife be ever so great (*f*). The reason for this was that he was not personally liable, but was liable to be sued jointly with her, because she could not be sued alone (*f*), nor could he be sued alone (*f*).

On the husband's bankruptcy after judgment recovered against husband and wife for an ante-nuptial debt of the wife their liability for the debt was gone in law; but if she had separate property it could be made in equity to answer for the debt (*g*), and the wife could not claim an equity to a settlement out of her property till her ante-nuptial debts were provided for (*h*).

However, he could be sued as her administrator, and personalty (such as *choses* in action) which, after coverture, comes to him as such administrator, is assets (*i*); and to their amount only he is liable (*k*), unless they were *expressly* secured to him by settlement

(*b*) Lush, 96.

(*c*) Married Women's Property Act, 1907 (7 Edw. VII. c. 18), s. 1, thus getting rid of In re Harkness and Allsopp's Contract, [1896] 2 Ch. 358; Williams, 321.

(*d*) In re Brooke and Fremlin's Contract, [1898] 1 Ch. 617; In re West and Hardy's Contract, [1904] 1 Ch. 145. For her power to convey to her husband, see Gifts *inter conjuges*, p. 722, *post*; and for her power to dispose of property by will or deed, see Separate Estate, pp. 701 *et seq.*, *post*.

(*e*) Lush, 311.

(*f*) *Ibid.*; 2 Roper, 73.

(*g*) Chubb *v.* Stretch (1870), L. R. 9 Eq. 555.

(*h*) Barnard *v.* Ford (1869), L. R. 4 Ch. 247.

(*i*) 2 Roper, 74.

(*k*) *Ibid.*

made on adequate consideration (*l*). If the wife survive the husband, an action may be maintained against her for the recovery of her debts contracted *dum sola* (*m*).

Modern legislation has modified this position as follows and prospectively in the case of each statute. By the Married Women's Property Act, 1870, in respect of marriages taking place between 1870 and 1874, the effect of which was only to deprive the husband of the right to certain property of the wife accruing during the marriage (*n*), the wife alone was made liable to be sued for any debts contracted by her before marriage, and her separate estate alone was made liable to satisfy it: it was not necessary to join the husband as defendant: the wife did not become personally liable (*o*). This left the creditors of the wife without a remedy where she married without a settlement; and an amending Act of 1874 accordingly provided that a husband and wife might be jointly sued for any debt contracted by the wife before marriage, or for any tort committed by her before marriage, or for the breach of any contract made by the wife before marriage, and that the husband should be liable in respect of such claims to the amount of the value of the personal estate in possession of the wife vesting in the husband, of the *choses* in action of the wife which the husband should have or could have reduced into possession, of the chattels real of the wife vesting in husband and wife, of the rents and profits of real estate of the wife which the husband had or could have received, and of the husband's estate or interest in any property real or personal transferred to him or to another person in contemplation of marriage, or with his consent transferred to any person with a view to defeating or delaying her creditors. There are other provisions for carrying out this limitation of the husband's liability in respect of the wife's ante-nuptial debts and liabilities, and to the extent that he was so liable in respect of such assets, judgment for the total amount was a joint one against him and the wife, and a separate judgment against her for the residue, and her separate estate was liable whether subject to restraint on anticipation or not. It was not necessary under this Act or the former one to

(*l*) See Settlements, p. 723, *post*.

(*m*) Woodman *v.* Chapman (1808), 1 Campb. 189, per Lord Ellenborough, C.J.; 2 Roper, 73; Lush, 312. For further on this subject, see 2 Roper, 75; Lush, 312.

(*n*) Lush, 129, 147—149.

(*o*) Lush, 314, 315, citing cases.

show that the wife had separate estate at the time of judgment or of bringing the suit, and the liability of the wife was a proprietary and not a personal one. This Act, however, by providing only for a joint judgment against both parties, was held not to make the husband liable after the wife's death, although having sufficient assets as described above to meet it.

The Married Women's Property Act, 1882, which governs all marriages entered into since 1882, makes a more comprehensive arrangement than its predecessors. The wife continues liable after marriage in respect of and to the extent of her separate property for all debts contracted and all contracts entered into or wrongs committed by her before her marriage, and she can be sued in respect of such liabilities, which shall be satisfied out of her separate property, and as between her and her husband, unless there is any contract to the contrary, her separate property is primarily liable. The liability of a woman married before the Act is not affected by it except as regards separate property coming to her under the Act which would not have been separate property previously to it (*p*). The husband is liable for such liabilities of the wife to the extent of all property whatsoever belonging to her coming to him by or through or from the wife after deduction of any payments made by him or sums recovered under judgments against him in respect of them; but his liability, if married before the Act, in respect of his wife's liabilities is not affected (*q*). The husband and wife may be jointly sued in respect of any such liabilities contracted by the wife before marriage. If in any action against them both or the husband alone, the husband is not found liable in respect of property coming through the wife as above mentioned, he gets judgment for the costs of his defence whatever be the issue of the suit; while if he is found liable wholly or partly for the debt or damages recovered, the amount of his liability is secured by a joint judgment against him personally and the wife in respect of her separate estate, and as to the residue against his wife as regards her separate property only (*r*). Although the liabilities of the wife under the Act include liabilities by reason of any breach of trust or *devastavit* committed by her being a trustee or executrix or

(*p*) Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 13.

(*q*) *Ibid.*, s. 14.

(*r*) *Ibid.*, s. 15.

administratrix either before or after marriage, the husband is expressly exempted from liability therefor unless he has acted or intermeddled in the trust or administration (*s*).

This alters the former law by which the husband was always liable, even after coverture, for any breaches of trust or *devastavits* of the wife, whether he had taken any part therein or not, as she was regarded as his authorised agent, not being able to execute such office without his consent, and the trust assets being vested in him (*t*).

A restraint on anticipation in a marriage settlement of a woman's property made by herself was held to have no validity against her ante-nuptial debts whether imposed by herself on her own property or by another person under the former Acts. Under the present Act it is not clear that it is not valid (*u*). A wife settling landed property devised to her by a testator with such a restraint is liable for the debts of the testator (*v*). Debts contracted before marriage include debts contracted during a former marriage (*w*).

The husband remains liable under the Act to be sued as his wife's administrator, and to the extent of any assets of hers belonging to him as such (*x*). Where husband and wife are sued jointly, and the misconduct of one has caused the joinder of the other, the latter's costs can be added to the sum recoverable from the one in fault (*y*). Where the husband being domiciled in England marries there a woman domiciled abroad in a country where the husband is absolutely liable for the wife's debts, he is liable only to the extent he would be by the then English law: if the marriage had been abroad the law there might be applicable (*z*). The wife is not given a position in respect of the husband's breaches of contract or wrongs before marriage corresponding to that given to him in respect of hers (*a*).

If a man marry a woman who then has a child, whether legitimate

(*s*) Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 24. It is not clear if this exemption applies to ante-nuptial breaches or not (Lush, 322, 323).

(*t*) Lush, 334—337. *passim*.

(*u*) *Ibid.*, 323; and see Restraint on Anticipation, p. 705, *post*.

(*v*) In re Hedgeley (1886), 34 Ch. D. 379, under Act of 1870.

(*w*) Jay *v.* Robinson (1890), 25 Q. B. D. 467.

(*x*) Lush, 324.

(*y*) London and Provincial Bank *v.* Bogle (1878), 7 Ch. D. 773.

(*z*) De Greuchy *v.* Wills (1879), 4 C. P. D. 362.

(*a*) See Lush, generally, ch. ix., and p. 325.

or illegitimate, he is bound to maintain her children as part of his family (*b*) until they attain the age of sixteen or their mother dies, and they are deemed a part of his family (*b*).

At common law, a gift or devise of lands to the husband and wife does not enable them to take interests in joint tenancy, as other persons, but they take such benefits by entireties.

Separate Legal Personality of Spouses.—Thus, a devise to A. and B., who are strangers to, and have no connection with each other, creates a joint tenancy, and a conveyance by one of them will sever the joint interest, and pass a moiety to the alienee; but under a devise to the husband and wife, since they take by entireties, and not in moieties, the husband is not enabled by his own conveyance to divest the wife's estate or interest, so that if she survive him, she will be entitled to the whole (*c*).

The Act of 1882 has altered this by giving the wife a separate legal personality from the husband, and a gift to them both jointly has the same effect as if they were strangers to each other. Formerly, as a consequence of the rule above, where a gift was made to a husband and wife and a third party, the husband and wife took one half, and the other person the other half (*d*); but any words showing an intention that the parties should all take equal shares were given effect to (*e*). It is doubtful if the Act of 1882 has made any difference, or altered any rights except those of the husband and wife *inter se*, contrary views having been expressed by Chitty, J., and Kay, J., though the former's view has been preferred (*f*).

Marriage does not sever the wife's joint tenancy in a *chose* in action which has not been reduced into possession, but only in

(*b*) Poor Law Amendment Act, 1834 (4 & 5 Will. IV. c. 76), s. 57, altering former law for the liability of a wife to maintain parents, husband, and children, see Separate Estate, p. 705, *post*.

(*c*) Co. Litt. 187 a; Doe *d.* Freestone *v.* Parrott (1794), 5 Term Rep. 652, per Lord Kenyon: Lush, 152; Ward *v.* Ward (1880), 14 Ch. D. 506; In re Bryan (1880), *ibid.*, 516, where it was held that a wife could not claim an equity to a settlement out of property given to her and her husband for their joint lives and that it all went to the husband's creditors.

(*d*) Dias *v.* De Livera (1879), 5 App. Cas. 123.

(*e*) Lush, 152, citing cases.

(*f*) In re March (1883), 24 Ch. D. 222; and on appeal (1884), 27 Ch. D. 166; In re Jupp (1883), 39 Ch. D. 148; In re Dixon (1889), 42 Ch. D. 306; Lush, 153.

the case of personal chattels; nor does divorce determine a joint tenancy though the wife continues to have it to her separate use (*g*).

V. **Wife's Separate Estate.**—Except in some few cases of necessity, which have been before adverted to, the common law did not permit the wife to take or enjoy real or personal estate, separate from and independent of her husband. Her incapacity in this respect has been greatly relaxed in modern times.

The interposition of trustees seems, at the first, to have been deemed essentially necessary, in order to protect the wife's separate interest (*h*); and, regularly, when property is intended to be given or settled upon a married woman for her separate use, it ought to be vested in trustees for her; but it has been established that if land or personalty be devised, or settled to, or upon, or transferred to a married woman, for her separate use, although it be not vested in trustees, still in equity the intention will be effectuated, and the wife's interests protected by converting her husband (who acquired the property *jure mariti*) into a trustee for her (*i*).

In the cases referred to the property was given by strangers to the wife's separate use; but the principle equally applies, and even more strongly, when the estate is given to the husband for her separate use (*j*). In these instances he will be a trustee for his wife of such property, and the wife's equity to it will be enforced against assignees in bankruptcy, and under the Insolvent Debtors Acts, and against trustees under conveyances from the husband to pay debts (*k*).

Since the modern statutes it is sufficient to say, generally, that under the Married Women's Property Act, 1882, all property of a wife belongs to her as her separate estate, without any special words being required to give that effect, if she is married since 1882 or the property accrues to her since 1882—in other words, the exception created by equity has become the general rule of law.

The first legislative provision or addition to equitable separate estate of wives was given by the Divorce Acts, 1857 and 1858, by

(*g*) In re Butler (1888), 38 Ch. D. 286; Thornley *v.* Thornley, [1893] 2 Ch. 229.

(*h*) Harvey *v.* Harvey (1710), 1 P. Wms. 125; Burton *v.* Pierpoint (1722), 2 P. Wms. 78.

(*i*) Bennet *v.* Davis (1725), 2 P. Wms. 316. This applies to wife's separate property under a marriage contract entered into abroad: Ex parte Sibeth (1885), 14 Q. B. D. 417; 2 Roper, 151, 152.

(*j*) See Lush, 126, 127; 2 Roper, 154.

(*k*) 2 Roper, 154.

which, property acquired by a deserted wife after desertion, by her own lawful industry or otherwise, was by means of a protection order made her separate estate (*l*); and the same privilege was enjoyed by a wife judicially separated from her husband (*m*); or a wife who obtained a separation order under 41 Vict. c. 19. Thus if a wife dies intestate, during separation by decree or a protection order, her property acquired during such time devolves as if her husband were dead and goes to her next of kin (*n*). Then by the Married Women's Property Act, 1870, any wages or earnings separately acquired by the wife by her independent skill or labour (*o*), whether married before or since August 9th, 1870, and any personal property accruing to a wife as next of kin, or any sum of money not exceeding £200 coming to a wife under a deed or will was made her separate property if married after 1870 (*p*); and the rents and profits of any freehold, copyhold, or customary hold property descending upon any woman married after 1870 as heiress or coheiress of an intestate were similarly made her separate property (*q*).

The Act of 1882 went further. A wife was made 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 (*r*). Every woman marrying after 1882 is entitled to have and to hold as her separate property, and to dispose of as 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 and acquired by her in any employment, trade, or occupation in which she is engaged or which she carries on separately from her husband (*s*), or by the

(*l*) Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 21.

(*m*) *Ibid.*, ss. 25, 26.

(*n*) But under the Act of 1882 the husband's rights hold good: Lush, 141, 142; Dawes *v.* Creyke (1885), 30 Ch. D. 500; Waite *v.* Morland (1888), 38 Ch. D. 135. For further details, see Lush, 141 *et seq.*

(*o*) Married Women's Property Act, 1870 (33 & 34 Vict. c. 93), s. 1.

(*p*) *Ibid.*, s. 7.

(*q*) *Ibid.*, s. 8. See Lush, 149.

(*r*) Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 1.

(*s*) For what makes a trade of the wife "separate from her husband," see In re Dearmer (1885), 53 L. T. 905; Ashworth *v.* Outram (1877), 5 Ch. D. 923; Lovell *v.* Newton (1878), 4 C. P. D. 7; In re Whittaker (1882), 21 Ch. D. 657; Lush, 197 *et seq.*; the fact of a husband and wife living together does not prevent the wife

exercise of any literary, artistic, or scientific skill, and to retain any such gains unless there is any contract to the contrary (*t*). Every woman married before the Act is 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 the Act (*u*), including any wages, earnings, money, and property so gained or acquired by her as aforesaid (*v*). Property includes a thing in action (*w*). Before this Act, by the Income-Tax Act of 1842, every wife acting as a sole trader or being entitled to property or profit for her separate use is chargeable as if unmarried, but the profits of any wife living with her husband are deemed his profits, and are chargeable in his name and not in that of the wife or her trustee. By the Finance Act, 1897, where the total joint income of a husband and wife charged to income-tax does not exceed £500, and that total income includes profits of the wife from any profession, employment, or vocation (Schedule D), or office or employment (Schedule E), a claim for relief is treated as a claim by each spouse separately, by the wife in respect of her profits, and by the husband in respect of the rest of the total income (*x*).

Words creating the separate use are not now necessary as with the old equitable estate. Under it, where an Englishwoman married a Frenchman, and a gift of property was made to her "to her separate use," it was held that these words showed a "contrary intention" to the French law of community being applied, by which one-half of the property acquired by the wife during marriage goes to the children, unless the donor expressed a contrary intention (*y*).

having a separate trade carried on in that house: Laporte *v.* Cosstick (1874), 23 W. R. 131. The Act of 1882 does not reproduce the words "by lawful industry" of the Act of 1870, above.

(*t*) Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s 2.

(*u*) This means that the wife must acquire the title for the first time since the Act, and a prior reversion falling into possession is not separate property: Lush, 150, citing cases; In re Bacon, [1907] 1 Ch. 475.

(*v*) Married Women's Property Act, 1882 (45 & 46 Vict. 75), s. 5.

(*w*) *Ibid.*, s. 24.

(*x*) Finance Act, 1897 (60 & 61 Vict. c. 24), s. 5, altering Bowers *v.* Harding, [1891] 1 Q. B. 560; Lush, 132, 133.

(*y*) De Serre *v.* Clarke (1874), L. R. 18 Eq. 587; Lush, 137.

The Act is not retrospective and does not interfere with previous settlements (*z*).

The wife's powers of disposition of property under the present Act can be gathered from the sections cited above. As regards dispositions by will, it was held that under the Act of 1882 property acquired by her after her husband's death did not pass by her will made during coverture, because not being enjoyed during coverture it was not separate property; but her will required to be re-executed and republished after coverture. This has been altered by the Married Women's Property Act, 1893, providing that a wife's will shall pass all separate property belonging to her at the time of her death, if dying in the lifetime of her husband, or all her disposable property belonging to her at death if she survives him, and no re-execution or republication is required, and this applies to every will of a wife dying after the Act (*a*).

As regards dispositions *inter vivos* a wife can dispose of her contingent interest in separate property, if that interest if falling into possession during marriage would be her separate property (*b*). She can only bar an entail (equitable), whether property was settled to her separate use before 1882, or is made her separate property by the Act, with her husband's concurrence under the Fines and Recoveries Act, as this is the only method of barring an estate tail (*c*). But she can by herself enlarge a base fee into a fee simple by deed without acknowledgment or her husband's concurrence if married since 1882 or if married before the Act in respect of property accruing after, and if in possession she can cut off the entail (*d*).

The devolution of the separate estate after the wife's death was the same before 1882 as that of her other property, the "separate use" determining on her death. The husband became entitled to her *choses* in possession and chattels real, *jure mariti*, without taking out administration, and by taking it out he became entitled to her *choses* in action (*e*). The Act of 1882 has not

(*z*) In re Whitaker, Christian *v.* Whitaker (1887), 34 Ch. D. 227.

(*a*) 56 & 57 Vict. c. 63, s. 3; In re Wylie, [1895] 2 Ch. 116; In re Bacon, [1907] 1 Ch. 475.

(*b*) Lush, 159.

(*c*) Cooper *v.* Macdonald (1877), 7 Ch. D. 288, 295; Chitty, J., thought this was removed by the Act of 1882, In re Drummond, *infra*.

(*d*) In re Drummond and Davie's Contract, [1891] 1 Ch. 524; Lush, 160.

(*e*) Lush, 167—168.

altered this devolution: under it, as before it, the wife can dispose of her separate property; but it seems the *jus mariti* is abolished, as husband and wife are made distinct legal persons and, therefore, as regards all property acquired since 1882 the husband must take out administration in order to be entitled to what the wife has not disposed of. The *jus mariti* will still give him, without taking out administration, property of hers made separate before 1882 (*f*). As his wife's administrator the husband has all the rights and liabilities in respect of her separate estate, and is subject to the same jurisdiction as she would be if living (*g*). Marriage revokes a previous will made by husband or wife, unless made in pursuance of a power of appointment where the property appointed would not in default of appointment pass to heirs and executors or next of kin of the appointor (*h*). A wife can be a trustee or executrix and dispose of real and personal trust property, and she can be the sole protector of a settlement if she has a prior estate (*i*). A wife is still unable to act as next friend or guardian *ad litem* (*k*). A wife possessed of separate property is liable to maintain her parents (in England), husband and children, and grandchildren till sixteen (in England and Ireland), but the husband continues to be liable as regards the children, and as between him and his wife he is primarily liable. She is not, however, liable to maintain her step-children, legitimate or illegitimate (*l*).

VI. **Restraint on Anticipation.**—As the separate estate of the wife is the invention of equity, the same Court which invented it might mould and modify its own creation in whatever manner it thought fit. It is by force of the donor's intention, to which, in the case of a *feme covert*, equity gives effect, that, contrary to the rule of law, a married woman is permitted to hold property in this peculiar manner, and it is strictly in accordance with the same principle, that equity allows such restrictions to be imposed on the separate interest thus given

(*f*) Lush, 169; see p. 683, *ante*.

(*g*) Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 23.

(*h*) Wills Act, 1883 (1 Vict. c. 26), s. 18; Lush, 170.

(*i*) Married Women's Property Act, 1907 (7 Edw. VII. c. 18, ss. 1, 3; Lush, 176 *et seq.*

(*k*) In re Duke of Somerset (1887), 34 Ch. D. 465. The Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 1 (2), which enables a married woman to sue and be sued in all respects as a *feme sole* only refers to actions relating to herself personally.

(*l*) Married Women's Property Act, 1908 (8 Edw. VII. c. 27); 1882, ss. 20, 21; Lush, 31, 33, 34.

as, by qualifying the extent of her dominion over it, may, in the judgment of the settlor or testator, best secure to the object of his bounty the full and uncontrolled enjoyment of the property for her own benefit (*m*). It has, therefore, allowed restrictions to be imposed on that power of alienation which is incident to the enjoyment of separate property. Although it was originally doubted, yet it is now established, that an express declaration that the wife should not dispose by anticipation of her separate estate, will deprive her of that power (*n*).

The ordinary form of the restriction is one providing for payment of the income to the wife for her separate use "so that the said wife shall not have power to deprive herself of the benefit thereof by sale, mortgage, charge or otherwise in the way of anticipation, and that her receipts only shall be effectual discharges for the same," but any words are sufficient which show that the settlor meant that the wife should not be able to alienate the property (*o*). Alimony payable to a wife or an allowance to her out of the estate of a lunatic husband is subject to the restriction (*p*). No limitation over is necessary, and no forfeiture happens if the wife attempts to alienate (*q*). The restraint does not prevent the wife from barring the entail of separate property settled on her as equitable tenant in tail without power of anticipation (*r*), nor from disposing of the property by will or appointing it under a power to that effect (*s*); nor from exercising the powers of a tenant for life under the Settled Estates Act, 1877, and the Settled Land Act (*t*). The restraint once imposed cannot be got rid of by consent of parties (except as hereinafter by sanction of the Court); it is valid even though the wife fraudulently conceals it and gets an innocent person to advance her money (*u*), and her contracts can not be enforced against property so restricted at the time when the

(*m*) Woodmeston *v.* Walker (1831), 2 Russ. & M. 197, *per* Lord Brougham, at pp. 205, 206.

(*n*) Jackson *v.* Hobhouse (1817), 2 Meriv. 483; 2 Roper, Husband and Wife, 230, 233.

(*o*) Hood Barrs *v.* Cathcart, [1894] 2 Q. B. 559, 569.

(*p*) In re Robinson (1884), 27 Ch. D. 160; Anderson *v.* Hay (1890), 55 J. P. 295; Lush, 265.

(*q*) In re Dugdale (1888), 38 Ch. D. 176.

(*r*) Cooper *v.* Macdonald (1877), 7 Ch. D. 288.

(*s*) *Ibid.* In re Hernando (1884), 27 Ch. D. 284, 294. See Lush, 274, *et seq.*

(*t*) Lush, 306.

(*u*) Lush, 275—278.

contract was entered into to the amount of it remaining at the time of judgment, nor against such property accruing afterwards (*r*).

Present Law.—Modern legislation (the Act of 1882) preserves this protection for the wife by maintaining "all restrictions against anticipation attached to the enjoyment of any property or income by a woman under any settlement," &c., but "no restriction of a woman's own property made by herself has any validity against debts contracted by her before marriage, and no settlement or agreement for a settlement has any greater force or validity against her creditors than a like settlement made by a man would have against his creditors" (*x*). The creditor of a wife can thus (which he could not do before this Act) (*y*) resort to any free separate property which she has at the date of the contract, or acquires subsequently —*e.g.*, which she has in hand at the time judgment is obtained against her—but not income coming to her hands after judgment (*z*).

An Act of 1893 (*a*) extended this limitation still further. Under it every contract made by a wife, otherwise than as an agent, binds all separate property possessed by her at the time of the contract or afterwards, provided that nothing in it is to render available to satisfy any obligation or liability arising out of such contract, any separate property which at the time of the contract or afterwards the wife is restrained from anticipating (*b*). This restores the law as it was before 1882, and prevents the creditor resorting to the income of separate property subject to the restraint at the time of the contract, though coming to her hands after the removal of the restraint before judgment (*c*). It is not clear whether separate

(*r*) Pike *v.* Fitzgibbon (1881), 17 Ch. D. 454 ; Chapman *v.* Biggs (1883), 11 Q. B. D. 27 ; Lush, 280.

(*x*) Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 19. See Hemingway *v.* Braithwaite (1889), 61 L. T. 224 ; Smith *v.* Whitlock (1886), 55 L. J. Q. B. 286 ; Beckett *v.* Tasker (1887), 19 Q. B. D. 7.

(*y*) Lush, 280, 281.

(*z*) In re Shakespear (1885), 30 Ch. D. 169 ; Hood Barrs *v.* Cathcart, [1894] 2 Q. B. 559 ; Draycott *v.* Harrison (1886), 17 Q. B. D. 147.

(*a*) Married Women's Property Act, 1893 (56 & 57 Vict. c. 63).

(*b*) *Ibid.*, s. 1. The proviso in this section makes a contract by a wife not binding on property as to which she was restrained from anticipation at the date of the contract, and such property will, after she has become discovert by the death of her husband, stand entirely clear of any liability or engagements of hers entered into during coverture: Brown *v.* Dimbleby, [1904] 1 K. B. 28.

(*c*) Barnett *v.* Howard, [1900] 1 Q. B. 784 ; Lush, 281, note (*b*), 286 ;

property of the wife so restricted is liable to satisfy damages recovered against her for her torts committed during marriage, or to make good her breaches of trust (strictly only such property as is free from restraint when the tort is committed, and not perhaps income accruing between then and judgment) (*d*), and in the latter case, whether it is liable to indemnify her trustees on the ground of her participation or acquiescence in their breaches of trust under s. 45 of the Trustee Act, 1893: probably not, as it seems that the Court would not remove the restriction for this purpose (*e*).

As regards the wife's torts committed before marriage, her separate property so restricted is not liable to satisfy them unless judgment is obtained against her before her marriage, and a creditor getting judgment against her before marriage cannot enforce it against such property of hers after marriage, unless she has put on such restraint by post-nuptial settlement (voluntary); nor is property in an ante-nuptial settlement where the restraint is put on by a stranger, unless it was a fraud on creditors, and then the rights of children and third parties would not be affected; nor property in an ante-nuptial settlement by the wife (*f*); nor property in a post-nuptial settlement by a stranger (*g*); and a judgment against a married woman in respect of a debt contracted by her before marriage cannot be enforced by way of equitable execution against her separate property which is subject to a restriction against anticipation, where this restriction is not contained in a settlement or agreement for a settlement of her own property made by herself, but is contained, for instance, in a separation deed in which her husband assents to make certain annual payments by monthly instalments for her separate use without power of anticipation (*h*).

Before 1883 it was doubtful whether such restricted property is liable for costs under an order or judgment obtained against her. Probably only such property existing as such at the date of the order or judgment would be so liable (*i*); and after 1882 and till 1893 all income of the wife accruing before the order or judgment

(*d*) Lush, 287—289.

(*e*) Bolton *v.* Curre, [1895] 1 Ch. 544; Ricketts *v.* Ricketts (1891), 61 L. T. 263; Lush, 290, 291; see p. 710, *post*.

(*f*) But see Chubb *v.* Stretch (1870), L. R. 9 Eq. 555.

(*g*) Lush, 293; and see Married Women's Property Act, 1882, s. 19.

(*h*) Birmingham Excelsior Money Society *v.* Lane, [1904] 1 K. B. 35.

(*i*) Lush, 295, 296; In re Glanvill (1886), 31 Ch. D. 532; In re Dixon (1887), 35 Ch. D. 4.

was so liable, as she could then sue alone, but income accruing after it was not. Now by the Act of 1893, when the wife herself institutes any action or proceeding, the Court can order the costs of the opposite party to be paid out of her separate property so restricted and enforce it by appointing a receiver or a sale, or otherwise (*k*). A "proceeding" does not include an appeal (*l*), nor a petition where she is defendant (*m*), nor an order before 1893 (*n*), but it does include a counterclaim by a wife even though proceedings were taken before 1893 (*o*), and by consent of the wife the Court can make an order binding her life interest in such restricted property for costs (*p*). It seems that the wife can also still (as she has been held to be able to do formerly) charge her separate property so restricted for solicitors' costs incurred in successfully defending a suit by her husband to set aside a settlement under which she was so entitled (*q*). Where a wife carrying on a separate trade (*r*) becomes bankrupt, only the dividends of her separate property so restricted will be available for her creditors unless she put on the restraint herself by a fraudulent settlement, and such dividends not paid over to her but in the hands of trustees are available to the judgment creditors (*s*).

Termination.—Such a restriction against alienation will not operate after the coverture has ceased, because it is a mere modification of the separate use which only exists during marriage (*t*). The restraint must not infringe the rule against perpetuities (*i.e.*, exceed existing lives and twenty-one years), and, if it does, the gift to the wife takes effect unfettered by it, though the correctness of this has been doubted (*u*).

When the married woman becomes *discovert*, she has the same power over her property as other persons. The attempt to impose upon the power of alienation a fetter unknown to the common law

(*k*) Married Women's Property Act, 1893 (56 & 57 Vict. c. 63), s. 2.

(*l*) Hood Barrs *v.* Cathcart, [1894] 3 Ch. 376.

(*m*) Hollington *v.* Dear, [1895] W. N. 35.

(*n*) Hood Barrs *v.* Cathcart, *ante*.

(*o*) Hood Barrs *v.* Cathcart, [1895] 1 Q. B. 873; In re Godfrey (1894), 63 L. J. Ch. 854; and on appeal, [1895] W. N. 12.

(*p*) Sedgwick *v.* Thomas (1883), 48 L. T. 100. See generally, Lush, 298, n., 304.

(*q*) In re Keane (1871), L. R. 12 Eq. 115; Lush, 300.

(*r*) See p. 711, *post*.

(*s*) Lush, 262, 301.

(*t*) Lush, 263.

(*u*) Re Ridley, Buckton *v.* Hay (1879), 11 Ch. D. 645; Lush, 306—309.

of England, was considered to be permitted to the extent to which that power was created by equity, but not further. Though the restraint ceases on the determination of the coverture a creditor who has got judgment against the wife during coverture, on a contract made during it, has no greater rights against her property than he would have if the husband were still alive (*x*). The restraint can be removed during coverture by the Court if that appear to be for her benefit (*y*), and not in order to benefit her creditors, but "it may be on her demand to be rid of their importunities" (*z*), unless there is a forfeiture in the event of assignment (*a*). It may be removed if the husband's death can be presumed by law (*b*): if the wife is past child-bearing, there has been a difference of judicial opinion, and it seems that a separate examination of the applicant is generally necessary (*c*). Under the old law, where a husband and wife were separated, and there was property of the wife subject to such restriction, it was doubtful whether the restriction continues: probably it does, and the wife does not get control over it (*d*). The restraint will end on a divorce being pronounced between the parties (*e*).

The effect of the restraint on anticipation is preserved by the Married Women's Property Act, 1882 (*f*).

VII. **Separate Trading by Wife.**—The wife also was entitled in equity to hold as her separate property what she acquired by carrying on trade on her own separate account, apart from and without the interference of, her husband. At common law the general rule was that whatever the wife earned belonged to her husband, and she could only contract as his agent, except in the City of London where she could trade as a *feme sole*, or unless he was a transported convict, or unless she had been deserted by him (*g*). The equitable view was adopted by the statutes already referred to—*i.e.*, the Divorce Acts and the Married Women's Property Acts.

(*x*) Becket *v.* Tasker (1887), 19 Q. B. D. 7; Pelton *v.* Harrison, [1891] 2 Q. B. 422; Married Women's Property Act, 1893 (56 & 57 Vict. c. 63), s. 1; Lush, 287, 301.

(*y*) Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 39 (1).

(*z*) Lush, 302, 303.

(*a*) *Ibid.*

(*b*) *Ibid.*, 304.

(*c*) *Ibid.*, 305.

(*d*) Waite *v.* Morland (1888), 38 Ch. D. 135; Hill *v.* Cooper, [1893] 2 Q. B. 85; Lush, 145, 146.

(*e*) Lush, 145.

(*f*) 45 & 46 Vict. c. 75, s. 19.

(*g*) Lush, 194.

The effect of these provisions is that the wife is no longer as formerly *primâ facie* agent of her husband when carrying on a trade: and there is nothing to prevent husband and wife being partners in business or from contracting together (*h*). As regards her creditors, the wife is solely liable in respects of debts incurred in her separate trade, and the husband is not liable (*i*). She can be made bankrupt in respect of her separate trade, but she is only subject to a proprietary, not a personal liability, and all the provisions of the bankruptcy law are not applicable against her (*k*). A bankruptcy notice cannot be issued against a wife, whether trading separately from her husband or not (*l*), not even after the marriage is ended (*m*), though she can be made bankrupt otherwise (*n*). Only her separate property is liable in her bankruptcy, and it does not include property over which she has a power of appointment (in spite of s. 4 of the Act of 1882 providing that the execution of a general power by will of a married woman makes the property appointed liable for her debts and other liabilities in the same way as her separate property), or any thing which would not be "property" if she were unmarried, but the trustee in bankruptcy is entitled to her life estate under a settlement though subject to restraint on anticipation (*o*).

VIII. **Contracts of Married Women.**—The wife's power of disposition over her separate property has been already considered, and it has been seen how far it may be made available to her general creditors. The next point to be considered is her liability in contract and in tort, during the marriage.

The common law does not allow a married woman, except in special cases, to contract as a *feme sole*, nor, as such, to sue or be sued. The wife cannot, unless in certain exceptional cases, therefore, at common law, bind herself by any contract in regard to her

(*h*) Lush, 202, n., 203.

(*i*) In re Shepherd (1879), 10 Ch. D. 573.

(*k*) Every wife 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 unmarried: Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 1 (5); Lush, 191.

(*l*) In re Gardiner (1887), 20 Q. B. D. 249; In re Lynes, [1893] 2 Q. B. 113.

(*m*) In re Hewett, [1895] 1 Q. B. 328.

(*n*) Lush, 191, 192. See *ante*.

(*o*) In re Armstrong, Ex parte Gilchrist (1886), 17 Q. B. D. 521, a power is not property, per Fry, L.J., at p. 531, but Lush doubts this: In re Armstrong, Ex parte Boyd (1888), 21 Q. B. D. 264; Lush, 193.

separate property. Courts of Equity in analogy to the common law, hold that her *general* personal engagements will not affect her separate property (*p*). If, therefore, the wife contracts debts generally, without doing any act indicating an intention specifically to charge her separate estate with the payment of them, a Court of Equity will entertain no jurisdiction for an application of such estate in the hands of her trustees to such purposes during her life (*q*).

In contract, as already indicated, before 1883, a wife was incapable of binding herself in law, and the only person liable under any contract of hers was her husband, if it could be held to be within the scope of her authority as agent for him (*r*). In equity, however, a decree could be obtained in a contract made by a wife, but only when she had separate property, and the decree was in the form of a declaration that her separate estate was chargeable with the amount due on the contract. Her separate estate was charged, but she was not liable to personal process (to be taken in execution)(*s*), as she was upon a judgment recovered after her marriage against her and her husband in respect of a contract made by her before marriage, and upon a judgment recovered against her and her husband in respect of a wrongful act done by her during the marriage (*t*).

The Married Women's Property Act, 1882, gave to a wife legal capacity of entering into contracts, and "making herself liable in respect of and to the extent of her separate property on any contract, and of suing and being sued in contract or otherwise in all respects as if she were unmarried, . . . and her husband need not be joined with her as plaintiff or defendant, or be made a party to any action or legal proceeding brought by or taken against her (*u*), 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, "and the Act contained a further provision (since repealed) that every contract entered into by a wife shall be deemed to be a contract . . . with respect to and bind her separate property

(*p*) Hulme *v.* Tenant (1779), 2 Dick, 560, 562.

(*q*) The Duke of Bolton *v.* Williams (1793), 2 Ves. 138; Jones *v.* Harris (1804), 9 Ves. 486, 498; Greatley *v.* Noble (1818), 3 Madd. 79, 94.

(*r*) See per Lord Esher, M.R., in Scott *v.* Morley (1887), 20 Q. B. D. 120, at pp. 124, 125.

(*s*) *Ibid.*

(*t*) *Ibid.*

(*u*) Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 1 (2).

unless the contrary be shown (*x*), and every contract of a wife to bind her separate property should bind not only her present, but her after-acquired separate property (*y*). Under this Act it was held that a person suing a wife on a contract must show that she had separate property at the time of entering into it, and that the separate property which she actually had must be such that she could be reasonably presumed to have contracted with reference to it (*z*).

This new liability on her contracts, to which she was not subject before the Act of 1882, is governed by the new remedy provided in the same Act, and is a proprietary and not a personal one, just as was the case before the Act in equity; and thus a wife cannot in respect of a judgment obtained against her under the Act be committed to prison for default in payment of any debt under any order or judgment of the Court (*a*), though she can be proceeded against personally (*e.g.*, by distress and committal) for a liability not imposed by the Act—*e.g.*, rates (*b*).

A further step was taken by the Act of 1893 (*c*), which provided that every contract entered into by a wife otherwise than as agent shall be deemed to be a contract entered into by her with respect to and bind her separate property, whether she is in fact possessed of or entitled to any separate property at the time of entering into such contract, and shall bind all present and future separate property, and shall be enforceable by process of law against any property she may thereafter become possessed of or entitled to while unmarried; but nothing shall make available to satisfy any liability or obligation arising out of such contract any separate property which at that time or thereafter she is restrained from anticipating (*d*). It is thus no longer necessary to show that the wife had separate property at the time of the contract, but it has not been decided under this Act whether it is necessary to show that the wife sued has separate property at the time of trial or judgment. Though there are decisions pointing both ways, it is thought that probably

(*x*) Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 1 (3); In re Shaw (1906), 94 L. T. 93.

(*y*) 45 & 46 Vict. c. 75, s. 1 (4).

(*z*) Lush, 349, citing cases.

(*a*) Debtors Act, 1869 (32 & 33 Vict. c. 63), s. 5; Scott *v.* Morley, *supra*.

(*b*) In re Allen, [1894] 2 Q. B. 924; Lush, 349.

(*c*) Married Women's Property Act, 1893 (56 & 57 Vict. c. 63), repealing s. 1 (3), (4) of the Act of 1882.

(*d*) *Ibid.*, s. 1.

it would be held that such proof is not required as a condition of obtaining judgment, but the judgment may be obtained on the contingency of the wife having separate property then or thereafter to satisfy it (*e*).

A wife's obligations under contracts entered into by her are "debts" within the ordinary law; though not within the Statute of Limitations (*f*), they were barred in equity in the same way (*g*). A wife is also, since 1882, "discovert" within the same Act, and must sue within the times respectively appointed in the Act for the particular cause of action (*h*). So a creditor getting judgment against a wife may bring garnishee proceedings and attach debts due from her to the garnishee (*i*). Though the remedy against a wife is not the same as against an unmarried woman or man, the right of action is the same, and if she joins in a contract with another person and becomes liable to a third party, judgment recovered against one of the joint contractors bars an action against the other (*j*). The liability of wives on contracts made by them as agents for their husbands has been already considered in a previous chapter (*k*). Where a wife contracts by the husband's authority, it is immaterial whether the other party knows or not that she is acting as his agent (*l*).

IX. **Contracts between Husband and Wife.**—Formerly husband and wife, being one person in law, could not contract *inter se* nor sue each other if they could have made a contract (*m*): and marriage suspended any contract made by them before marriage, as it seems it may do so still, though this is doubtful (*n*). In equity it was already recognised that a wife could enter into a contract

(*e*) Lush, 351—354. A wife contracting, whether as agent or otherwise, is liable in her separate estate for (1) breach of contract, or (2) breach of warranty of authority: Lush, 358.

(*f*) 21 Jac. I., 16.

(*g*) In re Lady Hastings (1887), 35 Ch. D. 94, 102.

(*h*) Lowe *v.* Fox (1885), 15 Q. B. D. 667.

(*i*) Holtby *v.* Hodgson (1889), 24 Q. B. D. 103.

(*j*) Hoare *v.* Niblett, [1891] 1 Q. B. 781; Lush, 363.

(*k*) Chapter VI., Personal Capacities of Husbands.

(*l*) Paquin, Limited, *v.* Beauclerk, [1906] A. C. 148.

(*m*) Lush 442, ; see *ante*, as to wife's power to sue her husband's surety on a bond given during marriage to secure a loan made by her to her husband, after husband's death (Richards *v.* Richards (1831), 2 B. & Ad. 447).

(*n*) Butler *v.* Butler (1885), 14 Q. B. D. 831, 836, Wills, J.; and on appeal, 16 Q. B. D. 374, Lush, 442.

with her husband as regards her separate estate—*e.g.*, by making a loan of it to him (*o*).

The Married Women's Property Act, 1882, now enables spouses to contract *inter se* not only with regard to the wife's separate estate, but as freely as the wife could with any person other than her husband (*p*) ; but it does not enable the wife to contract with her husband with regard to real estate held by her before the Act not settled to her separate use (*q*). The Act, however, specially provides for the repayment to the wife of a loan made by her to her husband for the purpose of any trade or business of his on his bankruptcy, such loan being treated as assets of his estate, but reserving the wife's claim to a dividend as a creditor for the amount or value of the loan after, but not before, all claims of the other creditors of the husband for valuable consideration in money or in money's worth have been satisfied (*r*). This applies only to the case of a husband carrying on business by himself, for where he has partners the wife can prove in the bankruptcy of the firm *pari passu* with other creditors, and it does not apply to loans other than business loans made by her to him, though she must prove that the transaction does not fall within the section (*s*). Except that the wife can also, as she could before 1882, retain, as administratrix of her insolvent husband's estate, a loan made by her out of her separate estate to him for his business (*t*), her loans to him for trading purposes are postponed to claims of other creditors (*u*).

A woman living with a man as his wife, but not legally married to him, is put in the same position as a legal wife in this respect (*x*).

Certain contracts between spouses were formerly void on grounds of public policy—*e.g.*, future separation (*y*) ; but they are

(*o*) Woodward *v.* Woodward (1863), 3 De G. J. & S. 672 ; Lush, 443.

(*p*) Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 1 ; McGregor *v.* McGregor (1888), 21 Q. B. D. 424, 428.

(*q*) Lush, 445.

(*r*) Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 3.

(*s*) In re Tuff (1887), 19 Q. B. D. 88 ; Ex parte Tidswell (1887), 35 W. R. 669 ; In re Genese (1885), 16 Q. B. D. 700 ; Mackintosh *v.* Pogose, [1895] 1 Ch. 505 ; and Lush, 446.

(*t*) See p. 694, *ante*.

(*u*) In re May (1890), 45 Ch. D. 499 ; In re Leng, [1895] 1 Ch. 652 : administration by Court of insolvent's estate ; and Lush, 447, 448.

(*x*) In re Beale (1876), 4 Ch. D. 246. For further details on this head, see Lush, 448—452, *passim*.

(*y*) See Lush, chapter xiii., p. 336, *ante*.

now recognised as legal (*z*) if based on good consideration. But an agreement by which the wife was to facilitate proceedings for divorce, though valid by the law of the country where it was entered into, will not be enforced in England as contrary to public policy (*a*). An agreement for separation must be followed by immediate separation (*b*), or it becomes void. Maintenance, secured to a wife under such an agreement, belongs to her as her separate property, and she can dispose of it as she likes subject to the provisions of the deed—*e.g.*, if it contains a restraint against anticipation; but she cannot assign alimony (*c*). A deed of separation will not prevent the spouses claiming their respective rights against each other—*e.g.*, dower or curtesy (*d*).

Proceedings between Husband and Wife.—The law governing this point only comes indirectly within the scope of the present chapter (*e*). It is sufficient to say that husband and wife are now treated as two independent persons (*f*), and the wife has all the same remedies and redress, civil and criminal, against her husband as against other persons for the protection and security of her own separate property as if it belonged to her as a *feme sole;* but, except as aforesaid, neither can sue the other for torts committed during the marriage, and the wife cannot take any criminal proceedings against the husband while they are living together, or while living apart as to any act done by him while they were living together, concerning property claimed by the wife, unless such property be wrongfully taken by the husband leaving or deserting her (*g*).

The wife is liable to criminal proceedings by the husband in respect of any act for which he would be liable to the like by her under the Act (*h*), and questions as to property between husband and wife can be decided in a summary way in the High Court or a County Court (*i*).

(*z*) Wilson *v.* Wilson (1848), 1 H. L. C. 538.

(*a*) Hope *v.* Hope (1857), 8 De G. M. & G. 731.

(*b*) Lush, 457.

(*c*) *Ibid.*, 184, 265, 497; and for details generally, see Lush, chapter xiii.

(*d*) Lush, 503; Slatter *v.* Slatter (1834), 1 Y. & C. Ex. 28.

(*e*) See Lush, chapter xiv.

(*f*) Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 1; see *ante*, *passim*.

(*g*) *Ibid.*, s. 12; see also ss. 16, 17; Wood *v.* Wood (1871), 19 W. R. 1049; Phillips *v.* Barnet (1876), 1 Q. B. D. 436; Weldon *v.* De Bathe (1884), 14 Q. B. D. 339; Symonds *v.* Hallett (1883), 24 Ch. D. 346.

(*h*) Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 16.

(*i*) *Ibid.*, s. 17.

X. **Torts of Wife during Marriage.**—Before 1883 at common law the wife's position as regards post-nuptial torts was the same as regards ante-nuptial debts or torts: as she could not sue or be sued alone, the husband was joined with her, and both were liable to be sued in respect of torts committed by the wife without the husband's participation or authority. On the dissolution of marriage (but not if the spouses were only living apart) the husband's liability ceased. The wife's separate estate was not available in equity to satisfy her general torts, but it was indirectly at law, because she was liable to arrest and imprisonment under a writ of *ca. sa.*, and the Court would not discharge her unless she had *no* separate estate. On the death of her husband she became personally liable for post-nuptial torts; and during the marriage she could make her separate estate liable for frauds committed in the course of her dealing with it, and her separate estate, unless restrained from anticipation, was liable to make good any misfeasance of hers with regard to property in which she had only a limited interest (*k*).

The Act of 1882 put an end to this shadowy legal position of the wife by giving her a substantial, independent juridical position as regards torts or otherwise, similar to that in the case of contracts already noticed, and with a similar exemption to the husband (*l*). He, however, still remains liable to be sued with the wife, as before the Act (*m*), for her post-nuptial torts, though not in respect of such torts if at the time of action the spouses are actually separated (*n*). The Act does not effect torts of the wife committed within the scope of her authority as agent for her husband (*o*), or torts of hers in which he shares. Her liability is not affected by whether she has separate property or not, whatever may be the case as regards contracts (*p*).

There are certain other proprietary relations between the spouses not derived from express contract between them. Two of them are exceptions to the common law rule, that all personal chattels and choses in possession of the wife became the absolute property of the husband, and they thus form a kind of separate estate—namely, pin-money and paraphernalia.

(*k*) Lush, 327—331, *passim*.

(*l*) Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 1 (2).

(*m*) Seroka *v.* Kattenburg (1886), 17 Q. B. D. 177; Scott *v.* Morley (1887), 20 Q. B. D. 120, 125.

(*n*) Cuenod *v.* Leslie, [1909] 1 K. B. 880; Earle *v.* Kingscote, [1900] 2 Ch. 585.

(*o*) Lush, 332.

(*p*) See *ante*, pp. 711 *et seq.*

XI. **Pin-money.**—Gifts by the husband to his wife for clothes, or to purchase ornaments, or for her separate expenditure, either by yearly allowance settled upon the wife before marriage, or by gratuitous gifts or payments afterwards made by him to her from time to time, are known by the name of pin-money. When a settlement is made for this purpose previous to the marriage, it will be binding not only upon the husband, but also upon his creditors.

The wife's savings out of pin-money and other similar allowances to her by her husband, such as certain produce of a farm, *not* in pursuance of an ante-nuptial contract, are not exempt from the husband's debts but are assets in the hands of his executor, though protected from voluntary claims (*q*) ; and arrears of pin-money are only recoverable for a year (*r*).

The husband has also the right to savings out of household money remitted by him to the wife unconditionally and banked by her in her name (*s*).

Since the recent statutes (already referred to) all that the wife acquires from her husband or from a stranger becomes her separate property, and pin-money need not therefore be distinguished from other property (*t*) unless a gift is made by a husband to his wife expressly as "pin-money" (*u*).

XII. **Paraphernalia.**— Since the recent legislation, property of any kind, whether articles of personal use or adornment, acquired by a wife belong to her as her separate property, though not limited to her separate use; but perhaps if such articles were given to her expressly as "paraphernalia" the former law would apply ; if there is nothing to show that they are intended to serve as paraphernalia only, they will probably become her separate property (*a*). Jeune, P. doubted this view, and held that the 1882 Act did not affect paraphernalia on the ground that "the creation of paraphernalia did not imply, nor was dependent on the legal identity which for most

(*q*) Williams, Executors, i. 583.

(*r*) Peacock *v.* Monk (1751), 2 Ves. Sen. 190; Thrupp *v.* Harman (1834), 3 My. & K. 513 ; Williams, Executors, i. 583 ; and see Burge, 1st ed., i., 534.

(*s*) Birkett *v.* Birkett (1908), 98 L. T. 540.

(*t*) Lush, 63—65, gives the law; and see Williams, Executors, i. 582—584 ; Howard *v.* Digby (1834), 2 Cl. & Fin. 634 ; Jodrell *v.* Jodrell (1845), 9 Beav. 45, 54, 55.

(*u*) Lush, 65.

(*a*) Williams *v.* Mercier (1884), 10 App. Cas. 1 ; Lush, 62, 63 ; but see Tasker *v.* Tasker, [1895] P. 1.

purposes existed between husband and wife before that Act, and was so largely modified by it" (*b*), but his reasoning has since been doubted (*c*). The account given in the former edition of the law relating to paraphernalia must be taken as subject to this qualification (*cc*).

The law of England uses the term paraphernalia in a sense different from that in which it is used in the civil law. It is applied to the apparel and ornaments of the wife, suitable to her rank and degree, given to her by her husband (*d*).

Pearls and jewels, whether usually worn by the wife, or only on birthdays and other public occasions, are to be considered paraphernalia (*e*). Old family jewels are not, unless bequeathed specially to the wife (*f*). It will make no difference, as to the widow's right, that the jewels, &c., were in the custody of the husband, if the wife occasionally wore them (*g*).

There is an important distinction between gifts of the husband to the wife for her separate use, and gifts by him to her as paraphernalia; for she may dispose absolutely of the things given to her for her separate use; but when the husband gives them to her expressly for the adornment of her person, she cannot, according to the law of England, dispose of them by gift, or will, during his life (*h*). But the husband may sell them, or give them away in his lifetime (*i*), although he cannot dispose of them by will during her life (*k*); and they are liable to his creditors, in case of a deficiency of assets (*l*). But the widow's claim to her paraphernalia is preferred to that of a legatee of her husband, and, therefore, they will not be liable to satisfy any of the testator's legacies, either general or specific (*m*).

(*b*) Tasker *v.* Tasker, *supra*, at p. 4; Williams, Executors, i. 584—590, takes the same view.

(*c*) Masson, Templier & Co. *v.* De Fries, [1909] 2 K. B. 831.

(*cc*) Burge, 1st. ed., i., 536.

(*d*) 2 Bl. Com. 436, Kerr's ed. ii. 389; 2 Roper, 140, 141.

(*e*) Burge, 1st ed., i. 536, citing 2 Roper, i. 141.

(*f*) Laing *v.* Walker, (1891) 64 L. T. 527; Lush, 61; Jervoise *v.* Jervoise (1853), 17 Beav. 566.

(*g*) Northey *v.* Northey (1740), 2 Atk. 77, 79.

(*h*) Graham *v.* Lord Londonderry (1746), 3 Atk. 393, 394.

(*i*) *Ibid.*

(*k*) 2 Roper, 141.

(*l*) 2 Bl. Com. 436, Kerr's ed. 389; Willson *v.* Pack (1710), Pre. Ch. 295; Ridout *v.* Earl of Plymouth (1740), 2 Atk. 104; 2 Roper, 142, citing cases; Lush, 62.

(*m*) Snelson v. Corbet (1746), 3 Atk. 369, 370; Graham *v.* Lord Londonderry (1746), 3 Atk. 393; 2 Roper, 145—149.

If the husband pledge his wife's paraphernalia as a security for money, the wife surviving him will be entitled to have them redeemed by his executors out of her husband's personal estate, if sufficient for that purpose, after payment of his debts (*n*).

If the husband should bequeath to his wife all household goods, furniture, plate, jewels, linen, &c. for life, or widowhood, with remainder over, this will not bar her paraphernalia (*o*). But, in such a case, if the widow does not, by some act in her lifetime, manifest her election to take them, by her elder and better title, her executor or administrator cannot lay any claim to them after her decease (*p*).

By the civil law *bona paraphernalia*, in all cases, go to the wife to the exclusion of the executor, and they are not subject to payment of the husband's debts (*q*). Where the creditors have a double fund, the widow is entitled to marshal the assets against the heir and against a devisee in trust for payment of debts, but *quære* whether against a devisee simply (*r*). She may bar her right to paraphernalia by accepting marriage articles (*s*).

Paraphernalia are, in their nature, materially distinct from gifts of jewels, &c., to the wife, by third persons for her separate use, as the latter may be alienated by the wife in the lifetime of the husband, and are not liable to his debts. With respect to what shall be considered as given to her separate use, it has been held that diamonds, which had been presented to the wife by the husband's father, on her marriage with his son, were to be considered as a gift to the separate use of the wife, and to which she was entitled in her own right (*t*).

But jewels, &c., presented to the wife by the husband himself, before marriage, were not exempted from being liable to his creditors; for immediately on the marriage the law gave them to the husband, and he cannot be considered as a trustee of them for her separate use afterwards. Now, under the Married Women's Property Act, they belong to the wife, and the husband has no interest in them (*u*).

(*n*) Graham *v.* Lord Londonderry (1746), 3 Atk. 393.

(*o*) Marshall *v.* Blew (1741), 2 Atk. 217.

(*p*) Clarges *v.* Albemarle (1691), 2 Vern. 245, 247; 2 Roper, 150.

(*q*) Williams, Executors, i. 587.

(*r*) *Ibid.*, i. 588.

(*s*) *Ibid.*, 589.

(*t*) Graham *v.* Lord Londonderry (1746), 3 Atk. 393.

(*u*) Ridout *v.* Earl of Plymouth

XIII. **Other Proprietary Relations between Spouses,—Insurances.**—Another proprietary relation between the spouses may be created by insurance effected by one spouse on his or her life for the benefit of the other. The wife may now effect a policy upon her life or on the life of her husband for her separate use, and take all benefits under it (*x*); and a policy by a husband on his own life and expressed to be for the benefit of his wife and children, or *vice versâ*, by a wife on her own life and expressed to be for the benefit of her husband and children creates a trust in favour of its objects, and the moneys payable under such a policy are not included in the estate of the assured, nor are subject to his or her debts so long as any object of the trust is unperformed (*y*). This is, however, subject to a proviso that, on proof that the policy was effected and premiums paid with intent to defraud the creditors of the assured, they are entitled to receive out of the moneys payable under the policy a sum equal to the premiums so paid (*z*).

If the death of the insured under a policy effected by him for the benefit of his wife is caused by the felonious act of the wife, his executors can sue on the policy, but the trust in favour of the wife is incapable of performance, and the insurance money belongs to the insured's estate, no question of public policy arising between his representatives and the insurance company (*a*). In the Act of 1870 a similar power was given to the husband to insure his life for the benefit of his wife and children (*b*), and they took as joint tenants (*c*). The wife may insure her own or her husband's life for her benefit, and the husband can insure the life of his wife for his own benefit, stating that it is so under the general law (*d*).

Dealings by One Spouse with Property of the Other.—The Act of

(1740) 2 Atk. 104, 105; cited by Williams, Executors i. 589, 590.

(*x*) Married Women's Property Act, 1882, s. 11.

(*y*) Re Parker's Policies, [1906] 1 Ch. 526; Prescott *v.* Prescott, [1906] 1 Ir. R. 185.

(*z*) Married Women's Property Act, 1882, s. 11.

(*a*) Cleaver *v.* Mutual R. F. L. Ass., [1892] 1 Q. B. 147.

(*b*) Married Women's Property Act, 1870 (33 & 34 Vict. c. 93), s. 10.

(*c*) Re Davies' Policy Trusts, [1892] 1 Ch. 90, following In re Seyton (1887), 34 Ch. D. 511; for a similar result under a foreign law introduced by contract, see Ex parte Dever, In re Suse and Sibeth (1887), 18 Q. B. D. 660, New York law.

(*d*) Life Assurance Act, 1774 (14 Geo. III., c. 48), s. 2; Evans *v.* Bignold (1869), L. R. 4 Q. B. 622; Griffiths *v.* Fleming, [1909] 1 K. B. 805; see Lush, 238—244.

1882 (*e*) also deals with investments made by the wife with money of the husband without his consent, and allows the latter to recover them; and if the husband makes any gift of property to his wife but such property continues in the order and disposition, or reputed ownership, of the husband, or a deposit or investment of his moneys is made by or in the name of the wife in fraud of his creditors, their rights are not affected, and such moneys may be followed. Before 1882 chattels in the actual possession of husband or wife were in law in the possession of the husband, and if her separate estate were allowed by her trustee to remain in the husband's possession contrary to the terms of the trust the result was the same; but if the terms of the trust admitted of this, such property of hers was not in the husband's possession. Since 1882 possession of both parties is not possession of the husband, but of the party entitled to the property (*f*). The husband may now make a valid gift of chattels to the wife by deed or by parol and delivery subject to the above provision (*g*); but gifts by the wife to the husband are not touched by the section above cited (*h*), and fall under the next head.

XIV. **Gifts Inter Conjuges.**—Marriage does not preclude the husband and wife, even during its continuance, from taking from each other by gift or purchase, and the means by which it is to be effectuated are not now different from those which would be required if they were strangers.

Thus, as the common law regards the husband and wife as one person, they could not by any common law conveyance take immediately from each other any estate either in possession, reversion, or remainder; but the Statute of Uses (*i*) enabled them to take by limitation of a use (*j*).

Since 1882 a husband or wife may convey a freehold estate or chose in action to the other either alone or jointly with another person; a wife may acquire and dispose of realty and personalty of all kinds as if unmarried, and she may possess a chattel in her own right (*k*). The ordinary rules of law applicable to gifts between

(*e*) S. 10.

(*f*) Ramsay *v.* Margrett, [1894] 2 Q. B. 18; and see Lush, 247—255.

(*g*) Bashall *v.* Bashall (1894), 11 T. L. R. 152.

(*h*) S. 10; Lush, 258.

(*i*) Statute of Uses (27 Hen. VIII., c. 10).

(*j*) Burge, 1st ed., i., 550; Litt. Sect. 168; Co. Litt. 187 b.

(*k*) Ramsay *v.* Margrett, [1894] 2

other persons now apply equally between spouses. It seems, therefore, no longer necessary to retain here the account of the law previous to 1883 as to presumptions of law applicable to transactions between spouses—*e.g.*, advances, expenditure, &c.—contained in the last edition (*l*).

XV. **Marriage Settlements.**—Neither the parents, nor the husband, nor wife are under any legal obligation to give to each other, by nuptial contract or settlement, any interest in their property. They may marry without making any settlement; and, except in those instances in which a Court of Equity interposes for the protection of the female, they may be left to the enjoyment of those rights and interests which the law gives them. But it has been seen that the wife's property may be so settled as to exclude or abridge the rights which the husband would otherwise have acquired in it by the marriage, and he may thus be barred of his curtesy and of his interest in the wife's property. The husband may have made such a settlement on his wife as to have acquired an interest in her property to which he would not otherwise have been entitled. He may also make such a settlement on her of his own property as to exclude her from the dower to which she would otherwise be entitled.

Dower.—By the common law the widow's acceptance of a collateral satisfaction of or out of lands in which she was not dowable was no bar to her title to dower in those to which that title attached (*m*). The effect of the Statute of Uses upon the conveyances which affected the greater part of the lands in England was to entitle the widow-at-law to dower in all her husband's unsettled estates of inheritance, whilst she might at the same time retain the lands which had been settled upon her in lieu of that right (*n*). This inconvenience, as well as injustice, induced the legislature to pass a statute (*o*) enabling the husband to bar effectually his wife's right to dower by making a provision for her *before* marriage in lieu of it. This provision is known by the name of jointure.

Jointure.—It is defined by Lord Coke to be "a competent livelihood

Q. B. 18; Bashall *v.* Bashall (1894), 11 T. L. R. 152; Weldon *v.* De Bathe (1884), 14 Q. B. D. 339; Lush, 207.

(*l*) Burge, 1st ed., i., 551-554. See Dunbar *v.* Dunbar, [1909] 2 Ch. 629, and generally see Lush, ch. vii., pp. 211 *et seq.*

(*m*) Co. Litt. 36 b.

(*n*) Vernon's Case (1572), 4 Co. Rep. 1; Gilb. Uses, 321.

(*o*) Statute of Uses (27 Hen. VIII., c. 10), s. 6 (s. 4 Stat. Rev.); Earl of Buckinghamshire *v.* Drury (1761), 2 Eden, 60, 74.

of freehold to the wife, of lands and tenements, to take effect presently in profit, or possession, after the decease of the husband, for the life of the wife at the least" (*q*). Whether legal or equitable, jointure bars the wife's right to dower (*r*). The jointure must be made *before* the marriage, in order to be a complete and irrevocable bar to dower (*s*). But even if it should be made after the marriage, either by deed or will (*t*), it would be a jointure within the statute, if made according to its directions, but it would be *voidable* by the widow, after her husband's death, at her election (*u*). It is, however, no longer of practical importance to consider the question of a widow's dower being barred by jointure (*v*), as, since the Dower Act, dower can be excluded by deed or will (*x*).

Binding Effect of Settlements.—The recent legislation has not affected the power of the parties to a marriage to make what arrangements they please as regards their mutual rights over their own or each other's property, the Act of 1882 (s. 19) providing that nothing therein 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 a married woman. For the provisions usual in practice in marriage settlements reference must be made to the standard authorities (*y*), and attention can only be called here to certain heads of the subject.

The effect of s. 19 of the Act of 1882 has been judicially considered in connection with s. 5 of the same Act, providing that property acquired after the Act by a woman married before the Act is to be held by her as a *feme sole*, under a covenant in a marriage settlement made before the Act by the wife to settle after acquired property, and s. 19 has prevailed (*z*); and that section has also been interpreted in connection with s. 2 of the same Act with regard to settlements made after the Act, with the same result (*a*). But by

(*q*) Co. Litt. 36 b, 37.

(*r*) Lush, 119.

(*s*) Co. Litt. 36 b.

(*t*) Vernon's Case (1572), 4 Co. Rep. 1—4.

(*u*) Burge, 1st ed., i., 539; Co. Litt. 36 b.

(*v*) See Burge, 1st ed,, i., 539—548.

(*x*) See p. 691, *ante*.

(*y*) Davidson, Key and Elphinstone, &c., Precedents in Conveyancing; Encycl. of Eng. Law, xiii., 296.

(*z*) In re Stonor (1883), 24 Ch. D. 195; In re Whitaker (1887), 34 Ch. D. 227; Beckett *v.* Tasker (1887), 19 Q. B. D. 7; In re Queade's Trusts (1885), 54 L. J. Ch. 786.

(*a*) Stevens *v.* Trevor - Garrick, [1893] 2 Ch. 307. For the meaning and effect of this covenant, see Lush, 568—582; Williams *v.* Mercier (1884),

an Act of 1907 a husband cannot now bind his wife's property by settlement unless she executes the settlement or confirms it after attaining majority (*b*).

Where a trust is created by ante-nuptial settlement for the maintenance of infant children it must be executed for their benefit; but the father can execute it and then reclaim recoupment of his expenditure for such purpose (*c*), but he cannot do so in the case of a post-nuptial settlement (*d*). A husband can take, under a provision in a marriage settlement, in favour of "personal representatives" of the wife in an ultimate limitation unless the context shows he is to be excluded (*e*), and persons taking under a limitation to "next of kin under the Statute of Distributions" take as tenants in common, not as joint tenants (*f*).

Marriage settlements or agreements must be made in writing (*g*). Before 1882 a contract between husband and wife, made before marriage, was suspended by marriage in law, though in equity the parties could make contracts relating to her separate estate (*h*). Now they are always separate persons, and a husband is liable in damages to his wife for breach of a promise on the strength of which the marriage takes place (*i*). Part performance will, however, take a case out of the statute (*k*).

Marriage Articles.—Where marriage articles are made pending a future marriage settlement which is never made, the articles are a valid contract and can be enforced by the wife or children (*l*). Where marriage articles and a settlement are both made, the former generally prevail, and the latter will be made to conform to them,

10 App. Cas. 1; In re Garnett (1886), 33 Ch. D. 300; Dawes *v.* Creyke (1885), 30 Ch. D. 500. *Quære*, whether it applies after judicial separation: Hilbers *v.* Parkinson (1883), 25 Ch. D. 200.

(*b*) Stat. 7 Edw. VII., c. 18, s. 2; and see p. 727.

(*c*) Mundy *v.* Howe (Earl) (1793), 4 Bro. Ch. Cas. 224; Wilson *v.* Turner (1883), 22 Ch. D. 521.

(*d*) Kerrison's Trusts (1871), L. R. 12 Eq. 422; Lush, 585.

(*e*) Re Best's Settlement (1874), L. R. 18 Eq. 686.

(*f*) Re Ranking's Settlement (1868), L. R. 6 Eq. 601.

(*g*) Statute of Frauds (29 Car. II., c. 3), s. 4; Hastie *v.* Hastie (1876), 2 Ch. D. 304; Lush, 538.

(*h*) Fitzgerald *v.* Fitzgerald (1868) L. R. 2 P. C. 83; Lush, 442, 443.

(*i*) Synge *v.* Synge, [1894] 1 Q. B. 466.

(*k*) Hammersley *v.* Baron de Biel (1845), 12 Cl. & F. 45, 64, n.; Lassence *v.* Tierney (1849), 1 Mac. & G. 551, 571; Jorden *v.* Money (1854), 5 H. L. C. 185, 210; Lush, 541, 542; see Ex parte Whitehead (1885), 14 Q. B. D. 419.

(*l*) Glenorchy *v.* Bosville (1733), 1 Wh. & Tud. L. C. Eq. 1.

especially if it recites them (*m*). Where there is mutual mistake the Court can rectify the settlement after any lapse of time (*n*). Settlements are construed strictly; articles according to the intention of the parties (*o*).

A Court which decrees dissolution of a marriage can vary marriage settlements whether ante- or post-nuptial ones (*p*). Unless express power of revocation is given in the settlement its trusts are irrevocable, unless the marriage is void, even before the marriage takes place, or if the contemplated marriage never takes place (though the parties cohabit and have children), but this contingency is generally provided for by the settlement (*q*).

Power of Infants to settle Property.—The power of infants to settle property on marriage is governed by the general law, but provision has also been made for it by statute. A settlement by an infant, if by deed, is valid if not repudiated by him or her within a reasonable time after majority; if he repudiates it, it does not bind him, and non-repudiation may be shown by evidence of confirmation (*r*). Statutory provisions (*s*) prohibit any action to charge any person on any ratification after full age of any promise made during infancy, whether there is any new consideration or not for such ratification, in case of acts by an infant which need ratification. Before 1882 an infant wife covenanting before marriage to settle after-acquired property was held only to bind such separate property as was such at the time that she confirmed the covenant when of age, the confirmation having the effect of a new contract (*t*). Since 1882 such a covenant binds all after-acquired property, except such property as is subject to restraint on anticipation, whether the wife covenants in a post-nuptial settlement or confirms such a covenant in an ante-nuptial settlement (*u*); and such confirmation is of no

(*m*) Lush, 545, 546.

(*n*) *Ibid.*, 547, 548.

(*o*) *Ibid.*, 549.

(*p*) Matrimonial Causes Act, 1859 (22 & 23 Vict. c. 61), s. 5; Noel *v.* Noel (1885), 10 P. D. 179; Farrington *v.* Farrington (1886), 11 P. D. 84; A. *v.* M. (1884), 10 P. D. 178; so on pronouncing nullity of marriage: Lush, 550.

(*q*) Paul *v.* Paul (1882), 20 Ch. D. 742; Lush, 551, 552.

(*r*) Edwards *v.* Carter, [1893] A. C. 360, man: Re Hodson, [1894] 2 Ch. 421, woman: Lush, 553.

(*s*) Infants Relief Act, 1874 (37 & 38 Vict. c. 62), s. 2.

(*t*) Smith *v.* Lucas (1881), 18 Ch. D. 531.

(*u*) Buckmaster *v.* Buckmaster (1887), 35 Ch. D. 21; Seaton *v.* Seaton (1888), 13 A. C. 61.

effect in a case where there was incapacity to settle, unless confirmation amounts to an election, or in a case where incapacity is due to marriage, unless confirmation amounts to a disposition made while the infant is unmarried (*x*). Where only one party to a marriage settlement is under age the other is bound, except where it is made under the Infants' Settlements Act or there is fraud by the infant (*y*). A party who does not confirm such a settlement must elect between adopting the deed or disregarding it altogether; but a wife need not elect where she is given an interest subject to restraint on anticipation by the instrument owing to which the question of election arises; but if she does not, her heir must, although an infant (*z*).

The Infants' Settlements Act was passed in 1855 to enable infants to settle property irrevocably on marriage. Male infants of twenty and female infants of seventeen are thereby enabled in contemplation of marriage to make a valid and binding settlement, which perhaps includes post-nuptial settlements (*a*), or contract for a settlement of all or any part of his or her property, or property over which he or she has any power of appointment, whether real or personal, whether in possession, reversion, remainder, or expectancy, and to convey the same for the purposes of such settlement, with approbation of the Court (*b*), with a proviso that if any disentailing assurance is executed by any infant tenant in tail under the Act, and he dies an infant, it is void. The Act removes the disability of infancy only and not that of coverture, and a settlement made by an infant during marriage of a reversionary interest in personalty though made with the sanction of the Court has been held not valid if not in accordance with Malins' Act (*c*) (*i.e.*, acknowledged and concurred in by husband). An infant is liable for the legal expenses of a settlement as "necessaries" (*d*).

By the Married Women's Property Act, 1907, a marriage settlement made by a husband, which is not executed or confirmed by the wife on attaining majority, is not valid, except that if she dies an infant, any covenant or disposition by him binds any interest in her property, to which he becomes entitled on her death, and

(*x*) See note (*u*), *ante*.
(*y*) Lush, 556, 557.
(*z*) *Ibid.*, 557, 558.
(*a*) See note (*u*), *ante*.
(*b*) Infants' Settlements Act, 1855 (18 & 19 Vict. c. 43), s. 1.
(*c*) See p. 671.
(*d*) Helps *v.* Clayton (1864), 17 C. B. N.S. 553; De Stacpoole *v.* De Stacpoole (1887), 37 Ch. D. 139; Lush, 560.

which he could have bound or disposed of before the Act (*e*). This applies to all settlements made since 1882.

Ante-nuptial and Post-nuptial Settlements.—Ante-nuptial settlements prevail not only against the husband, but against his creditors and subsequent purchasers, if they are *bonâ fide* made before and in contemplation of marriage, but they may be invalidated for fraud (*ee*).

If the settlement is not made in consideration of marriage a subsequent marriage will not validate it, and if made in consideration of a marriage void owing to the parties being within prohibited degrees or if made for a marriage abroad not legal here a settlement will be voluntary (*f*). *Inter partes*, however, it holds good if ante-nuptial, though the marriage is illegal (*g*). As marriage articles are as binding as a settlement against creditors, a post-nuptial settlement made in pursuance of a valid ante-nuptial agreement is equivalent to an ante-nuptial settlement—*e.g.*, an infant's ante-nuptial settlement confirmed after marriage. If the settlor is indebted at the time, the settlement is only good as against creditors in favour of persons who are really "purchasers" under it; and such a settlement, though set aside as a fraud on creditors, is still good *inter partes* (*h*).

Purchasers and Volunteers.—Any person within the range of the marriage consideration is a "purchaser," as opposed to a person who is outside it, and is termed a "volunteer." Only purchasers can compel performance of the settlement: and breach of it by one party does not, as in the case of other contracts, release the other, though the defaulter cannot take the benefit of it unless the covenants made by each party are made dependent on their mutual fulfilment, or unless the defaulter is interested by the property being settled on failure of issue to revert to himself. Children are purchasers if the contract is ante-nuptial or in pursuance of marriage articles; if it is post-nuptial they are volunteers (*i*): persons to whom the parties have appointed the

(*e*) Married Women's Property Act, 1907 (7 Edw. VII., c. 18), s. 2.

(*ee*) Burge, 1st ed., i., 549.

(*f*) 27 Eliz. c. 4; Brook *v.* Brook (1858), 3 Sm. & G. 481; and on appeal (1861), 9 H. L. C. 193; Chapman *v.* Bradley (1863), 33 Beav. 61; Ayerst *v.* Jenkins (1873), L. R. 16 Eq. 275.

(*g*) Pawson *v.* Brown (1879), 13 Ch. D. 202.

(*h*) Lush, 562.

(*i*) *Ibid.*, 567, 568; Green *v.* Paterson (1886), 32 Ch. D. 95, 105, 106, Fry, L.J.

settled property are purchasers: collateral relatives, nephews and nieces or children of subsequent marriage are not, nor are children of a prior marriage without apt words for that purpose. Illegitimate children of the settlor cannot claim as purchasers under limitations to them; though such limitations will be valid against subsequent purchasers for value under the statute 27 Eliz. c. 4; and next of kin claiming under an ultimate limitation to next of kin are only volunteers (*k*).

Effect of Bankruptcy.—A post-nuptial settlement is void against the trustee in bankruptcy if the settlor becomes bankrupt within two years, and if he becomes bankrupt within ten years it is void, unless the beneficiaries can prove that when it was made the settlor was able to pay all his debts without such property, and the interest in it passed to its trustee. A covenant or contract made in consideration of marriage to settle upon wife or children property in which the settlor then had no interest, and not being property of or in right of his wife, if he becomes bankrupt before the property has been actually transferred pursuant to the contract, is similarly void, and "settlement" includes any conveyance or transfer of property (*l*).

(*k*) Mackie *v.* Herbertson (1884), 9 A. C. 303; Re Cameron and Wells (1887), 37 Ch. D. 32; Tucker *v.* Bennett (1887), 38 Ch. D. 1; Paul *v.* Paul (1882), 20 Ch. D. 742, cited by Lush, 568 *et seq.*

(*l*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 4.

CHAPTER XIV.

EFFECT OF MARRIAGE ON THE PROPERTY OF THE HUSBAND AND WIFE, UNDER THE LAWS OF THE OTHER BRITISH DOMINIONS, THE UNITED STATES, AND THE LAWS OF INDIA, BURMAH, CHINA, JAPAN, AND SIAM.

SECTION I.

British Dominions.

In previous chapters a summary has been given of the laws by which the rights and interests of the husband and wife in the property of each other are governed in South Africa, British Guiana, and Ceylon, under the Roman-Dutch system, and in Lower Canada, St. Lucia, Mauritius, and the Channel Islands, under the former and modern laws of France, and in Malta by the Italian law.

The law by which they are governed in the other British dominions in Europe, Australia, West Indies, and elsewhere is that of England, with certain alterations made by their local laws.

Isle of Man.—Mutual Rights of Spouses in Lifetime.—By the common law of the Isle of Man the husband of an heiress was solely entitled to the receipt of the rents and profits during the coverture (*a*). The wife had no power to sell or lease her estate unless the husband joined her in the act; nor could the husband sell or make a perfect lease of his estate without the consent of his wife, so as to prejudice her right in case of survivorship. But by a statute of 1777 (*b*) a husband is empowered to lease lands of inheritance for a term not exceeding twenty-one years in possession at the highest and most improved rent.

The husband had during the coverture the disposition of his wife's as well as his own personal property (*c*).

The husband was not only subject to debts contracted by his

(*a*) A. T. 1777; Lex scripta of the Isle of Man, 1819; Johnson's Jurisprudence of the Isle of Man, 1811.

(*b*) Laws, vol. i., 333.

(*c*) Johnson's Manks Jurisprudence, p. 95; Mills' Stat. Laws of Isle of Man, p. 33. In the absence of a settlement the personalty of the wife vests absolutely in the husband upon marriage; but see p. 732, *post*.

wife before marriage, but also to those contracted by her for necessaries after the marriage, except she eloped from him or had a separate maintenance, and then he was not chargeable. But if the husband without cause discarded his wife he was liable to pay for necessaries provided for her; for by the moral and positive laws of all civilized countries he was bound to maintain her (*d*).

If the husband committed a felony, by which his part of the personal goods was forfeited to the lord, yet the wife did not forfeit her part thereof (*d*).

Mutual Rights of Surviving Spouses.—The development of the law of the Isle of Man as to the interests of husband and wife respectively in the lands of each other has been clearly traced by Mr. G. A. Ring, the present Attorney-General of the island, in a recent article in the *Law Magazine and Review*, from which the following account is taken (*e*). These interests depended, as did the descendibility of the lands and their liability for debt, "upon the title by which the lands were acquired. If the husband succeeded to the property as heir, or was the grantee under a *bargaine-eirey* (*f*), his widow was entitled as dower to one-half of the income for life, with the proviso *dum sola et casta vixerit*" (*g*). In case the widow were other than the first wife, and there were issue of a former marriage surviving the husband, the widow was entitled to a quarter only of the lands. "This restriction of the dower, however, did not apply to lands which only became vested in the husband after the death of the former wife. Lands acquired by voluntary settlement or devise stood in the same position with respect to dower as lands of inheritance." In the case of lands acquired by inheritance, *bargaine-eirey*, or devise, gift, or voluntary settlement, "the husband was entitled to his curtesy, consisting of half for life, or until he married again." Bought lands were "anciently chattels," and, therefore, came under the law regulating the devolution of personal estate. In 1577 (*h*) an Act of Tynwald, defining the customary law, declared that "if any man die, the wife to have the one-half of all his goods, and the debts to be paid out of the whole; and also the wife to have the one-halfe of the tenement wherein she dwelleth during her

(*d*) See note (*c*), p. 730, *ante*.

(*e*) 1905, pp. 142–146.

(*f*) *I.e.*, a settlement by an ancestor upon his heir-apparent or presumptive.

(*g*) See Cain *v.* Cain (1838), 2 Moo. P. C. 222.

(*h*) Stats. of I. of Man, i., 47.

widowhood." Although "there is nothing," says Mr. Ring (*i*), "in the known law of the island to suggest a doubt that originally on marriage the personalty of the wife became the absolute property of the husband as in England, and that the wife acquired no interest in her husband's estate during coverture, being simply entitled to a widow-right on his death," notwithstanding this, there grew up between 1577 and 1777 a doctrine of community of goods between husband and wife. The one-half of the husband's personal estate and effects given to the wife by the Act of 1577 was originally meant as dower. But the preamble of the amending Act of 1777 (*k*) recites that this provision "by usage hath been so perverted that by this custom married women now claim an absolute and distinct property in one-half of the goods and chattels of their husbands, insomuch that they make wills during coverture and dispose of one-half; or, in case of their dying intestate without issue, administration is granted to their own kindred in exclusion of the husband's right." The Act of 1777 accordingly provided (*l*) that the widow should have one-half of the goods and chattels, purchased lands, and premises absolutely, subject to one-half of the debts, but that, in case of the wife predeceasing her husband, her rights should cease. The Act reserved, however, to the wife the right of "making a will of the lands, premises, and effects aforesaid, even in the lifetime of her husband as heretofore accustomed in favour of the lawful issue of her body (*m*) or of her husband, but of no other person whatsoever." This right of dower could be barred by settlement before marriage, and this enactment left it still in the power of the wife to prejudice her husband's rights should there be issue

(*i*) *Ubi supra*, at p. 144.

(*k*) Stats. of I. of Man, i., 333.

(*l*) S. 1.

(*m*) Legitimation by subsequent marriage of a child born "within a year or two" (Act of 1594, s. 11) of the marriage although more than two years have elapsed since the child was conceived (Quane *v.* Quane (1852), 8 Moo. P. C. 63) is recognised. The question whether two years is the maximum period allowed was raised in a recent case, where the period was two years and nine months. The Court of first instance held that the child was illegitimate. The Judges in the Appellate Court were equally divided in opinion. A settlement of the case prevented an appeal to the Privy Council: see Mr. Ring's article, *ubi supra*, at p. 149. In Quane *v.* Quane it was held by the Privy Council that the customary law of legitimation, declared in the Act of 1594, applied to a case where more than one child had been born before the marriage: see also Stats. of I. of Man, ii., 358.

of the marriage, or even of a previous marriage on the part of the wife herself. This state of the law was amended by an Act of May 25th, 1852 (*n*), which deprived a wife dying before her husband of all interest in his purchased lands, and provided that her dower in such lands should consist of one-half absolutely, in case the marriage took place before January 6th, 1853, and of one-half for life where the marriage was subsequent to that date.

"Dower (*o*) was never, as in England, a claim superior to debts of the husband, where the land belonged to the class liable to debts. It was also easily released, the wife simply joining her husband in the conveyance. Fines and recoveries were barbarisms unknown to Manx law, and the Celtic wife was considered quite capable of protecting herself against the coercion of her lord without resort to the formality of a separate examination. An equitable estate has always been liable to dower as well as curtesy." According to Manx law there is no such doctrine as that of the wife's equity to a settlement (*p*). Among recent enactments relating to the property of married women may be noted the Conveyancing Act, 1908, s. 21, which enables the Court to bind the interest of a married woman, notwithstanding that she is restrained from anticipation, and the Married Women's Real Property Act, 1908, which provides that a married woman during coverture may devise all real property, and any interests therein, belonging to her in her own right, as fully as if she were a *feme sole*, subject, however, to any estate or interest of her husband therein by curtesy or otherwise.

Canada.—The law of Quebec with regard to the marital *régime* of property has been already stated.

For the other Provinces the subject may be considered under the heads of—(1) Curtesy; (2) Dower; (3) Married Women's Separate Property.

Curtesy.—The right of a husband to his estate by the curtesy in the lands of his deceased wife has been subjected to many limitations in many of the Provinces of Canada by provincial statutes, and in particular by the legislation respecting the property of married women with which it is of necessity involved. In Newfoundland and in the Province of Manitoba and the North-West Territories of Canada, and the Provinces of Alberta and Saskatchewan, it has been

(*n*) Stats. I. of Man, ii., 322.
(*o*) Law Mag. and Rev., 1905, p. 146.
(*p*) See In re Marsland (1886), 55 L. J. Ch. 581.

abolished entirely. Land in Newfoundland descends by statute as chattels real (*q*), and upon the death of the owner it is distributed according to the Statutes of Distribution. In Manitoba it is declared by statute (*r*) that no husband shall be entitled to a tenancy by the curtesy in his wife's estate, but that in the case of a wife dying since July 1st, 1895, the husband is entitled to the same interest in the lands of his wife as a wife has in the estate of her deceased husband (one-third of her real and personal estate if she leaves issue, and if no issue the whole), and the Dominion Land Titles Act of 1894 (*s*), makes similar provisions for the North-West Territories in the case of a woman dying after January 1st, 1887.

Ontario.—Sect. 5 of the Devolution of Estates Act (*t*), which applies to the estates of persons dying on or after the first day of July, 1886, provides that the real and personal property, whether separate or otherwise, of a married woman in respect of which she dies intestate, shall be distributed as follows: one-third to her husband, if she leaves issue, and one-half if she leaves no issue, and subject thereto shall go and devolve as if her husband had predeceased her." In pursuance of this enactment the primary right of a husband is his distributive share in his wife's estate, which is his only interest in her property, unless he elects against the Act, as he may do by virtue of the Act itself (*u*). That Act enacts that "any husband who, if ss. 3 to 9 of this Act had not passed, would be entitled to an interest as tenant by the curtesy in any real estate of his wife may elect to take such interest in the real and personal property of his deceased wife as he would have taken if the said sections of this Act had not been passed, in which case the husband's interest therein shall be ascertained in all respects as if such sections had not passed, and he shall be entitled to no further interest under the said sections of this Act." Although the husband's right of election depends upon a complete intestacy, that is, both as to her real and personal property, on the part of his wife, it is still important, in such cases, to consider the effect of the Married Women's Property Act upon the estate of the husband at the common law. The sole reference to the curtesy in that statute (*r*) will be found in the 5th section, sub-s. 3, which,

(*q*) C. S. Nfd. (1898), c. 77.
(*r*) R. S. M. c. 15, s. 20.
(*s*) 57 Vict. c. 28, s. 7.
(*t*) R. S. O. c. 127.
(*u*) *Ibid.*, s. 4, sub-s. 3.
(*r*) R. S. O. (1897), c. 163.

after enacting that "the real estate of any married woman married after the 2nd day of March, 1872, whether owned by her at the time of her marriage or acquired in any manner during her coverture, shall be held and enjoyed by her for her separate use, free from any estate therein of her husband during his lifetime, and from his debts and obligations, and from any claim or estate by him, as tenant by the curtesy," provides that "nothing herein contained shall prejudice the right of the husband as tenant by the curtesy in any real estate of the wife which she has not disposed of *inter vivos* or by will." There is no similar reservation in the remaining sections of the Act, which emancipate a married woman in Ontario, in respect of her property, as fully as the Imperial enactments on the subject.

The state of the law in Ontario is epitomised by a recognised Canadian authority on the subject in the following words:— "The effect of the various decisions and Acts respecting the property of married women upon the estate by the curtesy may be shortly stated as follows: In all cases in which the husband would be entitled to his estate by the curtesy at common law, he will be entitled to it notwithstanding any of the Acts relating to married women's property, and he is also entitled though the wife's estate is equitable, subject, however, to the right of the wife to deprive him of his estate in her separate property, whether legal or equitable, either by instrument *inter vivos* or by will" (*x*). In the great majority of cases, accordingly, the property of a married woman in Ontario can be effectually disposed of by her in her lifetime or by her will, without her husband's concurrence; and such disposition will deprive him of his interest.

Nova Scotia.—As there is no reservation of the tenancy by the curtesy in the analogous legislation of Nova Scotia and Prince Edward Island an effectual conveyance by a married woman of her separate real estate would presumably bar the right of her husband; but for such conveyance in both of those Provinces, the concurrence of the husband (either by joining in it or by separate instrument), is still necessary.

When a married woman dies intestate in Nova Scotia, leaving issue the husband is entitled to his tenancy by the curtesy in her

(*x*) Armour on Titles, 3rd ed., p. 207.

remaining realty and in addition to one-third of her personal property; if she dies without issue, the husband receives one-half of her personal property and in certain cases the whole (*y*). The Wills Act of this Province still provides (*z*), that no will of a married woman under which the husband takes a greater interest than he would otherwise receive upon her intestacy shall be valid, unless executed when he is not present with a declaration that it is her free act.

Prince Edward Island.—In Prince Edward Island the separate personal property of a wife dying intestate is distributed in the same proportion between her husband and children as the personal property of a husband dying intestate is distributed between his wife and children (one-third to the husband) and, if no child or children, as if the Act had not been passed (*a*). Subject to the Married Women's Property Act, the husband has his tenancy by the curtesy in addition.

New Brunswick.—The Married Women's Property Act of New Brunswick (*b*) expressly reserves the husband's right to his curtesy in the following words:—"Nothing contained in this chapter shall prejudice the husband's tenancy or right to tenancy by the curtesy in any real estate of his wife" (*c*). The effect of this clause has been recently considered in an instructive judgment, which was affirmed by the Supreme Court of the Province (*d*), in which the conclusion is reached that the clause prevents the separate conveyance of the wife having the effect of depriving the husband of his curtesy. Notwithstanding the conveyance, therefore, by a married woman of her separate real estate, the husband, should he survive her, is at her death entitled to his rights according to the common law, at all events as to women married before the Act came into force, viz., on January 1st, 1896. It is intimated in the course of the judgment that the effect of the clause may "possibly be more restricted as regards the husband's right" upon the property of a woman married since the Act came into operation. Acknowledgments by married women are required for the purposes of the Registry Act (*e*) and provision is made for the husband's interest in

(*y*) See R. S. N. S., c. 140, ss. 7, 16.
(*z*) C. 139, s. 15.
(*a*) 3 Edw. VII. c. 9, s. 21.
(*b*) R. S. N. B. (1903), c. 78.
(*c*) S. 4, sub-s. 4.
(*d*) De Bury *v.* De Bury (1903), 36 N. B. R. 57.
(*e*) R. S. N. B., c. 151, s. 60.

the separate personal property of his wife in the event of her intestacy (*f*).

British Columbia (*g*).—While tenancy by the curtesy still exists, a married woman can defeat the right by her dealing with her separate realty as a *feme sole*, as in Ontario. No conveyance by a married woman of real property acquired by her under any will or deed shall be deemed invalid or ineffectual (whether made before or after the Act) because made without the consent or concurrence of her husband (*h*). Her separate personal property is distributed as between her husband and children as the personal property of a husband is distributed between his wife and children, and, if no child, as if the Act had not been passed (*i*), viz., under the Statutes of Distribution.

Dower.—Generally.—The common law right of a widow to her dower in the lands of her husband still exists in the Provinces of Ontario, Nova Scotia, New Brunswick and Prince Edward Island. In all these Provinces, moreover, the provisions of ss. 2 and 3 of the Imperial statute 3 & 4 Will. IV. c. 105, conferring the further right to dower out of equitable estates, to which the husband dies beneficially entitled, and where the husband has been entitled to a right of entry, have been adopted by local enactments (*k*), but there is no dower in unimproved lands in a state of nature, or (in Ontario) in mining lands to which the husband does not die entitled. In Nova Scotia no dower is given out of unimproved land; allowance is to be made therefor in setting off the dower to her in improved land. But the provision that the widow is not entitled to dower out of unimproved land does not preclude her right to have woodland assigned to her from which she may take firewood necessary for her own use and timber for fencing the other portions of land assigned to her of the same lot, tract or parcel.

In British Columbia the husband has the right to dispose during his lifetime or by his will of any real estate he may own, without the consent or concurrence of his wife, but if he dies intestate and without having disposed of his real property she is entitled to her

(*f*) R. S. N. B., c. 161, s. 3.
(*g*) R. S. B. C., c. 97, s. 22.
(*h*) *Ibid.*, c. 130, s. 22.
(*i*) *Ibid.*, s. 21.
(*k*) R. S. O. (1897), c. 164, ss. 2, 3; and (1909), Ont., c. 39; R. S. N. S. (1900), c. 114, ss. 2, 3; R. S. N. B. (1903), c. 77, ss. 1, 2; P. E. I., 62 Vict. c. 13, ss. 1, 2.

dower. The Dower Act of this Province (*l*) is practically a transcript of the Imperial statute (*m*).

There is no right to dower in the Province of Manitoba, in the North-West Territories, Alberta, Saskatchewan, or in Newfoundland. In the last-named colony all land, tenements and other hereditaments, are by statute to be "chattels real," and go to the executor or administrator as other personal property, and there is no provision with respect to dower (*n*). The Dominion Land Titles Act of 1894 (*o*) enacts that no widow, whose husband died on or after January 1st, 1897, shall be entitled to dower in the land of her deceased husband, but she shall have the same right in such land as if it were personal property. A similar enactment in the case of a husband dying on or after July 1st, 1885, is contained in the Revised Statutes of Manitoba (1902), c. 48, s. 19 (*p*).

Dower in Mortgaged Property.—Ontario.—Nova Scotia.—In Ontario, owing to a decision that a wife was entitled to dower in an equity of redemption in those cases alone where the husband had died beneficially entitled to the grant (*q*), a statute of that Province was passed in 1879 which enacted that no bar of dower contained in any mortgage or other instrument intended to have the effect of a mortgage or other security upon real estate should operate to bar such dower to any greater extent than should be necessary to give full effect to the rights of the mortgagee or grantee under such instrument. This Act, which has been held to be confined to mortgages made after March 11th, 1879 (*r*), is now part of the Dower Act (*s*).

To settle the doubts and differences of judicial opinion that had arisen upon its proper construction (*t*) another statute was passed in 1895 (*u*) which added to the provisions of the earlier enactment that the amount to which the wife is entitled should be calculated on the basis of the amount realised from the sale of the land, and

(*l*) R. S. B. C. (1897), c. 63.

(*m*) 3 & 4 Will. IV., c. 105.

(*n*) C. S. Nfd. (1892), c. 77.

(*o*) 57 & 58 Vict. c. 28 (Can.), s. 6.

(*p*) The legislation of Ontario is discussed in Armour on Titles, 3rd ed., pp. 195 *et seq.*; Armour on Real Property, pp. 118 *et seq.*

(*q*) Black *v.* Fountain, 23 Gr. 174; In re Robertson, 25 Gr. 276, 486; Beavis *v.* Maguire, 7 App. R. 704.

(*r*) Martindale *v.* Clarkson, 6 App. R. 1.

(*s*) 1909, c. 39, s. 1.

(*t*) See Pratt *v.* Bunnell (1891), 21 O. R. 1; and Gemmill *v.* Nelligan (1895), 26 O. R. 307.

(*u*) Now part of Dower Act, 1909, c. 39. See s. 1, sub-s. 8; s. 10, sub-s. 8.

not upon the amount realised from the sale over and above the amount of the mortgage only. This enactment does not apply to a mortgage for unpaid purchase-money (*x*). These enactments have been adopted in Nova Scotia (*y*).

Barring of Dower.—Ontario.—Nova Scotia.—Prince Edward Island.—In Ontario, Nova Scotia and Prince Edward Island provision is made by statute for the conveyance of lands without the concurrence of the wife, and, in some cases, free from her dower, where she is of unsound mind or confined in a lunatic asylum, or has been living apart from her husband under such circumstances as would disentitle her to alimony, or otherwise as specified in the several enactments (*z*).

It is no longer necessary, in Ontario, that a bar of dower should be attended with any special procedure (*a*). In Nova Scotia "every deed made by a married woman of any real property to which she is entitled, or in which she has any interest, either present or future, either in her own right or by way of dower, or otherwise, shall be as valid and effectual as if made by an unmarried woman, if (a) the husband of such married woman joins in the deed, or by a separate instrument expresses his concurrence therein, and (b) the married woman acknowledges that the deed is her free act and deed, and that the same was executed freely and voluntarily without fear, threat, or compulsion of, from or by her husband" (*b*); and the acknowledgment must be certified by the person before whom it is made (*c*). The persons before whom the acknowledgment may be made are set out in the 4th section of the Act (*d*). By the Dower Procedure Act (*e*), the procedure in actions for assignment of dower without action is dealt with.

Prince Edward Island.—An acknowledgment and certificate are also required to bar dower in Prince Edward Island by the combined effect of the Acts 24 Vict. c. 18 and 34 Vict. c. 33.

New Brunswick.—By the Registry Act an instrument shall not be registered if executed by a married woman alone, or if executed by her with any other person shall not be deemed to be registered as against her or any person claiming by, through, or under her,

(*x*) See note (*u*).

(*y*) R. S. N. S., c. 114, ss. 6, 7.

(*z*) (1909), Ont. c. 39, ss. 13—18; R. S. N. S., c. 113, ss. 8, 9; P. E. I., 62 Vict. c. 13, ss. 3—7.

(*a*) See (1909), Ont., c. 39, ss. 19, 20; and R. S. O. (1897), c. 165, ss. 3, 5, 6.

(*b*) R. S. N. S., c. 113, s. 3.

(*c*) *Ibid.*, s. 4.

(*d*) *Ibid.*, *infra*, p. 744.

(*e*) R. S. N. S., c. 169.

unless the execution of such instrument is acknowledged by such married woman before some one of the persons authorised to take acknowledgments by the Act, who shall certify as therein provided (*f*).

Election.—Nova Scotia.—Ontario.—Although it is expressly provided that nothing in the Act relating to the descent of real or personal property in Nova Scotia shall affect the right of a widow as tenant in dower (*g*), the third section enacts that if an intestate "leaves no issue, one-half of his real property shall go to his father, and the other half to his widow in lieu of dower." And by statute of that Province, if a testator manifests an intention to dispose of his real property inconsistent with his wife's right to dower, the widow shall be obliged to elect between the provisions made for her by the will and her dower (*h*).

Ontario.—The right to dower is expressly preserved by the Devolution of Estates Act in Ontario (*i*), but it is provided that "A widow may, by deed or instrument in writing, attested by at least one witness, elect to take her interest under this section in her husband's undisposed-of real estate in lieu of all claims to dower in respect of real estate of which her husband was at any time seised, or to which at the time of his death he was beneficially entitled; and unless she so elects she shall not be entitled to share under this section in the undisposed-of real estate aforesaid." The effect of such an election is to give her one-third absolutely in the undisposed-of realty of her husband which is distributed by the statute as personal property.

Separate Property of Married Women.—Provinces—Generally.—An examination of the course of provincial legislation in Canada will show that the English Provinces have consistently endeavoured to follow Imperial legislation and to assimilate the local law regarding the property of married women to that of England. The provisions of the Imperial Married Women's Property Act of 1882 (*k*) have now been very generally re-enacted, and usually in the identical language in all these Provinces, and with a few exceptions, the Imperial statutory amendment of 1893 (*l*) has also been adopted in all of them.

(*f*) R. S. N. B., c. 151, s. 60.
(*g*) R. S. N. S., c. 140, s. 16.
(*h*) *Ibid.*, c. 114, s. 1.
(*i*) R. S. O. (1897), c. 127, s. 4, sub-s. 2.
(*k*) 45 & 46 Vict. c. 75.
(*l*) 56 & 57 Vict. c. 63.

In the older Provinces the dates of the marriage and of the acquisition of her property by a married woman are still material factors in determining the rights of the spouses in the exceptional cases, diminishing in number with the lapse of time, that fall within the terms of special, and sometimes confusing, enactments, which have been preserved in subsequent consolidations. With these exceptions, and subject to what follows, it may be said, roughly, that the law which regulates the rights and liabilities of a married woman in these Provinces in respect of her contracts and torts and of property owned or acquired by, or devolving upon her, conforms to the present law of England.

In all the English Provinces a married woman is now capable of acquiring, holding, and disposing by will, or otherwise, of any real or personal property as her separate property in the same way as if she were unmarried, without the intervention of any trustee. She is also 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 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 proceeding brought by or taken against her; every contract entered into by her is governed by an enactment copied from the first section of the Imperial Act of 1893 (*m*), except in Prince Edward Island, where the amending Act has not yet been adopted; and with the exception of those portions which relate to matters beyond provincial competence under the British North America Act, or are intrinsically inapplicable, the whole of the principal Act of 1882, with slight adaptations and occasional additions, will be found in all the provincial statutes.

Ontario.—The Married Women's Property Act of Ontario is chapter 163 of the Revised Statutes of Ontario, 1897. The fifth section consolidates various provisions relating to women married on or before May 4th, 1859, between that date and March 2nd, 1872, and after the last-named date (*n*).

Every contract entered into by a married woman on or after April 13th, 1897 (no matter when married), is within s. 4, which

(*m*) 56 & 57 Vict. c. 63.

(*n*) For the history of the legislation and a *résumé* of the present law in this Province, see Armour on Titles, 3rd ed., pp. 208, 374 *et seq.*; Bicknell & Kappele's Practical Statutes, pp. 778 *et seq.*; 25 Can. Law Times, pp. 1, 53, 105.

is practically a transcript of the Imperial Act of 1893, s. 1 (*o*). By s. 6, every woman married on or after July 1st, 1884, shall be entitled to have, hold and dispose of as her separate property, all real and personal property belonging to her at the time of marriage, or acquired by, or devolving upon, her after marriage. Her personal earnings are separate estate whether married before or after that date.

Every woman married before July 1st, 1884, is entitled to have, hold and dispose of as her separate property, all real or personal property, her title to which, whether vested or contingent, and whether in possession, reversion or remainder shall accrue on or after that date (*p*).

The provisions of the Imperial Conveyancing Act, 1881 (*q*), are adopted by the 9th section, which empowers the Court, where it appears to be for her benefit, to bind her interest in any property, with her consent, notwithstanding restraint on anticipation.

The 22nd section of the Act provides that any married woman having a decree for alimony against her husband, or who lives apart from him for cruelty or other just cause, or whose husband is a lunatic or undergoing sentence of imprisonment, or from habitual drunkenness, profligacy or other cause neglects or refuses to provide for her support and that of his family, or whose husband has never been in this Province, or who is deserted or abandoned by her husband, may obtain an order of protection entitling her, notwithstanding her coverture, to have and enjoy all the earnings of her minor children free from the debts and obligations of her husband and from his control and without his consent in as full and ample a manner as if she continued sole and unmarried upon the conditions therein specified. A similar enactment is to be found in the legislation of Nova Scotia, New Brunswick, Prince Edward Island, British Columbia, Manitoba and the North-West Territories. The remainder of the Act follows the Imperial precedent (*r*).

Manitoba.—The law of Manitoba has been consolidated and amended and brought into general conformity with the law of Ontario by chapter 106 of the Revised Statutes of Manitoba, 1902.

(*o*) See p. 713.

(*p*) R. S. O. (1897), c. 163, s. 7.

(*q*) 44 & 45 Vict. c. 41, s. 39.

(*r*) It has recently been held in Ontario, following Earle *v.* Kingscote, [1900] 2 Ch. 585, that a husband is still liable for the tort of his wife if the marriage took place before July 1st, 1884: Traviss *v.* Hales (1903), 6 O. L. R. 574.

This Act is free from any distinction as to the time when the marriage took place and applies to all women whenever married and to all their property whenever acquired without distinction (*s*).

Sects. 12 and 13 are respectively taken from ss. 1 and 2 of the Imperial Act of 1893 (*t*). Sect. 19 provides that a married woman shall be subject to liability for the maintenance of her children with a saving of all liability imposed by law upon the husband. The 20th section follows the Ontario statute as to a protection order for the earnings of minor children.

Nova Scotia.—The Consolidated Act of Nova Scotia (*u*) is of the same general character and adopts the Imperial legislation (*v*). Sect. 17 provides that any money, or other property, of a married woman, 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 the case of his executing an assignment for the benefit of creditors, under reservation of the wife's claim to a dividend as a creditor, but not until all claims of other creditors for valuable consideration have been satisfied. Any estate or interest acquired by a husband in his wife's real property by virtue of his marriage is not during her life or the life of her children to be subject to his debts (*x*).

Sect. 18 is peculiar to this Province. Under that section when a married woman carries on, or proposes to carry on business as a trader separately from her husband, she is compelled to file a prescribed certificate in the Registry of Deeds for the local registration district, and, in default, any property employed by her in such business may be taken in execution as the property of her husband, and her husband shall be liable in respect of all debts incurred and contracts made in the carrying on of the business as if incurred or made by himself.

There is the usual provision for the protection of earnings (*y*).

In this Province every deed made by a married woman of any real property to which she is entitled, or in which she has any interest, either present or future, either in her own right or by way of dower or otherwise, shall be as valid and effectual as if made by an unmarried woman, (a) if the husband of such married woman

(*s*) R. S. M., c. 106, s. 2.
(*t*) See pp. 707—709.
(*u*) R. S. N. S. (1900), c. 112.
(*v*) Acts of 1882 and 1893.
(*x*) R. S. N. S. (1900), c. 112, s. 30.
(*y*) *Ibid.*, ss. 31—41.

joins in the deed, or in a separate instrument expresses his concurrence therein, and (b) if the married woman acknowledges that the deed is her free act and deed, and that the same was executed freely and voluntarily without fear, threat or compulsion of, from or by her husband (*z*). If such acknowledgment is made within the Province it may be made before a Judge of the Supreme Court, or a County Court, a justice of the peace, a notary public, or a barrister of the Supreme Court. If made without the Province, before a commissioner appointed to take affidavits without the Province for use within the Province, a Judge of any Court of record, the mayor of any city, a notary public, or an ambassador, minister, consul, vice-consul, or consular agent of His Majesty. The person before whom such acknowledgment is made shall certify the fact that it was so made upon such deed in writing under his hand (*a*).

An amending statute of 1902 (*b*) provides that any married woman residing in the Province, or residing without the Province, and owning or having any interest in real or personal property situate within the Province, not living under a protection order, whose husband is confined in a penitentiary, or other prison, or has ceased to live with her without sufficient legal cause, or resides without the Province, or is a minor or insane or idiotic, or otherwise legally incapacitated from executing a deed, or whose husband's interests in her real estate have been sold under execution, or otherwise disposed of, may apply to a Judge for an order dispensing with the concurrence of such husband in any deed whatsoever of or relating to her real or personal estate. The Judge is thereby empowered to make an order either in the first instance, or upon notice, by which such married woman shall have power to execute such conveyance as if unmarried. A certified copy of the order is to be registered with the conveyance.

New Brunswick.—The New Brunswick statute is chapter 78 of the Revised Statutes of New Brunswick, 1903, which has been in force since January 1st, 1896. Sub-sect. 4 of s. 4, already mentioned, enacts that nothing contained in this chapter shall prejudice the husband's tenancy or right to tenancy by the curtesy in any real estate of the wife. In other respects the statute corresponds, in the main, to the statute law of England. An

(*z*) R. S. N. S., c. 113, s. 3. (*b*) 2 Edw. VII. c. 14.
(*a*) *Ibid.*, s. 4.

acknowledgment is not necessary, as in Nova Scotia, but by s. 60 of the Registry Act, for the purposes of that Act and the registry law of the Province, the deed of a married woman must be acknowledged by her in the manner therein prescribed.

Prince Edward Island.—Recent legislation (*c*) in Prince Edward Island repeals an earlier Act of 1896 (*d*) and brings the legislation of this Province into general accord with that of the other English Provinces, except that the Imperial Act of 1893 has not been adopted there. The present statute appears to apply, indifferently, to women married before, as well as to those married after, its date. The deed of a married woman must still be acknowledged as her free and voluntary act in this Province as prescribed by 24 Vict. c. 18 and amending Acts.

British Columbia.—The British Columbia statute (*e*) repeals the earlier enactments of this Province as from April 7th, 1887. The statute follows the Imperial model closely and contains the usual protection order clause.

Newfoundland.—The Imperial statute of 1882 is adopted in Newfoundland by the Act of 1883, which came into force on April 21st, 1883 (*f*). A later statute (*g*) re-enacts ss. 1 and 2 of the Imperial Act of 1893 and repeals the inconsistent provision of the consolidated statute.

In **Saskatchewan** (*h*), **Alberta, Yukon Territory,** and **North West Territories** the provisions of the Imperial statute are adopted (*i*).

Australia.—Married Women's Property.—New South Wales.—Act 11 of 1893 assimilates the statute law of the colony to that of England, and Act 4 of 1906 provides that no widow shall be entitled, nor after the commencement of the Probate Act, 1890, shall any widow be deemed to have been entitled to dower out of any land or out of any estate or interest therein.

Queensland.—Act 54 Vict. No. 9 (1890) closely follows the Imperial Married Women's Property Act, 1892, and 61 Vict. c. 2 (1897) is practically a re-enactment of the Imperial Married Women's Property Act, 1893.

(*c*) 3 Edw. VII. c. 9.
(*d*) 57 Vict. c. 5.
(*e*) R. S. B. C., c. 130.
(*f*) C. S. Nfd., 2nd series, 1892.
(*g*) 59 Vict. c. 17.
(*h*) No. 18 of 1907.
(*i*) Yukon Act, chapter 63 of Revised Statutes of Canada (1906), ss. 30—35; North West Territories Act, *ibid.*, chapter 62, ss. 26—31.

South Australia.—Acts 300 of 1883-84 and 701 of 1898 introduce the Imperial Married Women's Property Acts, 1882 and 1893. Act 796 of 1902 provides that a married woman and her property shall be subject to all such proceedings and other remedies upon any judgment against her in any Court of justice as might be had or taken upon a judgment against her if she were unmarried, except that execution shall not issue against her property which is subject to a restraint on anticipation.

Tasmania.—Acts 47 Vict. No. 18 and 64 Vict. No. 7 introduce the Imperial statute law.

Victoria.—Acts 1116 of 1890 and 1416 of 1896 adapt the Imperial Acts of 1882 and 1893 to the Colony.

Western Australia.—Acts 20 of 1892 and 22 of 1895 introduce the Imperial Acts of 1882 and 1893.

New Zealand.—Acts 10 of 1884 and 16 of 1894 introduce the Imperial legislation.

Fiji.—Ordinance 5 of 1891 adapts to the Colony the Imperial Act of 1882.

West Indies.—In the first edition of Burge's Commentaries (*j*) attention is drawn to the mutual rights enjoyed by husband and wife with regard to property in slaves, which, although now having only a historical interest, may, as presenting an analogy for the present purpose, be reproduced here.

Slaves were formerly Property subject to Dower.—Until the abolition of slavery by the Acts of the British Parliament and colonial Legislatures, there existed in the West India colonies a species of property which Great Britain had herself created and for more than two centuries encouraged. After that property ceased to exist, the money allotted by the British nation to the owners of slaves as a composition for the price of that property was subject to the same laws by which the property itself was governed.

In Jamaica slaves were for many purposes real property. They descended, and must have been transferred either by act *inter vivos*, or by devise, in the same manner and with the same formalities, as lands. The estate in them was subject to the same principles of law and the same rules of construction, as regulated the creation and tenure of an estate in lands. The husband could not alienate the wife's slaves. Her alienation of them must be with those

(*j*) Burge, vol. i., 563—565.

formalities which were required in the conveyance of her land. The husband would take an interest in them as tenant by the curtesy, subject to the same rules by which he would acquire that estate in her land (*k*). They would descend on her heir.

The wife had a much more restricted interest in her husband's slaves than in his lands (*l*). She was dowable only of those slaves whereof he *died seised*. Her concurrence in his alienation of them was not necessary, and, consequently, he might defeat her title to dower. Even if he had not alienated them in his lifetime, yet her title to dower would be defeated, if his assets, including his slaves, were not more than sufficient for the payment of his debts.

In other colonies, although slaves were assets for the payment of debts, yet they were subject to many of the incidents of real property, which cannot be treated of here; but in none of the colonies, except Jamaica, did the law recognise the title of the husband to an estate by the curtesy in his wife's slaves.

In Barbadoes, Antigua, St. Vincent, Grenada, and Tobago, negroes were assets for the payment of debts, whether they were attached or unattached to the plantation, but those of whom the husband died seised were subject to the dower of the wife after the payment of debts (*m*).

In St. Kitts, Montserrat, and the Virgin Islands (*n*), those only were subject to dower who had been commonly employed in or upon the plantation.

In Nevis, Dominica, the Bahamas, and Bermuda they were not subject to dower (*o*).

For the purpose of giving to the wife the full benefit of her title to dower, the cattle and plantation utensils belonging to a plantation whereof the husband died seised are in some colonies subject to the widow's dower. Thus in Antigua, St. Kitts, and Montserrat, "all coppers, stills, cattle, horses and asses;" and in Grenada and Tobago (*p*) "horned cattle, horses, mules, and asses, commonly

(*k*) 36 Geo. III. c. 10, s. 31, Jam. Law.

(*l*) 8 Will. III. c. 2, ss. 40, 42.

(*m*) Burge, 1st ed., i., 564; Meynell *v.* Moore, 4 Bro. Parl. Ca. 103; Antigua Act, No. 83, cl. 10; St. Vincent's Act, July 11th, 1767, cl. 1; Grenada Act, No. 9, cl. 3; Tobago, 8 Geo. III. cls. 1, 2.

(*n*) Leeward Island Act, No. 31.

(*o*) Nevis Act, No. 18; Conn. Rep. App. 143.

(*p*) Leeward Island Act, No. 31, cl. 3; Grenada Act, No. 12; Tobago Acts, 8 Geo. III., 2 Geo. IV.

used or exercised upon or about any plantation, and all other plantation utensils, are inheritance and affixed to the freehold and are with the plantation descendible to the heir-at-law, and the widow is dowable, as well of them and every of them, as of the lands and tenements whereof her husband died seised, and she is entitled to recover the mesne profits of such plantation. She may recover mesne profits for the negroes, cattle, horses, asses, or other hereditaments whereof she shall be so endowed, against the party or parties who have received or detained the same, in damages by action at law or suit in equity."

Present Law (*pp*).—In these colonies the law by which the rights and interests of the husband and wife in the property of each other are now governed has, for the most part, followed the course of recent legislation in England on the subject. Thus in Barbados (*q*), Grenada (*r*), Jamaica (*s*), the Leeward Islands (*t*), (comprising Antigua, Dominica, Montserrat, Nevis, St. Christopher, and Virgin Islands), and St. Vincent (*u*), the English Dower Act of 1833 has been adopted. In the Bahamas the old law of dower is still subsisting, subject, however, to certain modifications by recent legislation. By the Dower Act, 1873 (*x*), provision is made for the renunciation of dower by married women (*y*), and it is provided that where a judgment debtor has acquired real property otherwise than by descent or devise within twelve calendar months next before the day when judgment is entered up against him, or where such property has been acquired by him otherwise than as aforesaid and he has expended thereon within the twelve months £500 in erecting buildings or otherwise improving the estate, then in either of such cases the real estate may be levied on and sold under the judgment free from all claims to dower. By the Dower Act, 1903 (*z*), of the same Colony, the Court in any action for dower may issue a

(*pp*) This account of the law of the West Indies and Trinidad has been contributed by Mr. J. S. Henderson, barrister-at-law.

(*q*) Dower Act, 1878 (No. 4 of 1878).

(*r*) Act of February 2nd, 1842.

(*s*) Law No. 33 of 1881, amended by Law No. 24 of 1892, which provides that the land of a debtor married before the passing of the Act of 1881 may be ordered to be sold freed from all claim to dower, but of the proceeds of sale such sum as the Court may direct is to be set aside for the wife in lieu of dower.

(*t*) Act No. 13 of 1872.

(*u*) Dower Act, 1850 (No. 82); Dower Act, 1879 (No. 20).

(*x*) 36 Vict. c. 9, amended in certain particulars by 56 Vict. c. 15 and 61 Vict. c. 7.

(*y*) S. 7.

(*z*) 3 Edw. VII. c. 6.

commission for the apportionment of dower, or may order a money compensation to be paid in lieu of an assignment of dower. A provision similar to this also prevails in Bermuda (*a*). In the Turks' and Caicos Islands (*b*) all renunciations of dower of married women must be recorded, and there is a provision as to the non-liability to dower of the real estate of a judgment debtor identical with that obtaining in the Bahamas as mentioned above.

The Imperial Married Women's Property Acts, 1882 and 1893, have been adopted in their entirety in the various colonies above referred to; in most cases both statutes have been followed, while in one or two of the colonies only the Act of 1882 has been reproduced.

Both Acts have been adopted in Bahamas (*c*), Barbados (*d*), Bermuda (*e*), Grenada (*f*), Jamaica (*g*); and the Act of 1882 has been adopted in the Leeward Islands (*h*) and the Turks' and Caicos Islands (*i*). In St. Vincent provision has been made for the protection of the earnings and other property of married women who have been deserted by their husbands (*k*), and the Imperial Married Women's Property Acts have recently been adapted to the colony by Ordinance 15 of 1906. As in England, the right of curtesy of the husband continues.

Trinidad.—Till well on into the nineteenth century Spanish law, which was in force in Trinidad when the island became a British possession, was retained in the colony with some few alterations made from time to time by Orders in Council. The differences between English law and that of Spain were very markedly reflected in the rights *inter se* of husbands and wives as to the property of each other; but now by a series of Ordinances the law of Trinidad as affecting the property of husband and wife has been for the most part assimilated to that prevailing in England.

By Ordinance No. 14 of 1844 it was enacted that as regards persons married thereafter, marriage should operate as an actual gift to the husband of all his wife's personal chattels, either belong-

(*a*) Act No. 253 of 1866.

(*b*) Ordinance No. 9, 1852, ss. 41, 48.

(*c*) 47 Vict. c. 22; 58 Vict. c. 16.

(*d*) Act No. 33 of 1891; Act No. 32 of 1896.

(*e*) Act No. 14 of 1901. By this statute husbands are given electoral rights in respect of the real property of their wives.

(*f*) Act No. 13 of September 1st, 1896.

(*g*) Law 21 of 1886; Law No. 14 of 1895.

(*h*) Act No. 7 of 1887.

(*i*) Ordinance No. 7 of 1889.

(*k*) Ordinance No. 5 of 1886.

ing to her at the date of the marriage or coming to her during the coverture; it was likewise provided that all her choses in action, which the husband might reduce into possession during the marriage, should become his property. The husband was further given an estate for the joint lives of himself and his wife in all the latter's real estate; he was also given an estate by the curtesy in his wife's lands. The tacit mortgage of a married woman on her husband's property was expressly abolished, as was also any interest she theretofore had in the ganancial property, *i.e.*, property consisting of acquisitions *durante matrimonio*. She was, however, given dower out of such of her husband's real property as had not been absolutely disposed of by him in his lifetime or by his will, unless such right to dower was barred. If a husband died intestate his widow was given a right to one-third of his personalty, and if he left no child, or legal representative of such child, she was entitled to a moiety instead of one-third. In 1855 (*l*) a married woman was empowered to dispose, by deed duly acknowledged, of her lands with the concurrence of her husband. By Ordinance No. 4 of 1863 a married woman deserted by her husband might obtain a protection order in respect of her earnings subsequent to the desertion; by Ordinance No. 16 of 1884 the English Married Women's Property Act, 1882, was, with one or two modifications, introduced into Trinidad; and the later Imperial legislation is similarly given effect to (*m*). Since then a further change in the law on this subject has been effected by the Distributions Ordinance (*n*), which by s. 6 provides that in lieu of dower or thirds and of the right to the curtesy and to the marital succession to personalty the widow or surviving husband of an intestate dying after the commencement of the Ordinance shall be beneficially entitled as follows:—(1) If there are no next of kin as defined by ss. 2, 3, and 4, or if the next of kin does not consist of lawful issue of the deceased, to the whole of the deceased's estate; (2) If there is lawful issue of the deceased, to one-third thereof. In the case of marriages before the commencement of this Ordinance, however, the surviving husband's right, which he would otherwise have had to an estate by the curtesy, may at his option be claimed by him in lieu of the provisions given by s. 6.

(*l*) Ordinance No. 21. 1908.
(*m*) Nos. 1 of 1907, and 37 and 50 of 1908.
(*n*) No. 8 of 1902.

The Imperial Married Women's Property Acts, 1882 and 1893, have been adopted in the Straits Settlements (*o*) and Hong Kong (*p*) and there has been legislation on the same lines in the Gold Coast Colony (*q*), Sierra Leone (*r*), Gambia (*s*), and Gibraltar (*t*).

SECTION II.

Law of United States.

United States.—In the United States, while they were part of the British dominions, the early English law was generally adopted, and the legislation of the different States since their independence has proceeded on similar lines to the recent developments in our law, but with the variations indicated below.

The systems of the marriage *régime* of property prevailing in the United States diverge widely from one another. From the point of view of uniformity of legislation the conditions presented are almost chaotic.

In eight of the American jurisdictions positive provisions have been enacted expressly abrogating the common law effects of marriage upon the property of the wife or of the married parties (*u*). Furthermore, those States which have introduced the community system have abrogated the common law rule so far as it obtained among them (*x*).

In a majority of States either there is a general provision that all of the property of the wife shall be deemed separate or held by

(*o*) Ordinance 11 of 1902. This Ordinance applies to all "married women," an expression which (s. 16) includes any woman married in accordance with her "religion, manners and customs," with the exception of Muhammadans (s. 17).

(*p*) No. 5 of 1906. This Ordinance is to be deemed to have come into force on January 1st, 1883. See also No. 5 of 1907.

(*q*) No. 6 of 1890—a brief enactment providing that the wages and earnings of a married woman are property held to her separate use (s. 2), and enabling married women to maintain actions in their own names (ss. 3, 4).

(*r*) No. 7 of 1875.

(*s*) No. 9 of 1885.

(*t*) Nos. 8 of 1885, 19 of 1895, 4 of 1908 (adopting the Imperial Act, 7 Edw. VII. c. 18).

(*u*) Conn., G. S., 1888, s. 2796; Ky., Stat., 1894, s. 2127; Me., R. S., 1883, c. 61, s. 2; Miss., An. Code, 1892, s. 2289; Mont., C. C., 1895, ss. 213, 220; N. D., R. C., 1895, ss. 2766, 2767; Oklah., R. S., 1893, s. 2967; S. D., C. L., 1887, ss. 2588, 2600.

(*x*) Ariz., R. S., 1887, ss. 2100, 2102; Cal., C. C., ss. 162, 164; Idaho, R. S., 1887, ss. 2495, 2497; La., C. C., 1402; Nev., G. S., 1885, ss. 499, 500; Texas, R. S., 1895, arts. 2967, 2968; Wash., G. S., 1891, ss. 1397, 1399.

her as if unmarried (*y*), or there is a number of specific enactments providing that her property shall not be liable for the obligations of her husband, followed by a general clause (*z*), or there is a series of general grants of property rights to the wife which, in effect, produce the same results (*a*).

Finally, there are nine jurisdictions which, while providing in general or specific terms that all the property of a married woman shall be deemed separate, make an exception of objects donated by or acquired from the husband (*b*).

Of the American States in which individual matrimonial property systems exist Florida and Tennessee are the only ones which fail to recognise that the normal condition is the separate system; for although it is declared that the property of the wife shall not be liable for the husband's debts, still in those States the husband has the administration of such property, with the exception of her earnings and deposits in bank. Furthermore, a Court of competent jurisdiction may grant the wife a licence to become a tradeswoman, in which case all of her property becomes separate as though she were unmarried (*c*). In Tennessee the husband still has certain

(*y*) N. C., Const., art. x., s. 6; Ohio, R. S., 1891, s. 3114; Oreg., An. Stat., 1887, s. 2992, as amended by statute of February 22nd, 1893 (Acts, p. 170); Penn., Statute of June 8th, 1893, s. 1 (Laws, p. 344); R. I., G. L., 1896, c. 194, s. 1; Va., Code, 1887, s. 2284; Hawaii, Laws, 1888, c. xi., s. 1.

(*z*) Ala., Code, 1896, ss. 2520—2523, 2530; Ark., Dig., Stat., 1894, ss. 4940, 4945; Ga., Code, s. 2474; Md., Laws, 1898, c. 457, s. 1; Mich., An. Stat., 1882, s. 6295; Minn., G. S., 1894, s. 5531; N. J., Act, March 27th, 1874, ss. 1, 3, 4, Rev., 1877, p. 636; N. Y., Laws, 1896, c. 27, ss. 20, 21; S. C., C. S. L., 1893, s. 2164; Wis., An. Stat., 1889, ss. 2341, 2342, as amended by Laws, 1895, c. 86. See also Loeb, Property Relations of Married Parties, 1900, pp. 130—135.

(*a*) Ill., An. Stat., 1885, c. 68, pars. 7, 9; Ind., An. Stat., 1894, ss. 6962, 6975; Mo., R. S., 1899, s. 4340; Utah, R. S., 1898, s. 1198; Dist. of Col., Act, June 1st, 1896, s. 1, U.S. Stat. at Large, xxix., p. 193.

(*b*) Col., gifts of money, jewelry, and wearing apparel become her separate property, An. Stat., 1891, ss. 3007, 3012; Del., Laws, xv., c. 165, s. 1, R. C., 1893, p. 600; Kans., G. S., 1889, s. 3752; Mass., gifts of wearing apparel and articles for personal use not exceeding $2,000 in value become her separate property, P. S., 1882, c. 147, ss. 1—3, as amended by Acts, 1884, c. 132, and Acts, 1889, c. 204; Neb., C. S., 1891, s. 1411; N. H., P. S., 1891, c. 176, s. 1; Vt., Stat., 1894, s. 2647; W. Va., Code, 1891, c. 66, ss. 2, 3, as amended by Acts, 1893, c. iii.; Wy., R. S., 1887, s. 1558.

(*c*) Fla., Const., art. xi., s. 1, R. S., 1892, ss. 1505—1508, 2070, 2075, 2199, 2208.

common law rights in the property of his wife, though exceptions are made in the case of insurance policies, deposits in bank and stock in building and loan associations, for which a separate estate is created for her by the statutes (*d*).

Wife's Separate Property.—The right of the wife to hold, control, and dispose of her separate property is recognised in all the States except in Louisiana, where the system of community of property for husband and wife exists. In some States the right of the wife to have her separate estate is combined with a right of community to both spouses in all property acquired by them after marriage for themselves, *e.g.*, in California, Arizona, Nevada, Texas, and Washington; but the husband generally has the control of it and the management of it, though the wife's consent is necessary for its disposal and she may be authorised to transact business like a *feme sole* by the Courts. In Nevada all property acquired after marriage, except by gift, devise, or descent, is in common; the husband has absolute control over this during the marriage, and can dispose of it as his separate estate; at his death the entire common property passes to her, and at divorce it is equally divided. In Texas there are similar provisions, except that at the death of one spouse half the community goes to the survivor and half to the children, and the community is liable for the debts of both spouses during coverture and for necessaries. In Florida, where the wife's separate estate is recognised, she may be judicially authorised to deal with it, but otherwise the husband manages it. In Massachusetts and New Mexico she can place her property under her husband's control, and in his absence from the State can deal with it as of right. In Maryland, if the wife is under eighteen, her husband must join in any dealing with her property. In Indiana she cannot alienate her property, nor in Minnesota the homestead, if hers, without her husband's consent. In Vermont all her personal property is separate; she can dispose by will of her real and personal property, but cannot convey realty without her husband's concurrence. In New Jersey she cannot convey her real estate without her husband's consent unless living apart from him under judicial decree, or even without a decree certain interests in land which have no value to him. In Montana she cannot give away by will more than two-thirds of her property without his consent. In

(*d*) Tenn., Code, 1896, ss. 2087, 2142, 4231, 4237.

West Virginia she cannot, though her separate property is completely recognised, convey real estate except with her husband's consent, unless they are living apart. In Tennessee she can deal with her separate estate as she likes, but as regards her general estate she cannot bind herself by bond or by contract to sell and convey it, and she can convey it only by joint deed with her husband. In Virginia she has full separate property; her property is not liable to her husband's debts; and if she is a minor, she may have a receiver appointed for her estates by the Court. In Missouri her property is liable for the necessaries of the family. In South Carolina she is not bound to support her family if her husband is living, nor is she bound by his contracts made for the support of the family or otherwise without her consent. In Nevada a wife is bound to support her husband out of her separate property if he has none, and there is no community property, and he cannot support himself. In North Dakota husband and wife are regarded as separate individuals for holding property, but neither can be excluded from the other's dwelling nor made liable for the other's debts.

Curtesy and Dower.—The rights of the husband to curtesy and the wife to dower out of the other's property continue in most States on the lines of English law, except Indiana, California, Arizona, and Nevada. In Indiana a widow may for one year occupy her husband's house and forty acres of land; she is also entitled to one-third out of her husband's personal estate, and one-third of his realty up to a value of 10,000 dollars, and one-quarter up to a value of 20,000 dollars as against his creditors. In Kentucky she has dower of one-third of his property in fee simple owned during the marriage and half his net personalty. In Maryland there are mutual rights of spouses to curtesy and dower of one-third for life of the other's property. In Ohio each spouse has a similar right on the other's death. In Pennsylvania a widow is entitled to 300 dollars out of her husband's estate before debts and legacies (cumulatively); in his lifetime a wife cannot convey realty without her husband's concurrence, nor can she by will dispose of property so as to affect his rights to curtesy. In Virginia the husband has a right of curtesy which cannot be taken away unless the common law requisites exist. In Connecticut husband and wife (if married since 1877) each take one-third of the other's property; and in the case of marriages

between 1849 and 1877 and of property acquired since 1877 the wife's personalty is vested in the husband in trust for the wife and he takes its profits, and she can only contract for necessaries and sue in respect of any separate trade carried on by her.

Wife's Contracts.—As regards ante-nuptial contracts and debts of the wife the general rule is that the husband is not liable or is only liable to the extent of her separate property received with her at marriage. Thus in Alabama, Nevada, California, South Carolina (except for necessaries after marriage), Maine (if married since 1882), Minnesota (*e.g.*, for her contracts and debts before or during coverture), Mississippi, and Missouri (except to the extent of the property acquired from her), he is not liable. In New Hampshire he is liable for the wife's debts after marriage as at common law. In New York he is liable for her debts before marriage to the extent of the separate property received from her. In Oregon husband and wife are not liable for each other's debts, and the expenses of the family and the children's education are chargeable to both. In West Virginia they may be sued jointly for the wife's ante-nuptial debts, but execution binds only her separate property or such property in the husband's hands. In Vermont he is not liable for her ante-nuptial debts (unless married before 1884). In Wisconsin he is liable for her ante-nuptial debts to the extent of her separate property. In Texas husband and wife are jointly liable for all debts of the wife for necessaries for her and the children and her expenses incurred for the benefit of her separate property, but she cannot trade. In Illinois a wife and husband are not liable for each other's debts except such as are for the support of the children. In North Carolina a wife's property is secured to her by the State Constitution, but she cannot contract to affect her real or personal property except for her necessary personal expenses or for the support of her family or to pay her ante-nuptial debts without the consent of her husband, unless she trades on her own account.

Wife's Torts.—In New York a husband is not liable for his wife's torts unless done under his coercion, nor can he sue for torts to his wife. In Michigan her property is solely liable in execution for judgment against her and her husband for a tort committed by her. In Vermont the husband is not liable for the wife's torts.

Contracts between Spouses.—In Mississippi gifts between husband and wife are void unless in writing and acknowledged and recorded.

They may contract with each other in Alabama and California, and can convey lands to each other in New York (where lands conveyed to them are held by them as tenants by entireties), and also in Washington.

SECTION III.

Laws of India, Burmah, China, Japan, and Siam.

India.—Hindu Law.—Except that in times of pressing need he may use his wife's separate property (*e*), and that he has in certain cases a right of inheritance, a husband does not by marriage acquire any beneficial interest in his wife's property (*f*); but in certain cases the property of the wife (other than that which has been inherited by her) passes to her husband (*g*). Except in the rare cases of her having acquired property by mechanical arts or of her having received gifts from strangers, a wife is able to deal with what is called her *stridhan* property (*h*), whether acquired before, at, or after marriage, in the same way as if she had never been married (*i*).

A Hindu wife is competent to contract (*k*), but unless she be an agent, either express or implied, of her husband, she does not thereby bind him or his property.

Except so far as she may be entitled to maintenance thereout, to a share on partition, and to rights of inheritance (*l*), a wife does not by marriage acquire any interest in her husband's property or any voice in its management (*m*).

A husband may sue his wife, and a wife may sue her husband in respect of any cause of action, in the same way as if they were independent of one another (*n*).

Muhammadan Law.— Except by way of inheritance a Muhammadan

(*e*) See Mohima Chunder Roy *v.* Durga Monee (1875), 23 Calc. W. R. C. R. 184.

(*f*) Sooda Ram Doss *v.* Joogul Kishore Goopto (1875), 24 Calc. W. R. 274.

(*g*) Mayne's Hindu Law, 7th ed., ss. 669, 670, 672.

(*h*) *I.e.*, property over which she has an absolute power of disposal, and includes all property which has come to her otherwise than by inheritance.

(*i*) Ramasami Padeiyatchi *v.* Virasami Padeiyatchi (1867), 3 Mad. H. C. at pp. 278, 279.

(*k*) Nathubhai Bhailal *v.* Javher Raiji (1876), I. L. R. 1 Bom. at p. 123; Ind. Act IX. of 1872, s. 11.

(*l*) In the absence of sons, son's sons, and son's son's sons, the wife is the heir of her husband: Mayne's Hindu Law, 7th ed., s. 553.

(*m*) Sorolah Dossee *v.* Bhoobun Mohun Neoghy (1888), I. L. R. 15 Calc. at p. 306.

(*n*) G. *v.* K. (1794), 2 Morley's Digest, 237.

husband does not by marriage acquire any right in the property of his wife, and except so far as she has rights to dower, to maintenance, or by way of inheritance a Muhammadan woman does not by marriage acquire any right in the property of her husband.

Dower.—A peculiarity of a Muhammadan marriage is that the wife is always entitled to receive from her husband money or other property in consideration of the marriage. Should the amount not be fixed by contract the Court must fix an amount, having regard to the amount that may have been settled upon other female members of the wife's father's family, such as her sisters or paternal aunts. It is usual to stipulate that a portion of the dower be prompt and the remainder deferred. The former is payable at once to the wife, the latter is payable on the dissolution of the marriage by divorce or death (*o*).

The Indian Succession Act, which applies to all persons domiciled in British India who are neither Hindus, Muhammadans, or Buddhists, provides (*p*) that "no person shall, by marriage, acquire any interest in the property of the person whom he or she marries, nor become incapable of doing any act in respect of his or her own property which he or she could have done if unmarried." The Married Women's Property Act, 1874 (*q*), which applies to the same classes of persons, declares a married woman's earnings to be her separate property, empowers her to effect policies of insurance, allows a husband to insure his life for the benefit of his wife, permits a married woman to take legal proceedings, makes her liable for her post-nuptial debts, and releases a husband from any liability for his wife's ante-nuptial debts.

Law of Burmah (*qq*).—The husband and wife may have joint and separate property. The joint property is known as *letetpwa* or *hnapazone*. The separate property is called *thinthi*. The property given by the parents or contributed by the husband towards joint purposes is termed *kanwin*, and becomes part of the joint property. Property inherited by either party during marriage is not classed as *letetpwa*, but all profits arising therefrom come under that designation. Property derived through mutual skill and industry is joint property.

(*o*) 1 Wilson's Digest, ss. 71 *et seq.*
(*p*) Ind. Act X. of 1865, s. 4.
(*q*) Ind. Act III. of 1874.
(*qq*) This account is contributed by Moung Tun Lun, K.S.M., Rangoon.

Alienation of the joint property by either party without the consent of the other affects the interests of the former only.

Law of China (*r*).—The wife cannot possess property of her own so long as the husband lives. When she marries her separate estate passes to her husband, and so to her husband's family, and anything inherited by her during marriage likewise becomes his; but by special stipulation in the marriage contract she may have a reversion in such property after his death. There is no law of *dos* or *paraphernalia*, but by custom a divorced wife or widow will always take her jewellery and silks away with her.

Law of Japan.—Under the Japanese Civil Code, as in the modern European codes, the property of married persons may be regulated either by (1) the statutory *régime* or (2) by a contractual *régime*.

Statutory Régime.—This governs the relations of the spouses as regards property where they do not make a special contract with regard to it before giving notice of their marriage (*a*). The husband, or the wife if she is the head of the family, bears the expenses connected with the marriage, but this does not affect the mutual liability of the spouses to support each other (*b*), or the general preferential rights belonging to a creditor arising from expenditure upon household necessaries, etc. (*c*). The husband (or the wife in the position above mentioned) is entitled to use and take the profits of the other spouse's property in accordance with the uses to which it may be applied, and must pay the interest on the other's debts out of the income of the property, including (*d*), in the case of loans, the ordinary necessary expenditure connected with the thing borrowed (not being a beneficial outlay which he can recover (*e*)), and restoring it in its original state less anything which he has attached to it (*f*). The husband manages the wife's property (*g*) unless he is incapable of doing so, in which case she manages it. He must obtain her consent for contracting debts on her behalf (*h*), for assigning her property, giving it as security, or letting it out to hire for longer periods than those fixed by law for persons without legal capacity or authority (*i*), excluding, however,

(*r*) This account is contributed by Mr. J. Bromley Eames, barrister-at-law.
(*a*) Art. 793.
(*b*) Art. 790.
(*c*) Chapter VIII.
(*d*) Art. 800.
(*e*) Art. 595; and see art. 583 (2).
(*f*) Art. 598.
(*g*) Art. 801.
(*h*) Art. 802.
(*i*) See art. 602.

dealing with the profits of the property for the purposes of management; and, on the wife's application, where he manages her property, he may be ordered by the Court to give security for its administration and restoration to her (*j*).

The wife is considered as her husband's agent with regard to daily household matters; the husband may repudiate her agency in whole or in part, but this does not affect a third person who has acted *bonâ fide* (*k*).

Where the husband manages the wife's property or she acts as his agent each must take the same care as if acting on his or her own behalf; and such agency by either party is subject to the general rules, in the case of termination of the agency, that the agent's representatives must continue to act until the principal can take over the business entrusted to the agent, and that the reasons for terminating the agency on either side must be brought to the notice of the other party before they can take effect (*l*).

The property which a wife, or a husband who on marriage enters the wife's family, acquires before marriage, or in her or his name during marriage, is regarded as his or her special property; and property of which the ownership is not clear as between the spouses is presumed to belong to the husband or the female head of the family (*m*).

Contractual Régime.—A contract which differs from the legal *régime* cannot be set up against the successors of the parties or a third person unless it is registered before notice is given of their marriage. A contract which differs from the legal *régime* for matrimonial property in the country to which the husband belongs, made by foreigners who after marriage become naturalized or domiciled in Japan, cannot be set up in Japan against their successors or a third person unless registered within a year after such naturalization or domicil (*n*).

The proprietary positions of spouses cannot be changed after notice has been given of their marriage. But where one spouse manages the property of the other and endangers it by mismanagement, the other spouse may apply to the Court to be given the management, and in the case of joint property application may be made at the same time for partition of the property. A change of

(*j*) Art. 803.
(*k*) Art. 804.
(*l*) Art. 806; and see arts. 654, 655.
(*m*) Arts. 807, 808.
(*n*) Art. 795.

management or partition of property, owing to the preceding provisions or as the result of a contract, cannot, however, be set up against the successors of the husband and wife or a third party unless registered (*o*).

The right of spouses with respect to their own property or that of their consorts after death fall under the head of "Succession" and not within the province of this work.

Law of Siam (*p*).—There is community of goods between husband and wife, and the husband has the management. Marriage is a kind of partnership between husband and wife for their joint living, and the capital that each party brings in is called *sinderm*: wearing apparel and small ornaments (*q*) are not capital; dwelling-houses are. The subsequent earnings of both husband and wife are called *sinsomrot* (*r*). There may also be separate property of the wife, but this should be in the hands of her parents, guardians, or trustee; if it is under the control of either husband or wife it must be very clearly understood to be separate property.

On death or divorce (other than for adultery on the part of the wife), the property is divided as follows:—The *sinderm* (capital) of each party is first set aside, and then the *sinsomrot* (subsequent earnings) are divided between husband and wife; two shares to the husband and one to the wife if both had capital; two shares to the wife and one to the husband if the wife alone had capital (*s*); if the wife had no capital there is no *sinsomrot* for division (*t*). On the death of a man intestate, after the *sinderm* and *sinsomrot* of the wife have been set aside for her, the deceased's *sinderm* and *sinsomrot* become his estate; and out of this the wife can claim her share under the law of inheritance, which, roughly speaking, amounts to one-third (*u*). A husband cannot by will deprive his wife of her share in *sinderm* or *sinsomrot* save with her consent. As far as her separate property is concerned, a wife is regarded as a *feme sole*.

(*o*) Arts. 796, 797; Gubbins, Civil Code of Japan, Tokio, 1899, 28—33.

(*p*) This account is contributed by H.R.H. Prince Rajburi Direkhiddi, Minister of Justice, Bangkok.

(*q*) Sang *v.* Luang In. Dika, 351, 119.

(*r*) Phua Mia, art. 72 *et seq.*

(*s*) Phua Mia, art. 69.

(*t*) Plub *v.* Somboon, Dika, 773, 123.

(*u*) Laksana Moradok.

CHAPTER XV.

EFFECT OF MARRIAGE ON PROPERTY OF HUSBAND AND WIFE.

Private International Law.

Arrangement of Subject.—The rules of Private International Law with regard to the Marriage Property *Régime* were considered by Burge under the following heads:—

(1) Where there is no express contract regulating the property rights of the spouses, which is the proper governing law in cases (a) where the law of the original matrimonial *régime* is the system of community; (b) where by change of domicil or personal law the parties subsequently come under a different system; (c) where the law of the original matrimonial *régime* does not prescribe the system of community; and what is the law governing (d) capacity of spouses to deal with property.; (e) ante-nuptial debts; (f) debts and charges on immovable property; (g) dispositions of such property made to the husband and wife;

(2) Where there is such an express contract;

(3) Donations *inter conjuges;* and

(4) Separation of goods.

It will be perceived from the preceding chapters that there is a great diversity amongst the several systems of jurisprudence as to the disposition of the property of the husband and wife which the law makes on the occasion and as the effect of their marriage, where this has not been the subject of an express contract between the parties. In this latter case, as will be seen later, the systems of most countries allow the parties free choice subject to its not being prohibited by the personal law of the parties or the *lex fori* (*a*).

Choice of Governing Laws.—The jurisprudence of the country in which the parties were married may be at variance with that of the country in which either of them was domiciled or was a citizen before their marriage or with that of the country in which they

(*a*) Burge, 1st ed., i., 599.

had subsequently acquired a domicil or nationality, or that of the country in which their property was situated.

When such a conflict arises it becomes necessary to ascertain by which of these systems of jurisprudence the rights of the married parties in the property of each other are governed.

I. **Where no Marriage Property Contract.**—When those rights depend on the disposition of the law and not on the express contract of the parties, the jurisprudence of the country in which either the marriage was celebrated (*a*) or the husband or wife was previously domiciled is not that which is admitted, unless that country be also either the matrimonial domicil, or the actual domicil, or the country of which the husband is a subject, or the place in which the property is situated.

General Observations.—Present View.—It may be said here that in the present day the conflict of law as to the effect of marriage on property lies chiefly between the personal law and the *lex situs;* and it is necessary to consider (1) how the personal law is to be determined—by domicil or by nationality; (2) if by domicil, what domicil; (3) what is the scope of the *lex situs* and the relative limits of it and the personal law; (4) the effect of the *lex fori;* (5) the distinction between the statutory *régime* and the contractual *régime* of matrimonial property, and between mutable and immutable *régimes* illustrated in the preceding chapters.

How Personal Law is Determined.—As regards the first two questions, as already stated, in previous discussions, both these standards are recognised, and, generally speaking, nationality is adopted by the Continental countries, and domicil by the English-speaking States.

A distinction requires to be drawn between the term "domicil," which is properly applied to the country whose law governs the personal status of the individual for general purposes, and the term "matrimonial domicil," which is the country the law of which is presumed to be adopted by the spouses for regulating their mutual proprietary rights. This is necessary because several of the Continental Codes, while they adopt nationality as the standard for the former purpose, yet consider that the law of the place which the parties intend to make their matrimonial home should be applied for the latter purpose; though in countries which adopt the

(*a*) Bar, 406; Savigny, s. 379, and Lord Eldon, Lashley *v.* Hog (1804), 4 Paton, 581, p. 612. So Guthrie, 291; Story, ss. 191—199; Lafleur, 164; 1900, J. 982, 987, France; Wharton, s. 192.

standard of domicil for the former purpose the terms "domicil" and "matrimonial domicil" are practically equivalent.

A distinction has also to be drawn between restrictions on the legal capacity of a married woman and limitations on her power of disposal of property owing to the husband's marital power. The former may be regarded as subject to the law of the domicil or the personal law as at the time of the particular transaction: the latter as subject to the law of the original matrimonial domicil or personal law at the date of the marriage (*b*).

Thus the English and American law adopt the law of the matrimonial domicil (*c*); and so does the Swiss Federal Law as far as the property relations of the spouses to one another are concerned (*d*); and the opinions of the older jurists and the Institute follow the same line (*e*). In France and in Belgium the balance of the judicial decisions is in favour of allowing the Courts full liberty to fix the *régime* by reference to the intention, express or implied, of the parties, which must be ascertained from all the circumstances of the case, of which the matrimonial domicil is the most important (*f*). This applies equally to Frenchmen

(*b*) Bar, pp. 417, 418.

(*c*) Dicey, rule 175, 639; Westlake, (4th), s. 36, p. 71; see *post*, p. 775; Dicey, 1st ed., American Notes, ch. xxvi., 657; Wharton, s. 191; Story, ss. 191—199. The matrimonial domicil is the domicil of the husband, actual or intended, at the time of the marriage: *ibid.*, Lafleur, 163.

(*d*) See Swiss Federal Law of June 25th, 1891, art. 19. The relations of the spouses to third parties are governed by the law of the matrimonial domicil for the time being. This rule applies also to foreigners domiciled in Switzerland (art. 32), and was applied in the Courts of Geneva before the passing of the law of 1891 (1880, J. 412; 1886, J. 249, 251). If the first matrimonial domicil of the spouses was outside Switzerland, their property relations are governed by the law of the State of their nationality, except so far as Swiss law applies (see Zeitschrift für Schweizerisches Recht, xiii., 324, xv., 24; Entscheidungen des Bundesgerichts, xi., 121; Revue, xiii., 103). These rules are to remain in force after the Federal Civil Code comes into force (see Final Title, art. 61).

(*e*) See Burge, vol. i., 1st ed., 601 *et seq.*; Bar, 407; and Weiss would apply the personal law of the parties if no contrary intention appears. Weiss would make intention of parties govern: iii. 553, 555. Institute, Lausanne, 1888, art. 14; Ann. x. 78.

(*f*) Baudry-Lacantinerie, iii., p. 11; Affaire Dagés, Cass., 1836, 37, 1, 437; Affaire Fraix, Cass., 1857, Dalloz, 57, 1, 104; Evans *v.* Enregistrement, Cass. D., 1874, 1, 258; Hutchinson *v.* Enregistrement, Cass., 1885, 1886, J. p. 93; Gabay *v.* Sarfati, Cass., 1886, 1886, J. p. 456; Favier *v.* Favier, Cass. S., 1893, 1, 457; Bourgoise, Court of Appeal, Paris, S., 1896, 2, 273; Anderson *v.* Anderson, Douai (1899), 1899, J. p. 825.

marrying abroad and to foreigners marrying in France (*g*), who do not necessarily adopt the respective local laws. Where the parties are of different nationalities, the law of the matrimonial domicil is often given priority over the law of the husband's nationality (*h*). The law of the matrimonial *régime* is to be kept distinct from that of the mutual succession of the spouses, which, as will be seen later, is governed by the law of the deceased's domicil or nationality at the time of his death (*i*).

Many foreign Codes, however, adopt the national law for this purpose (*k*), and it is favoured by a strong body of modern opinion (*l*).

Thus according to German law, if the husband is a German at the date of the marriage, wherever the matrimonial domicil may be situate, the matrimonial *régime* is determined by German law; and if the husband at the date of the marriage is not of German nationality, the matrimonial *régime* is determined by the law of the country of which he was a subject or citizen at the date of his marriage, though the matrimonial domicil is in Germany (*m*); but in the latter case, if the national law adopts the principle of domicil and the domicil of the parties is German, then German law is applied though the parties are not German subjects (*n*).

No express rule is laid down as to the matrimonial *régime* in a case in which the husband at the date of the marriage is not of German nationality and is not domiciled in Germany, but according to the universal opinion and the practice of the Courts, the law of the nationality is also applied in such a case.

There is one modification of the national law which takes place in a case where the matrimonial domicil is in Germany; it consists

(*g*) 1887, J. 331; 1901, J. 354, Frenchmen marrying abroad; 1898, J. 935; 1899, J. 385; 1904, J. 185, foreigners marrying in France. Frenchmen marrying in France are subject to art. 1393 of Code, but this does not necessarily apply to them marrying abroad: 1889, J. 845, C.A., Paris.

(*h*) Aubry et Rau, vol. v., s. 504 bis, pp. 275, 276.

(*i*) 1876, J. 187; Westlake, ss. 42—82; Hernando *v.* Sawtell (1884), 27 Ch. D. 284.

(*k*) Codes of Italy, art. 6; 1903, J. 873, and 1904, J. 187; Spain, art. 1325, which makes the national law of the husband, Spanish or foreign, prevail, but without prejudice to the law governing real property; 1891, J. 1122; 1897, J. 616; Portugal, art. 1107; Belgium, 1876, J. 182; 1881, J. 478.

(*l*) Berlin, 1891, J. 989; Leipzig, *ibid.*; Roumania, 1900, J. 529, 530.

(*m*) Civil Code, s. 15.

(*n*) Code Civil, s. 27.

in the non-recognition of immutable *régimes* (*o*). While the German Courts apply the national law irrespectively of the domicil of the spouses, they do not recognise the immutability of any matrimonial *régime* (*p*).

In many cases in which national law has to be applied the domicil has to be considered as well; this limitation of the doctrine occurs wherever there is no uniform national law (*q*). But the fact that the domicil has in these cases to be considered does not, of course, affect the general principle.

With regard to real property, as will be seen, while the *lex situs* has been declared by the majority of opinions and jurisprudence to be decisive, recently the personal law or law of matrimonial domicil as described above has received strong support, which seems likely to increase even in systems like our own, which have been most positive in favour of the *lex situs* (*r*). The local law must not, however, be infringed by giving effect to the tacit contract of the parties (*s*).

Scope of Lex Situs and Personal Law.—A distinction requires to be made between rights of ownership and the contractual right to claim the ownership of marital property, which resembles the difference in English law between legal and equitable ownership. The *lex situs* controls the actual proprietary rights created over property real or personal, immovable or movable, but the proper law of the parties (personally) may create rights by contract as

(*o*) Therefore, if a Frenchman marries without a marriage contract, being then domiciled in Germany, the spouses may, by post-nuptial marriage contract, modify the French statutory *régime* (*communauté légale*) though this this be forbidden by French law.

(*p*) In the former German law (before 1900) there were no express rules similar to those governing the present law, and there were opposing opinions of jurists. The prevailing opinion in those parts of Germany where the so-called German "common law" was applied favoured the *lex domicilii*. In Saxony the same law was followed; while in the parts of Germany where French law was applied, and in the Grand Duchy of Baden, the law of the nationality was the prevailing law.

(*q*) Thus, for example, a French Court, in applying the national law of a Prussian subject before 1900, could not leave the matrimonial domicil out of consideration, because the statutory *régime* at Berlin was not the same as at Königsberg, and a different statutory *régime* was again applied in Cologne, &c., &c. On the other hand, Saxony (since 1862), as well as the Grand Duchy of Baden (since an earlier period), had the same *régime* throughout its territory.

(*r*) See *post*, pp. 792, 793, and 795.

(*s*) See *post*, p. 796; Story, s. 188.

regards the particular property, which will be enforced against that property on the footing of contract, and *à fortiori* on that of matrimonial contracts, which were and are still regarded as universal assignments of property (*t*). Except in this sense and to this extent, the *lex rei sitæ*, at least as regards personalty, has now but few supporters (*u*). The difference formerly recognised between immovable and movable property, and treated by Burge in the former edition as indubitable, is now disfavoured. Subject to what is said above as to the effect given in Continental countries to the law of the matrimonial domicil, it may be said that the whole marital *régime* on principle is governed by the proper *personal* law, but that as regards tangible objects of property—whether movable or immovable—the acquisition of ownership in the strict sense depends on the *lex situs*, which may claim the right to regulate the property according to the legal *régime* of the country where it is situated, but without prejudice to the contractual or equitable rights created by the matrimonial *régime*. As regards rights to stocks and shares and to choses in action, the rules as to the acquisition of the legal interest are determined analogously by the law of the place where the register is kept or where the debtor is domiciled; but that does not prevent the equitable interest from vesting in the manner required under the proper personal law.

Effect of Lex Fori.—The ordinary rule of conflict is liable to be modified by the influence of the *lex fori*. This law may be that of the temporary residence, but it may also be the law of any Court which properly has jurisdiction over the persons or property concerned, *e.g.*, the law of the domicil of a debtor, the *situs* of the property, &c. This is recognised in the German Civil Code (*x*).

Mutable and Immutable Régimes.—As already seen, in certain countries community of matrimonial property arises in the absence of a marriage contract, *e.g.*, France. In others, community of goods may be adopted by such contract. Again, the *régime* may be immutable, like the French *régime*; or mutable, like the German *régime*. The question whether parties, married under an immutable *régime*, can, after establishing their domicil in a country where the *régime* is mutable, contract themselves out of the original *régime* is one of

(*t*) Westlake, ch. iv., pp. 68 *et seq.*

(*u*) Russian law apparently adopts *lex situs* for both realty and personalty: 1902, J. 479, 480.

(*x*) Introd. Law, art. 30.

great practical importance. In the only case (De Nicols *v.* Curlier) which has as yet come before the English Courts raising this question, the judgments appear to favour the inference that effect would be given to any change of contractual *régime*, but not of an immutable *régime*. As will be seen below, the view of the United States jurists favours giving effect to the actual personal law of the parties as decisive; while the Continental jurisprudence upholds the original matrimonial property *régime* (*y*).

From the change of view which has taken place on the whole subject, the quotations from mediæval jurists made by Burge in the former edition are not now capable of being usefully combined with the opinions expressed on the actual law of the present day, and they are accordingly stated separately where retained, while the original plan of the chapter in his work is followed.

In the former edition, Burge cited the following authors in dealing with this question:—

(a) **Where the Marriage Régime is System of Community.—Older Jurists.**—Amongst the various questions which have arisen in consequence of such a conflict, the subject of the greatest controversy has been the effect of the *communio bonorum* on property situated in a country where the law established no such provision (*z*).

Doctrine of Tacit Contract.—Dumoulin is placed at the head of that numerous body of jurists who maintain that the *communio bonorum* extends to property wherever it is situated. In a case arising out of the marriage of Monsieur de Gannay and Dame Jeanne Boyleaüe, on which he was consulted in 1525, he gave his opinion that, as they were domiciled and married under a *coutume* in which the community prevailed, the widow was entitled to one moiety of the conquests in whatever place they were found, notwithstanding that the marriage contract did not contain any stipulation that they married under the community. He commences his reasoning in support of this opinion by laying down the undoubted proposition that a co-partnership once formed comprehends property wherever it was situated; because every contract, whether it be tacit or express, "ligat personam et res disponentis ubique," &c., and that it affords no objection to the application of this principle to the community that "such a co-partnership is not express, but tacit,

(*y*) 1902, J. 314.

(*z*) Burge, 1st ed., i., 600; Rodenburg, de Jure, c. 5, tit. 2, s. 12.

and arises out of the tacit or presumed contract introduced by local custom" (*a*).

He affirms that there exists this contract between the parties, and asserts that it is one, and indeed the principal cause which subjects them to the law of community, but that it is only a tacit contract.

This doctrine, which Dumoulin supports by referring to Baldus and other authorities, is sanctioned by the decision of the Appellate Court in Belgium (several times approved by the Belgian Courts in modern times), and is approved by Christinæus (*b*).

Rodenburg has adopted it on similar grounds (*c*).

Lambert Goris seems to be of opinion that the property, wherever it is situated, is affected by this tacit contract of the parties (*d*).

A. Wesel has expressed a decided opinion in favour of this doctrine (*e*).

Hertius discusses the case in which the law of the matrimonial domicil is at variance with that of the *locus rei sitæ* in adopting the community. If it exists *in loco rei sitæ*, but not in the husband's domicil, he concludes in favour of the presumed agreement, that the law of the latter country should be adopted (*f*).

The converse of the preceding case is next discussed by him, as when the law of community prevails in the matrimonial domicil but not *in loco rei sitæ*. Having observed that those who maintain that the *lex loci rei sitæ* must prevail admit as an exception the case of an express contract excluding that law, he urges that exception in supporting the opposite opinion (*g*).

He maintains the same opinion on the effect of the law of Liége, called *le droit de main plenie*, by virtue of which the husband, on his marriage, acquires the *dominium* in all his wife's property of every description. He considers that the property of the wife situated at Liége would not be subject to this law if the matrimonial domicil were in Utrecht (*h*).

(*a*) Dumoulin, Conc., 53. See Weiss, iii., 547.

(*b*) Burge, 1st ed., i., 603; Bald. Cons., 208. See Rod. Suarez. De Bon. Acq., nn. 42, 43; Christ. Decis. tom. 2, Decis. 57, p. 55.

(*c*) Rodenb., de Jure Stat. Divers, c. 5, tit. 2, s. 14.

(*d*) De Soc. Conjug., tr. 1, c. 6, p. 62.

(*e*) A. Wesel, tr. 1, s. 115, pp. 42, 219; L. Goris, de Soc. Conj., tr. 1, c. 6, p. 62.

(*f*) Hertius, i., De Collis. Leg., s. 4, p. 143, s. 46.

(*g*) Hertius, *ibid.*, p. 144, s. 47.

(*h*) *Ibid.*, s. 44. The citations from these authors, given in the first edition of Burge, 601—607, are not reproduced in this passage.

Huber adopts this doctrine in its fullest extent (*i*).

It appears to have been sanctioned by Grotius, in an opinion given by him, on the question whether the husband who, by marrying in Holland without an ante-nuptial contract, had by the law of the place acquired the full power of disposition over his wife's property, could exercise this power over property in another State where the same law did not prevail. He was decidedly of opinion that his power extended over the foreign property, for, as the woman had married in a country where the law gave the husband this power, she must be understood to have tacitly contracted to this extent (*k*).

Müller, after referring to the opposite opinions entertained on this question, adopts the doctrine of Dumoulin, that the community originates in the tacit agreement of the parties on their marriage, and that such agreement has the same effect as an express agreement in transferring property wherever it may be situated (*l*).

J. Voet, in his treatise "De Familiâ Erciscundâ," had inclined to the opinion that the community which prevailed in the matrimonial domicil did not extend to immovable property situated in another country (*m*). But in his commentary on the Pandects he recedes from it and adopts the doctrine of Dumoulin. His argument is founded on the presumed or tacit agreement of the parties to conform to the law of the matrimonial domicil. He considers that it is of equal efficacy with a similar express agreement and that it infers an exclusion of any other law (*n*).

It is supported by Stockman, who expresses his dissent from a decision which he reports at variance with it (*o*).

To these authorities may be added Neostad (*p*), Schrassert (*q*), and Van Leeuwen.

Early French Decisions and Jurists.—The decisions in the Courts of France are founded on this doctrine (*r*).

An Arrêt of April 8th, 1718, is an express recognition of it. In

(*i*) Vol. ii., lib. 1, tit. 3, de Confl. leg., s. 9.

(*k*) Hollandsche Consultatien, b. 4, p. 53.

(*l*) Vol. ii., p. 34.

(*m*) J. Voet, de Fam. Ercis., c. 4, n. 19.

(*n*) J. Voet, de Ritu Nupt., lib. 23, tit. 2, n. 85.

(*o*) Stockman's Decis., 50.

(*p*) Obs. de Pact. ant. Nupt. Obs., 9.

(*q*) Obs., 233; Cens. For., lib. 4, c. 23, ss. 5, 6.

(*r*) Two of the earliest are reported by Gousset in his commentary on the *coutume* of Chaumont; liv. 15, nn. 13, 14, 15; Burge, 1st ed., i., 606.

1655 a marriage took place between François A. and Charlotte H. Senlis was the place of their birth and their matrimonial-domicil, and the community of goods prevailed there. On the death of the wife her collateral heirs, in conformity with the community, claimed a partition of the estate in whatever place it was situated, and particularly of property in Normandy. Their claim was resisted on the ground that there was no express contract that the community should exist. In reply to this objection they relied on the tacit or implied contract. It was held that there was no distinction between an express and an implied agreement, and that the operation of the law of community ought in both cases to be determined by the same principles; and accordingly it was adjudged that the partition should take place (*t*).

It was decided by a subsequent Arrêt that when the matrimonial domicil was in Normandy the wife could not claim the benefit of the community of Paris (*u*).

The greater number of the jurists of France have in their commentaries on the several *coutumes* adopted this doctrine of the tacit contract (*x*). It is supported by the authority of Pothier, according to whom the parties to a marriage, when they have not entered into an express contract with regard to the marital property *régime*, are deemed to have tacitly adopted the law of their domicil, which will extend to all the property which they may acquire during the marriage, even though such property is situated in a country the law of which does not admit the *régime* set up by the law of their domicil, unless it has been expressly agreed upon for that purpose (*y*).

Opposing Views.—Merlin is another zealous advocate of this doctrine (*z*).

But it has encountered able opponents. The principal of them, D'Argentré, maintained that there is no such tacit agreement. The utmost effect which can be deduced from the circumstance of

(*t*) 1 Boull. 767, 768.

(*u*) Arrêt, July 27th, 1745; Arrêt, May 7th, 1746.

(*x*) Burge, 1st ed., i., 607; Bouhier, Cout. de Bourg., c. 23, ss. 69, 74; Bacquet, tr. des Droits de Just., c. 21, nn. 66, 67; Auzanet on the 220 art. of the Cout. Dupless., tit. de la Comm.; Notes by Berroyer and Lauriere; Le Maitre, Ferriere, Le Brun; Argou, Hist. du Droit Franç., liv. 3, c. 4, tit. de la Comm., p. 28.

(*y*) Pothier, Tr. de la Comm., art. prélim., tom. 6, nn. 10—12.

(*z*) Merlin, Rep. tit. Comm. and tit. Droits de Feodalité.

the parties having married without any express contract is their simple assent to submit to the law of the matrimonial domicil. Such an assent cannot give to the law an obligatory force which does not in fact belong to it, nor cause it to extend its power to another country. One of the objections to the doctrine of Dumoulin is that he assigns to this supposed tacit agreement a greater effect than would justly belong to an express agreement of a similar import, because, if an agreement had expressed that the parties submitted themselves to the law, they could only be understood to submit to it according to its known operation and effect, namely, that it did not extend to property situated in any country where such a law did not prevail. Nothing less than an express agreement that the community should extend to the future acquisitions *ubicunque fuerint reperti* would give the parties even a personal action to compel a transfer of such acquisitions. He expressed a decided opinion that the community, although it exists in the country of the matrimonial domicil, would not affect property situated in a country where such law does not exist (*a*).

These conflicting doctrines were brought under the consideration of the Court at Brabant in 1698, and the opinion of D'Argentré was adopted. A person whose matrimonial domicil was in Brussels married a lady possessed of considerable real estate in Bergen-op-Zoom. The *communio bonorum* existed in the latter place but not in Brussels. On her death without issue the husband claimed a moiety of her real property in Bergen-op-Zoom. He was opposed by her heirs. The Court decided in favour of the husband. This decision was followed by the celebrated dissertation of Van der Meulen, in which he supports it by reasoning similar to that which had been used by D'Argentré (*b*).

This doctrine, that the law of community does not affect property situated in a country where the provision does not exist, obtained the concurrence of a numerous body of jurists (*c*).

It should, however, be observed that the doctrine of Dumoulin is by himself and the French jurists applied to the community of

(*a*) Argentr., art. 418, pp. 612 *et seq.*

(*b*) Boullenois, Tr. des Stat., tit. 2, c. 5, obs. 29, p. 761.

(*c*) Burge, 1st ed., i., 612, citing Everard, Resp., 213; Peck. de Test. Conj., lib. 4, c. 28; Chassinæus, Covarruv., 199; Van der Keessel, Thes., 28; Matthæus Præm. Belg., par. 2, nn. 63 *et seq.*; Carondas. Greg. Lopez on the Partidas, tom. 2, p. 598; Garsias, de Acquæst., n. 146; Christ. Decis., 133, tom. 3. See 1 Frol. Mem., 223.

property which the husband and wife might acquire *stante matrimonio*, the *communio quæstuum*; and that on the other hand, the argument of Van der Meulen is addressed to the *communio omnium bonorum*, and especially to that of property belonging to the wife at the time of the marriage. It may be, and indeed has been inferred, that Dumoulin would not have extended his doctrine to the community of property belonging to the husband and wife at the time of their marriage, and Van der Meulen has himself stated that his own opinion would have been different if the question discussed by him had involved the *communio quæstuum* (*d*).

It is also to be remarked that Dumoulin acknowledges that his doctrine cannot be admitted, if there exists *in loco rei sitæ* a law which prohibits the community (*e*).

A different view of this question has been taken by other jurists: *e.g.*, Burgundus, who, while otherwise agreeing with Dumoulin, thought that the community ought not to be extended to *acquêts* made in another country (*f*); and Boullenois, who regarded the community as a law, constituting the status of the husband and wife, as conferred by the law of the matrimonial domicil, and affecting property wherever it was situated (*g*), and discarded the theory of a tacit agreement as thus unnecessary for the purpose of giving to this law of community its extraterritorial quality (*h*).

Burge's Opinion.—The conclusion arrived at by Burge (*i*) was to the same effect, namely, that immovable property situate abroad is not affected by the law of community existing in the domicil or matrimonial domicil of the parties, for the following reasons:—

Extraterritorial Effect of Law of Community.—Immovable Property.—1st. The law, which by its own force and operation, and independently of contract, gives an interest in immovable property, is a territorial law.

2nd. Immovable property is not subject to the power of a territorial law, unless such law exists in the country where that property is situated.

3rd. The joint interest which the husband and wife acquire under

(*d*) Boull. 766, 767; Merlin, tit. Comm., vol. v., s. 1.

(*e*) Froland, tom. 1, p. 218.

(*f*) Tr. ad Consuet. Fland. tr. 1, n. 15; Froland, tom. 1, p. 196.

(*g*) Boull. tom. 1, c. 5, obs. 29, p. 750.

(*h*) *Ibid.*, p. 738.

(*i*) 1st ed., i., 617.

the community in the immovable property of each other is conferred by the law alone, unless that law be controlled in its operation by a tacit agreement; such an interest, therefore, will not be acquired in immovable property situated in a country where the law of community does not exist.

4th. If a tacit agreement could be inferred for the purpose of giving to the law of community a more extensive operation than belongs to the quality of a real law, it might with equal propriety be inferred for a similar purpose in the case of other territorial laws, *i.e.*, those which govern the succession to real property, &c., a preference of the law of the country in which a man has passed his life to that of another country, in which his real property may be situated, is as natural a presumption as that in favour of the law of the matrimonial domicil.

5th. It cannot be said that because the title is conferred by the law, as the consequence of the marriage, there is a ground peculiar to marriage for admitting the presumption of a tacit agreement, because no such presumption is admitted in respect of other titles conferred by law as the consequence of marriage, *e.g.*, the titles to *douaire* and *droit de viduité*.

6th. The laws which confer *douaire* and *droit de viduité* are admitted by all jurists to be territorial laws, and consequently they attach on that property only which is situated in the country where they prevail, and they do not extend to that which is situated in another country, and no tacit agreement is presumed, in order to control their powers.

7th. The law establishing a community in immovable property is not essentially distinguished from the laws of *douaire* and *viduité* in any one of those particulars which determine the extent of their power. There does not, therefore, appear to be any substantial reason for allowing the law of community to have the effect of an exterritorial law, and to attach on immovable property, in whatever country it may be situated.

If this reasoning be admitted, the community, when it prevails in the matrimonial domicil, will be confined to such immovable property as is situated either there or in a country in which a similar law exists, but it will not extend to such property situated in a country where a similar law does not exist (*j*).

(*j*) Burge, 1st ed., i., 618, 619.

Extraterritorial Effect of Law of Community.—Movable Property. —Burge's Opinion.—In the preceding observations the law of community has been considered only as it affected immovable property. Its effect on personal property is determined by other principles. According to a principle of international jurisprudence, the acquisition of movable or personal property by the operation of law is, as will be presently shown, governed by the law of its owner's domicil. The community, if it prevailed in the matrimonial domicil, would therefore attach on the movable property of the husband and wife, in whatever place it was situated (*k*).

This proposition is now subject to the qualification that it applies to such universal assignments as arise on marriage contracts and successions, and to the beneficial interests in such property as distinct from the legal ownership (*l*).

Modern Decisions and Jurists.—Modern opinion seems to adopt the theory of tacit agreement and to treat as the governing law on this point the personal statute; and though prohibitions against alienation of matrimonial property have been treated as ineffectual beyond their jurisdiction, this has been doubted (*m*).

Savigny adopts this theory, but bases it upon the voluntary submission of the parties to the law under which they marry. In his view this law applies to foreign immovable property (*n*), and Phillimore and Westlake agree with him (*o*). Bar rejects the idea of implied contract and prefers to treat the personal law as the basis of the matrimonial *régime* of the parties as regards property, as it is generally considered to be that of their personal mutual relations in marriage, regarding this as the historical foundation of the matter. He would make the application of the personal law to foreign real property depend on whether that law adopts the idea of an unity of marriage property similar to that of succession; and to justify its application he would require that both the personal law and the *lex rei sitæ* should hold that doctrine (*p*). Weiss adopts the tacit agreement theory, the law intended by the parties

(*k*) Burge, 1st ed., i., 619; and see pp. 765, 766.

(*l*) Westlake, ch. vii., and pp. 181, 182, 198; and Weiss, iv., pp. 191 *et seq.*; Alcock *v.* Smith, [1892] 1 Ch. 238; Embiricos *v.* Anglo-Austrian Bank, [1904] 2 K. B. 870.

(*m*) 1893, J. 1196, T. C. Toulon.

(*n*) Savigny, s. 379; Guthrie, pp. 293—295.

(*o*) Phillimore, vol. iv., 314, 316; Westlake, 73—75; 1881, J. 315.

(*p*) Bar, Gillespie, 405—412.

governing and applying to all matrimonial property, without distinction between real and personal estate there or abroad (*q*).

Continental Law.—In the Continental jurisprudence, as a general rule, a system of community or any other kind of matrimonial *régime* will extend to property of the spouses abroad unless the *lex situs* prohibits it, *e.g.*, this view has been adopted by the Institute (*a*), and favoured by German and Italian writers (*b*). In France the prevailing judicial opinion seems to uphold the *lex situs* as governing real property of foreigners in France (*c*), but the opinions of jurists would confine the supremacy of French law in this matter only to a controlling function and not a directly governing power (*d*).

Law of Quebec.—In Canada (Quebec) the Courts have held that community established by the law of the matrimonial domicil will apply to property real or personal abroad (*e*).

English Law.—In England until lately there was no definite decision on this point, but there were judicial dicta which seemed to negative the theory of the tacit contract (extending even to personalty abroad), and make the matrimonial *régime* of the spouses depend on the law of the actual domicil at the time of the dissolution of the marriage (*f*). It has, however, lately (1900) been held by the House of Lords that the French system of community of goods imposed by the law of the matrimonial domicil upon the parties in the absence of express contract applies to personalty in England as an implied contract (*g*), and the High Court has held that the reasoning of that decision applies the same system of law to real property in England, and creates a personal obligation in respect of it, if that is not inconsistent with English

(*q*) Weiss, iii., 551.

(*a*) Institute, Lausanne, 1888, s. 12; Ann., x., 77.

(*b*) Bar, Gillespie, 407.

(*c*) Weiss, iii., 557, 155—158; Code Civil, art. 3, s. 2. Weiss thinks this does not apply to the rule in art. 1554 of the Code against alienation of *dot*, 558.

(*d*) Weiss would apply the criterion of intention to govern real as well as personal property, but admits that French jurisprudence distinguishes between them: iii., 555, 556; see *post*, p. 794.

(*e*) Lafleur, 165, 166, citing Languedoc *v.* Laviolette (1848), 8 L. C. R. 257.

(*f*) Foubert *v.* Turst (1703), 1 Bro. P. C. 129; Burge, 1st ed., i., 615, 619; Hall *v.* Hall (1854), 16 D. 1057; Duncan *v.* Cannan (1854), 18 Beav. 128; (1855), 7 D. M. & G. 78; Guepratte *v.* Young (1851), 4 D. G. & Sm. 217.

(*g*) De Nicols *v.* Curlier, [1900] A. C. 21.

law (*h*). Whether the same rule would hold good of any other system of community would seem to depend on whether the law establishing it makes it a tacit contract between the parties (*i*).

Law of United States.—Out of the variances in the statutory law of the American States upon the subject of the matrimonial *régime* of property, a group of rules have been developed for the solution of conflicts, which have been followed with considerable uniformity. This may be ascribed perhaps, to the careful reasoning of Story in his first edition of his work upon the Conflict of Laws, wherein he deduces the rule that the matrimonial domicil should govern the respective rights of the spouses in personal property, because that place is the seat of the performance of the contract of marriage (*k*). This reasoning was adopted in most jurisdictions, though different tests have since been set up for determining the matrimonial domicil; thus the view of Story, that the place of celebration will govern in the absence of proof of a contrary intention has been abandoned. A recent American writer objects to the term "matrimonial domicil" and cites an English case in support of his contention (*l*), but it is submitted that the same result is reached provided the term be interpreted simply as a substitute for the place of celebration of the marriage, and this is in fact the interpretation given to it by the preponderance of American authority (*m*).

The law of the matrimonial domicil is held not applicable to foreign immovables nor to real property when converted into money. The rights of the spouses in immovables are determined by the *lex situs* (*n*);

(*h*) De Nicols *v.* Curlier, [1900] 2 Ch. 417, Kekewich, J.

(*i*) Burge, 1st ed., i., p. 615, pointed out as an argument against the community extending to lands abroad by mere operation of law that bankruptcy, though operating as an assignment of the personal property wherever situated, will not have a similar effect on his real property. This analogy no longer holds good absolutely; under the modern statutes an English bankruptcy is equivalent to an assignment to the debtor's trustee of real property here or abroad, and Scottish and Irish bankruptcies have the same effect; but a bankruptcy outside the United Kingdom or in a foreign country does not operate as an assignment of real property in England: Dicey, rule 68, p. 329, and rules 109, 110, pp. 429, 430.

(*k*) Ss. 191—199.

(*l*) Minor, 1901, pp. 177—178, citing Le Mesurier *v.* Le Mesurier, [1895] A. C. 517.

(*m*) Davenport *v.* Karnes (1876), 70 Ill. 465; Glenn *v.* Glenn (1873), 47 Ala. 204; Crayeroff *v.* Morehead (1873), 67 N. C. 422. "This place of performance is the matrimonial domicil to which husband and wife jointly propose to repair": Wharton, 1905, p. 408.

(*n*) Besse *v.* Pollochoux (1877), 73

but a distinction must be observed even here, because the *lex situs* itself may prescribe a different rule when the parties are domiciled outside of the State than when they are domiciled within the State. The character impressed upon personal property by the law of the domicil at the time it was acquired may attach to real property purchased with the proceeds, though the real property would otherwise be dealt with according to the *lex situs*. And so it has been held that real property purchased in a State recognising community will still be considered separate if purchased with funds acquired in a State where separation of property prevails, thus applying the equitable theory of conversion to the marriage *régime* (*o*).

In Louisiana the legislature has made the system of community prevailing there applicable to all property acquired within the State. Accordingly, as to that property, even though personal, the *lex sitæ* applies without regard to the location of the matrimonial domicil (*p*).

In the discussion of one of the cases, the doctrine of Dumoulin received a most learned and elaborate investigation; his theory of a tacit agreement was condemned, and it was considered that the law of community has not an exterritorial effect (*q*). This has received the approval of Story (*r*).

(b) **Change of Domicil or Personal Law.—Older Jurists.**—In the former edition Burge next discussed the effect of a change of domicil or personal law on matrimonial property (*s*).

If the parties retain their matrimonial domicil or nationality, the only laws between which a conflict could arise would be those of that domicil or nationality and of the *situs* of the property. But when they change their matrimonial domicil, and acquire another domicil in a country where no such law as that of their former domicil prevails, the conflict will take place between the law of that domicil and the law of the new or actual domicil. Thus, if

Ill. 285; Saul *v.* His Creditors, 5 Mart. N. S. Louis. 569; Wharton, s. 191.

(*o*) Blethen *v.* Bonner (1902), 30 Tex. Civ. App. 585; 71 S. W. 290; accord. Elliott *v.* Hawley (1904), 76 Pac. 93 (Wash.); Castleman *v.* Jefferies, 60 Ala. 380; Wharton, s. 191.

(*p*) La. Civil Code, art. 2400; Packwood (1845), 9 R. 438; McVey *v.* Holden (1860), 25 A. C. 317; Le Breton *v.* Nouchet (1813), 3 Mart. 60.

(*q*) Saul *v.* His Creditors (1827), 5 Martin's Rep. N. S. 569; Gale *v.* Davis (1817), 4 Martin's Rep. 645; Story, C. L., 183, 186, 187.

(*r*) The passage in the older edition, pp. 617—619, is cited in Story, s. 170 (1872 edition).

(*s*) Burge, 1st ed., i., 619.

the law of community prevail in the matrimonial domicil, but not in the new or actual domicil, it will become a question whether the property acquired before or after the removal will be subject to it.

According to the general doctrine of the older jurists, the property of the husband and wife, whether it be acquired before or after the change of domicil, continues subject to the law of community notwithstanding they have removed to another domicil where that law does not exist. The change of the domicil neither divests them of any right which they had acquired under the law of their matrimonial domicil nor confers on them any right which they could not acquire under that law. If the law of community existed in their matrimonial domicil, they will not cease to be in community, although they should have acquired another domicil in a country where no law of community was established ; and, on the other hand, if there was no law of community in their matrimonial domicil, they will not become subject to the law of community because they have taken up their domicil in a country where that law does exist (*a*). The concurrence of jurists in this doctrine is so general that there are few who have dissented from it (*b*).

This doctrine seems to result as a necessary and legitimate conclusion from the theory that the community exists by force of the tacit agreement of the parties, which is considered of the same weight as if it had been an express agreement; because, if the rights of the parties, either in their present property or in their future acquisitions, had been conferred by an agreement, they could not be varied by a change of domicil (*c*). But if this theory is rejected, and the law of community has no greater operation than any other real law, it can never be necessary to consider the effect of a change of domicil on the interests of the husband and wife on their real property, because those interests in their present property,

(*a*) Burge, 1st ed., i., 620, citing Rodenb., de Jure, Quod., &c., Pars. Alt., tit. 2, c. 4, s. 3; Sande, Decis., lib. 2, tit. 5, def. 10; J. Bacquet, des Droits de Just., c. 21, nn. 27 *et seq.*; Goris. Adv., tr. 1, c. 7, s. 3; J. Voet, De Ritu Nupt., lib. 23, tit. 2, s. 87; A. Wesel, de Con. Bon. Soc., tr. 1, ss. 104 *et seq.*; Groenew. ad Dig. lib. v., tit. 1, de Jud. l. 65, p. 116; Matth. Paræm. Belg., par. 2, s. 66, P. Voet, de Statutis, s. 9, c. 2, s. 7. Merlin's Rep. tit. Comm.; Muller's Prompt., tit. Comm. Bon., s. 23; Hertius, de Coll. Leg., ss. 48, 49; Quebec, Lafleur, 164 *et seq.*

(*b*) Burge, *ubi cit. sup.*; Mævius, ad Jus Lub., pars. 2, tit. 2, art. 12, nn. 401 *et seq.*; Muller's Prompt., *ibid.* 23, and the references.

(*c*) See Bar, Gillespie, 415.

as well as in their future acquisitions, are determined by the *lex loci rei sitæ*.

The application of this doctrine to the interests acquired by the husband and wife in the personal property of each other under the law of their matrimonial domicil, so far as it regards property acquired before their removal from their matrimonial domicil, might, it seems, be maintained without the aid of the theory of a tacit contract.

Thus the matrimonial domicil of the parties may be supposed to be in a country where, as formerly in England, the marriage is an absolute gift to the husband of the wife's whole personal estate, and the subsequent domicil may be in a country where, as formerly in British Guiana, the wife, by virtue of the *communio bonorum*, retains an interest in her own and acquires an interest in her husband's personal property; or the matrimonial domicil may have been in British Guiana and the subsequently acquired domicil in England. In the one case the whole personal estate of the wife has become vested in the husband, and the wife brings no personal property of her own into British Guiana, on which the law of community can attach. In the other case, the wife arrives in England, not only retaining an interest in her own property, but having acquired an interest in the property of her husband. The law of the matrimonial domicil has, in this case, already made a disposition of the property of the husband and wife at a time when the parties and the property were subject to that law.

In neither case could the law of the new domicil be admitted without divesting rights which had been already legally acquired. But in the opinion of the greater number of the older jurists not only the property which had been acquired by the husband and wife before their removal from their matrimonial domicil, but even that acquired in their new domicil, is subject to the law of the matrimonial domicil; and their opinion has been sanctioned, even to this extent, by the decisions in France.

French Decisions.—A person was married and domiciled in L., where the civil law prevailed. He afterwards removed to Paris and established his domicil there. On his death his widow demanded a share of his movables and of the *acquêts* made since the marriage. By an Arrêt of March 29th, 1640, her demand was rejected (*d*).

A similar decision was given in the case of a person married and

(*d*) Journal des Audiences, April 8th, 1718.

domiciled in Normandy who afterwards removed to and established his domicil in Paris. A demand by his widow for a share of the *acquêts* made since the removal from Normandy was rejected (*e*).

On the other hand, the application of this doctrine to the acquisitions of personal property made by the husband and wife in their new or actual domicil can only be sustained by means of the theory of a tacit agreement (*f*), or on the basis of the personal law (*g*). Even its advocates do not all concur in subjecting future acquisitions after a change of domicil to the law of the matrimonial domicil. Thus, Huber was of opinion that they are governed by the law of the new or actual domicil (*h*).

But if the law of community be a territorial law its power as to personal property cannot be more extensive than as to real property. As it affects only such real property as is actually situated in the country where it is established, so it affects personal property only when its owner is actually domiciled in the country where such law is established, because the place of his domicil is the *situs in fictione juris* of his movable property. The territorial law as to personal property is that which prevails in the place of its owner's actual domicil. He acquires and holds it according to the disposition of that law, and it depends on that law whether he and his wife acquire it for their joint benefit or for his sole benefit (*i*).

The third view above mentioned has received the adhesion of the law of Louisiana.

Law of Actual Domicil applied in Louisiana.—According to the law of Louisiana, if married persons remove from another State, or from foreign countries to Louisiana, the property acquired by them in that State is subject to the community of *acquêts* established by that Code (*j*).

This provision is founded on a law of the Partidas (*k*), and in the commentary on the latter the distinction is taken between the property acquired in the matrimonial domicil, and that which is afterwards acquired in the new domicil. The former remains

(*e*) Journal des Audiences, Arrêt, April 8th, 1718, cited by Boullenois, tom. 1, p. 767. Arrêt, May 7th, 1746, cited by Merlin, tit. Com., p. 551.

(*f*) Burge, 1st ed., i., 622; Savigny, s. 379; Guthrie, 293.

(*g*) Bar, Gillespie, 413, 414; Foelix, i., p. 197, s. 91, citing decisions of Court of Cassation.

(*h*) Huber, tom. 2, lib. 1, tit. 3, n. 9. p. 540.

(*i*) Burge, *ubi cit. sup.*

(*j*) Art. 2370, 1875, J. 131 *et seq.*

(*k*) P. 4, tit. 11, s. 24.

subject to the disposition which the law of the matrimonial domicil has already made of it, and the latter is governed by the law of the new domicil (*l*).

The Supreme Court of Louisiana, in giving its judgment on the local law of that State, entered into the consideration of the principle which should be adopted, when a conflict arose between the laws of the matrimonial and actual domicil, and thus expressed its opinion:

"Though it was once a question, it seems now to be a settled principle, that when a married couple emigrate from the country where the marriage was contracted into another, the laws of which are different, the property which they acquire in the place to which they have removed is governed by the laws of that place" (*m*). It has accordingly been decided, that where a couple who were married in North Carolina, where no community exists, had removed to Louisiana, where it does exist, the property acquired after the removal was to be held in community (*n*).

Burge's Opinion.—The change of the matrimonial domicil, it is said, does not affect the continuation of the community which is governed by the law which prevails in that domicil (*o*). Such is the general opinion of jurists. Pothier, in expressing his concurrence, observes, that this rule can only be adopted, when the law of the matrimonial domicil admits the continuation of the community after the death of one of the spouses, because, if according to that law it was by that event dissolved, its continuation exists only under the law of the actual domicil, and therefore must be governed by that law (*p*).

The conclusions which seem most consistent with the distinctive qualities and attributes of real and personal laws, and with the principles which govern the acquisition of movable and immovable property by the operation of law, would be—1st. That the law of

(*l*) Greg. Lopez, tom. 2, p. 599, n. 2.

(*m*) Gale *v.* Davis (1817), 4 Martin's Rep. 645; 17 Martin's Rep. 605, 606; Le Breton *v.* Nouchet (1813), 3 Martin's Rep. 60, 73.

(*n*) Gale *v.* Davis (1817), 4 Martin's Rep. 645. See 1875, J. 131, for other cases; Henderson *v.* Trousdale (1855), 10 La. A. 548. But in New York and Kentucky the law of the matrimonial domicil has been applied: Bonati *v.* Welsch (1861), 24 N. Y. 157; and Kendall *v.* Coons (1868), 1 Bush. Ky. 530; Wharton, s. 195; Burge, 1st ed., i., 623; Story, s. 187.

(*o*) Burge, 1st ed., i., 625; A. Wesel, de Fin. et Con. Bon. Soc. tr. 2, c. 4, s. 109, et tr. 1, nn. 104 *et seq.*

(*p*) Pothier, Tr. de la Com., p. 6, c. 1, n. 777; Merlin, Cont. de Com.

community does not extend to immovable property situated in a country where that law does not prevail (*q*). 2ndly. That movable property, wherever it be situated, which belonged to the parties at the time of their marriage, or which they acquired at any time afterwards, will be subject to the community, if that provision be the law of the matrimonial domicil, and the parties do not remove from that domicil (*r*). 3rdly. But if they remove from that domicil, the law of the matrimonial domicil will continue to govern the property which belonged to them before their removal, although no such law prevails in the new domicil (*s*). 4thly. But property acquired by them in their new domicil will be subject to the law of that domicil and not to that of the matrimonial domicil (*t*).

Modern Opinion.—Three main theories have been propounded as to the governing law for the matrimonial *régime* when the parties change their original domicil or personal law: (a) The matrimonial domicil or personal original law on the tacit agreement theory (*u*); (b) the law of the actual domicil (*x*); (c) that the law of the matrimonial domicil should govern the property acquired under it and the law of the actual domicil the property accruing under it (*y*). The second theory is to some extent adopted by the law of Switzerland (*z*), but otherwise has little support. The main contest has been between the first and third.

Continental View.—This is in substantial agreement with the first theory which was favoured by the older jurists, viz., that the

(*q*) See p. 772, *ante*.

(*r*) See p. 774, *ante*.

(*s*) See pp. 777 *et seq.*

(*t*) Bar rejects this as unscientific (Gillespie, 416), and there is no English authority for it, but American only, see Burge, 1st ed., i., p. 625. All these propositions must now, as regards English law, be taken as subject to the modifications established in the decisions next cited.

(*u*) Savigny, s. 379, pp. 293, 294; Bar, Gillespie, 415, 416; Phillimore, iv., 318.

(*x*) See Story, s. 171. It comes into force if the law of the new domicil prohibits the system set up by the matrimonial domicil: Phillimore, iv., 320, citing Savigny, s. 379; but see *post*, p. 803, Donations inter Conjuges.

(*y*) This is supported by Wharton, s. 198, and considerable German authority, Puchta, &c. See Bar, Gillespie, 416. The passage in the former edition, vol. i., pp. 619—622 (pp. 778—780, above), is cited in Story, s. 187, n.

(*z*) This is the law of Switzerland as regards the relations between the spouses and third parties (Federal Law of 1891, art. 19), and the spouses may, upon any change of domicil, place the relation between themselves under the law of their new domicil (art. 20). This law will remain in force, as regards foreigners in Switzerland, even after the new Code comes into force.

law of the original matrimonial domicil (or nationality) governs all property acquired during the marriage in spite of a change of that domicil or nationality (*a*).

Law of Quebec.—In Canada (Quebec) it is settled law that a change of domicil of the spouses will not establish a new marriage *régime* of property, but that the *régime* established by the law of the matrimonial domicil governs all property whether acquired under the old or the new domicil and whether it was a system of community or not (*b*).

Law of England and Scotland.—The effect of a change of domicil has been discussed in the Courts of Scotland and England and in the common appellate tribunal in the cases of *Lashley* v. *Hog* and *De Nicols* v. *Curlier*.

Lashley v. Hog (*c*).—The facts in the former case may be taken from Lord Brampton's judgment in the latter case. Roger Hog, a native of Scotland, came to England to better his fortune, and in 1737, being then domiciled there, he married Rachael Missing, an English lady. No settlement affecting the point raised in the case was made on their marriage, but with his wife Mr. Hog received £1,000, which according to the law of England became his own sole absolute property upon the principle that in England a wife can by the common law have no separate legal existence. They remained resident in England until 1752, when they removed to Scotland, where

(*a*) Bar, Gillespie, 413. 414; but he cites contrary opinions, and especially the American decisions, subjecting to the law of the new domicil property acquired under it: Story, s. 187; Wharton, s. 196; Argentine law of 1888; Savigny, s. 379; Phillimore, iv., 316. So Weiss, iii., 559, citing Bouhier, Foelix, Aubry et Rau, vol. v., p. 276, Asser and Rivier. Laurent, Cass. 1825 to 1882; Germany, 1897, J. 595; Holland, 1892, J. 299. So German Civil Code, Intr. Law, 15; Monte Video Conference, 1889, arts. 40—49; Institute (Lausanne), 1888, art. 15. So a change of nationality will make no difference in this respect either where the national law is the personal law for this purpose or where the law of the domicil is so: 1892, J. 299, Groningen; 1897, J. 595, Reichsgericht; and so 1899, J. 44, Keidel; Roumania, 1900, J. 531; 1903, J. 666, Colmar; France, 1881, J. 50; 1882, J. 541, rights of wife under national law, under which she married, not affected by husband's acquiring a new nationality. So 1901, J. 568, T. C. Seine on Prussian law; 1898, J. 723, Algiers; 1901, J. 568, T. C. Seine.

(*b*) Rogers *v.* Rogers (1848), 3 L. C. J. 64; 3 R. de L. 255; Languedoc *v.* Laviolette, *ante;* Astill *v.* Hallee (1877), 4 Q. L. R. 120; Converse *v.* Converse (1882), 5 L. N. 69; Wadsworth *v.* McCord (1886), 12 S. C. R. 466; Young *v.* Deguise, 29 L. C. J. 194; all cited by Lafleur, 165—168.

(*c*) (1804) 4 Paton, 581.

undoubtedly they became domiciled before 1760, when their coverture was dissolved by the death of the wife. The husband survived till 1789, when he also died, still domiciled in Scotland, possessed of considerable personal property. After his death Mrs. Lashley, who was a daughter of the marriage, as representing the right of her deceased mother, made a claim in the Scottish Courts upon her father's estate to a share of the personal property which, as she alleged, her father held in community, according to the then law of Scotland, at the dissolution of the coverture. (Mr. Hog had amassed a large fortune and he left a will making provision for his children. Mrs. Lashley, however, refused to take anything under her father's will and insisted on her rights under the Scottish law.) For Mrs. Lashley it was contended that the Scottish law of community of goods attached itself upon the property of Mr. Hog on his becoming domiciled in Scotland, notwithstanding the fact of his marriage to her mother in England without any settlement many years before. (Mrs. Lashley had already obtained her legitim, or share of her father's estate on his death, on the recognised principle that the law of the actual domicil regulates the succession.) The judgment of the House of Lords was in Mrs. Lashley's favour, reversing the decision of the Court of Session, affirming the Court of first instance, which had pronounced that "when parties marry in one country and afterwards remove to another in which the legal rights of married persons are different, the change of domicil ought not to operate any change on any of the rights pre-established in them in the country in which they were married, and that all these rights ought to be preserved and enforced by the law of the country to which they have removed, unless they be incompatible with the religion and morality of that country" (*d*). Lord Eldon held that the Scottish law of community attached itself upon all the personal property of which Mr. Hog was or thereafter might become possessed during his domicil in Scotland, and that on the death of Mr. Hog the distribution of his personal estate, including the share of the predeceased wife, which up to that event had not been severed, must be regulated by the succession law of Scotland, where his death occurred. The judgment definitely overruled the contentions made against the claim that—(1) In the absence of a written contract, the rights of husband and wife must be regulated by the law of the

(*d*) Burge, 1st ed., i., 624.

country where they were domiciled at the time of the marriage; and (2) that there was, on the marriage, an implied contract between the spouses that they would be bound to all those conditions and consequences which the law of the country made to follow upon their consent to the marriage itself, and that no change of domicil could alter this matrimonial law or implied matrimonial contract (*e*). The complete absence of any settlement affecting the property was evidently the basis of the decision. The law of England made none; it merely gave to the husband all his wife's property, placing upon him no restrictions (*e*).

De Nicols v. Curlier.—In *De Nicols* v. *Curlier* (*f*) the facts were as follows:—In 1854 Mr. De Nicols, the testator, and his wife intermarried in Paris; both were French by birth and both domiciled at the time in France. They married without a contract of marriage and consequently under the law of France they became subject to the system of community of goods. In 1863 they left Paris and came to London and acquired an English domicil, and in 1865 the husband obtained a certificate of naturalization in England. From that time forward their residence in England was continuous. The husband was successful in business and amassed a large fortune consisting of both movable and immovable property, and died in 1897, leaving a will in the English form and language by which he gave his residuary estate to his executors and trustees in trust for sale and to hold the proceeds in trust for his wife for life, and after her death upon trust for his only daughter, her husband, and children. A French lawyer proved that according to French law a husband and wife intermarrying without having entered into an antenuptial contract in writing are placed and stand, by the sole fact of the marriage, precisely in the same position in all respects as if previously to their marriage, they had in due form executed a written contract and thereby adopted as special and express covenants all the provisions contained in arts. 1401—1496 of Tit. V. of the Code Civil headed "Of Marriage Contracts and the respective rights of Spouses" (*g*). The question was first raised as to the personalty, whether the change of domicil altered the legal position of the parties to the marriage in reference to

(*e*) De Nicols *v.* Curlier, [1900] A. C. 21, pp. 42, 43.

(*f*) *Ibid.*, 1899, J. 170.

(*g*) De Nicols *v.* Curlier, [1900] A. C. 21, per Lord Macnaghten, p. 31.

property. Kekewich, J., held that it did not. The Court of Appeal was of opinion that, apart from authority, the matrimonial law of the place where the parties were domiciled when they married and not the law of the husband's domicil on the wife's death should be applied, but that the decision in *Lashley* v. *Hog* governed the question. The House of Lords reversed this judgment on the ground that the decision in *Lashley* v. *Hog* did not apply, distinguishing it on the ground that in that case the law of the matrimonial domicil (English) gave the wife no proprietary rights by marriage (*h*), and the change of domicil was from a country in which neither the law nor the parties had made any settlement to one in which there was in some sort a settlement by the law in the shape of the community of goods (*i*); while in the present case the French marriage conferred not only an implied but an actual binding partnership proprietary relation fixed by the law upon the persons of the spouses, the binding nature of which no act of either of the parties contracting marriage could affect or qualify (*j*), and the change of domicil was from a country where the most elaborate and binding settlement by the law of France and by contract was made on and by marriage to a country (England), the law of which makes no settlement at all, but ignores the separate legal existence of the wife altogether (*k*).

De Nicols v. Curlier (2nd Case).—The same question was then raised as to the immovable (freehold and leasehold) property of the testator in England, and Kekewich, J., held, on the principles enunciated by the Lord Chancellor (Lord Halsbury) in the judgment just cited, that the partnership created by French law by marriage without a settlement applied equally to English realty, there being nothing in the English law of realty to prevent such a contract being enforceable against English land (*l*).

Effect of Decisions on Case of English Matrimonial Domicil.—The principle laid down by Lord Eldon in *Lashley* v. *Hog* that upon an English marriage without an express settlement there is an implied contract that the expectations of the wife are to depend upon the domicil of the husband and shift with it (*m*), is not, therefore,

(*h*) Lord Halsbury, *ubi sup.*, p. 29.
(*i*) Lord Brampton, *ubi sup.*, p. 44.
(*j*) Lord Halsbury, *ubi sup.*, p. 29.
(*k*) Lord Brampton, p. 44.
(*l*) De Nicols *v.* Curlier, [1900] 2 Ch. 410.
(*m*) 4 Paton 581, at p. 617 (and so Lord Rosslyn, *ibid.*, 645), cited by Lord

affected by the later decision (*n*). Foote so regards it, and while admitting that "the argument that English spouses similarly enter into an implied contract that their property shall be regulated by English law has no doubt some plausibility," he thinks that, in the case of an English marriage, the distribution of property on the husband's death depends upon the fact whether or not he dies intestate, which is in his own power, for the wife acquires no vested rights in his property by marriage and does not contract for any (*o*). On the other hand, Westlake states the proposition that in the absence of express contract the law of the matrimonial domicil regulates the rights of the husband and wife in the movable property belonging to either of them at the date of the marriage or acquired by them during the marriage (*p*).

The ruling in *Lashley* v. *Hog* has been applied in England and Scotland as the undoubted rule (*q*); and consequently if this still stands, spouses who have an English matrimonial domicil and change it subsequently for a foreign one, will not be in the same position as spouses having a foreign matrimonial domicil and afterwards acquiring an English one. In the former case the new domicil will govern their mutual rights of property; in the latter, if the law of the matrimonial domicil sets up a marriage *régime* for property with regard to which the parties make no contract, it will continue to govern their mutual relations. It is also to be noticed that in the generality of foreign Courts spouses in the former case will be held to retain the rights conferred on them by the law of their matrimonial domicil, whereas they will not do so in an English Court, most foreign systems applying their law not to persons married abroad and coming in there, but to persons married there (*r*); though the Scottish system of community applies to persons already married if becoming domiciled there (*s*). On the other side, in view of principle, though *Lashley* v. *Hog* has been declared to be not open to judicial

Macnaghten in De Nicols *v.* Curlier, *ubi cit. sup.*, pp. 34, 35.

(*n*) Foote, 338.

(*o*) *Ibid.*

(*p*) S. 36, p. 71. See Phillimore, iv. 337.

(*q*) In re Marsland (1886), 55 L. J. Ch. 581; Hall *v.* Hall (1854), 16 D. 1057; and see other cases cited in De Nicols *v.* Curlier before the Court of Appeal, [1898] 2 Ch. 60.

(*r*) See Lord Macnaghten, De Nicols *v.* Curlier, [1900] A. C. 21, at p. 33.

(*s*) See Lord Halsbury, *ibid.*, 28, 29, 30.

review (*t*), the Court of Appeal has declared in *De Nicols* v. *Curlier* (and the House of Lords has not disagreed with it) that "it is not altogether satisfactory to hold that a change of domicil cannot affect an express contract embodying the law of the matrimonial domicil, but that a change of domicil does affect the application of that law if not embodied in an express contract" (*u*); and the Lords in the same case emphasised their view that "a written contract is after all only the evidence of what the parties have agreed to, and it would seem to be of no superior force as evidencing the agreement of the parties than a known consequence of entering into the married status" (*x*).

Scots Law.—As regards Scots law, however, the view has been expressed that on a change of domicil, if thereby the husband's powers over the wife's property are enlarged, this will apply only to property acquired by her subsequent to the change, and will not divest her of property held by her in her own right under the law of the matrimonial domicil (*y*).

It has, moreover, been treated as a settled point in Scotland that the division of the goods in community is governed by the law of the actual domicil (*z*).

Effect of Recent Statutes.—The Married Women's Property Act for Scotland (1881, 44 & 45 Vict. c. 21) has, moreover, adopted the principle (contended for by Westlake above and admitted for parties having a foreign matrimonial domicil whose law imposes a specific *régime* in default of agreement) that the law of the matrimonial domicil shall govern the right of the parties *inter se* without regard to change of domicil by providing that, if the husband has a Scottish domicil at the time of marriage, all the personalty of the wife, whether acquired before or after the marriage, vests in the wife as her separate estate, and is not subject to the *jus mariti*, saving, however, the right to make an ante-nuptial contract of settlement. The English statute on the same subject (*a*) may be equally held to create a marriage *régime* of like effect to the foreign Codes, which

(*t*) Lindley, M.R., De Nicols *v.* Curlier, [1898] 2 Ch. 60, at p. 71.

(*u*) Lindley, M.R., *ibid.*, 71.

(*x*) Lord Halsbury, p. 26; and see Lord Macnaghten, p. 33; Lord Shand, p. 37; Lord Brampton, p. 45.

(*y*) Fraser, Husband and Wife, 1326. So Bar, Gillespie, 419.

(*z*) Ferguss. Rep. Cons. Decis., pp. 346, 417.

(*a*) 1882 (45 & 46 Vict. c. 75).

will make the principle stated in *De Nicols* v. *Curlier* applicable to persons having an English matrimonial domicil (*b*).

United States.—The prevailing doctrine of the judicial tribunals of America, following the lines of the Louisiana decisions already mentioned, is that property acquired before the removal from the matrimonial domicil is governed by the law of that domicil; but that property which is afterwards acquired in the new domicil is subject to the law of the latter domicil (*c*).

In the United States the effect of a change of the matrimonial domicil from one State to another, with or without the consent of the wife, has been considered in connection with the practice in most States of the Union not to accord a separate domicil to the wife even though the unity of the marriage relation has been disturbed and the parties are in fact residing in different jurisdictions. There is, however, a tendency in this direction, but in none of the cases wherein it was manifested is there to be found an indication that the matrimonial domicil could be thus affected. In fact, it is quite obvious that there can be only one matrimonial domicil at the same time. There are, however, indications that Courts will tend to hold that the husband has not really acquired a new domicil where the old domicil is attempted to be altered to the detriment of the wife without her consent (*d*). Furthermore, as to property acquired before marriage, the rights of the wife have vested and cannot be affected by any subsequent act of the husband (*e*).

When the matrimonial domicil has been abandoned and a new one acquired, acquisitions of property subsequent to the change will be governed by the law of the new domicil (*f*). On the other hand, even though the property has been acquired subsequent to the marriage, if it was acquired prior to the change of domicil and

(*b*) In Loustalan *v.* Loustalan (1902), J. 380; (1900), p. 211, the law of the matrimonial (English) domicil, which governed the rights of the spouses, was held to include the provision of English law, which makes marriage revoke a formerly made will.

(*c*) Burge, 1st ed., i., 625; Gale *v.* Davis (1817), 4 Martin, 645; 17 Martin, 605; Le Breton *v.* Nouchet (1813), 3 Martin, 60, 73; Dicey, 1st ed., American Notes, c. xxvi., p. 657; Saul *v.* His Creditors (1827), 5 Martin, N. S. 569; Story, ss. 186, 187; Brookman *v.* Durkee (1907), 47 Wash, 978; Wharton, ss. 196, 197.

(*d*) Bonati *v.* Welsch (1861), 24 N. Y. 157; and see p. 368, *ante*.

(*e*) *Ibid.*; Kendall *v.* Coons (1868), 1 Bush. Ky. 530.

(*f*) Davis *v.* Zimmerman (1870), 67 Pa. 70; Clanton *v.* Barnes (1876), 50 Ala. 260.

is vested in husband or wife according to that law, it will not be divested by removal to another State (*g*).

In the United States the property relations of the spouses so far as they affect the rights of third parties with whom they enter into obligations are deemed to be governed by the proper law of the contract, for this is in reality a question of the capacity of one or the other of the spouses to bind the estate of either or both. Thus, it has been held in a recent case, that where a law of a foreign State provides that the expenses of the family are chargeable on the property of both husband and wife, a creditor whose obligation was entered into in that State may rely upon the provisions of that law, though by the local law such a liability does not exist (*h*).

(c) **Where Matrimonial Regime is not System of Community.**—Burge (*i*) next discussed the question, What should be the governing law where the matrimonial *régime* is not the system of community? The interests which the husband and wife acquire by their marriage in the property of each other and the powers which they may exercise in relation to it, where the *communio bonorum* does not prevail, are of course wholly independent of the law by which that community is established.

In the conflict, therefore, between the laws which confer those interests, many of the considerations which have induced jurists to attribute so extensive an effect to this provision cannot be urged.

Older Jurists Favoured Lex Situs for Immovables and Lex Domicilii for Movables.—The subjection of property to the law of its actual *situs* if it be immovable or of its fictitious or presumed *situs*, that is, the domicil of its owner if it be movable (*j*), is admitted by all jurists. As the law which has for its primary and principal object the disposition of property is territorial and limited in its influence to the country in which it is established, a law different from that which prevails in the place where the property is situated does not affect that property.

(*g*) Bond *v.* Cummings (1879), 70 Me. 125; Kraemer *v.* Kraemer (1879), 52 Cal. 302 Lichtenberger *v.* Graham (1875), 53 Ind. 288.

(*h*) Mathews *v.* Dickinson (1901), 73 N. Y. Suppl. 190; so Law *v.* Smith (1904), N. J. (Ch.), 59, 327.

(*i*) 1st ed., i., 626.

(*j*) This proposition as regards movable property is only generally admitted where that property is regarded as a whole for any purpose, and not in cases where it is necessary to consider any constituent portion of such property, which may be subject to the *lex rei sitæ*. See Burge, vol. i., c. 1.

Pothier has, with his accustomed force and accuracy of expression, thus stated the rule: "Toutes ces choses, qui ont une situation réelle ou feinte, sont sujettes à la loi ou coutume du lieu où elles sont situées, ou censées l'être" (*k*).

The controversy amongst jurists has been on the application of this rule.

The sense in which it should be received and the proper influence which belongs to it in examining the questions to which this branch of the subject gives rise will perhaps be more fully understood if a distinct consideration is bestowed on its application to these two species of property.

Movable or personal property has no real *situs* (*l*), but a fiction of the law assigns as its *situs* the domicil of its owner, for it is presumed that it follows his person. It becomes, therefore, subject to the same law as the person of its owner, that is, to the law of his domicil (*m*). This is so stated by Pothier (*n*), J. Voet (*o*), and Merlin (*p*).

The law is not the less a territorial law, and not the less limited in the extent of its power because it regards movable or personal property. A law, therefore, different from that which prevails in the domicil of the owner of personal property will not affect that property. Such is the opinion of J. Voet, P. Voet (*q*), Rodenburg (*r*), and Boullenois (*s*), while the language of D'Argentré and Herz seems to imply, that although the law of the owner's domicil governed the disposition of movable property, yet it was as a personal and not as a real law (*t*).

But whatever may be the quality of the law, it is undoubted that movable property is subject to its disposition. In the language of Lord Loughborough it is a clear proposition, not only of the law of England, but of every country in the world, where law has the semblance of science, that personal property has no locality. The meaning of that is, not that personal property has no visible

(*k*) Burge, 1st ed., i., 627; Pothier, tom. 10, c. 1, n. 23; Rodenburg, tit. 2, c. 2, s. 3.

(*l*) The House of Lords decided against this opinion in Inland Revenue *v.* Muller, [1901] A. C. 217.

(*m*) See note (*j*), *ante*.

(*n*) Pothier, tom. 10, c. 1, s. 2, n. 24.

(*o*) Voet, tom. 1, lib. 1, tit. 4, n. 11.

(*p*) Merlin, tit. Biens, ss. 1, 12, p. 767.

(*q*) P. Voet, s. 4, c. 2, s. 2, p. 118.

(*r*) Rodenburg, de Jure, c. 2, tit. 2, pp. 32, 33.

(*s*) Boull., tom. 1, princ. 33, p. 8.

(*t*) Argent., art. 218, gl. 6, 1, n. 30; Hertius, i., s. 6, p. 123. There are extensive citations from these jurists in the first edition of Burge (i., 627—630).

locality, but that it is subject to that law which governs the person of its owner. With respect to the disposition of it, with respect to the transmission of it, either by succession or the act of the party, it follows the law of the person. The owner in any country may dispose of his personal property (*u*).

The decisions of the English Courts adopted this principle in its fullest extent (*x*).

The subjection of immovable or real property to the law of its *situs* is expressed by jurists in the most explicit and comprehensive terms, *e.g.*, D'Argentré, P. Voet, and Pothier (*y*).

Burge's Opinion.—The conclusion established by these opinions, supported as they are by general concurrence, is that the validity, the extent or effect of any disposition of property, whether it be made by the act of the parties or by the operation of law, must, if it be movable property, be decided by the law of the actual domicil or nationality; and if it be immovable, by the law of its *situs* (*z*). It has been adopted and is indeed the foundation of the (older) decisions in the Courts of England (*a*), Scotland (*b*), and the United States (*c*).

(*u*) Sill *v.* Worswick (1791), 1 H. Blackstone's Rep. 665, 690.

(*x*) Sawer *v.* Shute (1792), 1 Anst. Rep. 63; Campbell *v.* French (1797), 3 Ves., p. 321; not if the marriage has determined before the property falls in: De Serre *v.* Clarke (1874), L. R. 18 Eq. 587; Watts *v.* Shrimpton (1855), 21 Beav. 97; Dues *v.* Smith (1822), Jacob's Rep. 544; Anstruther *v.* Adair (1834), 2 Mylne & Keene's Rep. 513. See Westlake, 71, 72.

(*y*) Burge, 1st ed., i., 631, citing Argent., art. 218, nn. 9, 10, 24; P. Voet, s. 9, c. 1, n. 2, p. 252; Pothier, tom. 10, c. 1, s. 2, nn. 21, 22, 23, p. 6.

(*z*) Cochin, Œuvres, tom. 5, p. 85; tom. 1, pp. 545, 555; 2 Henry's Œuvres, lib. 4, c. 6; Quæst. 105, p. 612; *ibid.*, 720; Hertii Opera, tom. 1, De Collis. s. 4, n. 9, pp. 122 *et seq.*; Bouhier, Cout. de Bourg., c. 23, ss. 36, 37 to 63, pp. 456, 457; Le Brun, Communauté, lib. 1, c. 2, pp. 9, 10; D'Aguesseau, Œuvres, tom. 4, p. 660. But see Boyer, Cass. D., 1854, i., 62; Voet, ad Pand., lib. 1, tit. 4, p. 2, ss. 3, 5, 6; 1 Froland, Mém., c. 4, p. 49, c. 7, p. 155; Pothier, Cout. d'Orleans, c. 1, ss. 22, 23, 24, c. 3, n. 51; Vattel, B. 2, c. 3, s. 110, *ibid.*, s. 103.

(*a*) 1 Rose's Bank. Cas. 478; Pipon *v.* Pipon (1743), Ambl. 25; Potter *v.* Brown (1804), 5 East, 124, 130; Bruce *v.* Bruce (1790), 2 Bos. & Pull. 229, n.; Hunter *v.* Potts (1791), 4 T. R. 182, 192; Phillips *v.* Hunter (1795), 2 H. Black. 402, 405; Sill *v.* Worswick (1791), 1 H. Black. 665; Selkrig *v.* Davies (1814), 2 Rose's Bank. Cas. 97, 291; 2 Dow. Rep. 230; Coppin *v.* Coppin (1725), 2 P. Wms. 290, 293; Brodie *v.* Barry (1813), 2 Ves. & Bea. 127, 130; Birtwhistle *v.* Vardill (1826), 5 Bar. & Cress. 438; In re Ewin (1830), 1 C. & J. 151; In re Bruce (1832), 2 C. & J. 436.

(*b*) Ersk. Inst., b. 3, tit. 2, s. 40; 2 Bell. Com. (McLaren), pp. 569, 574; Kaims on Equity, b. 3, c. 8, ss. 3, 4.

(*c*) 2 Kent's Com., ss. 37, 405 *et seq.*; Holmes *v.* Remsen (1820), 4 Johns.

Modern Opinion.—Modern opinion is not in accordance with these views, as has been stated at the opening of this chapter (*d*). As regards movable property, both in respect of the transmission of chattels and the assignment of *choses* in action the domicil of the owner is now of no importance (*e*). Movables are also assigned a *locus* for certain purposes.

The subjection of immovable property to the *lex situs* is by no means now universal. As regards devolution on death the German law only recognises it to a restricted extent. Among modern jurists, as already stated in the case of community, Savigny extends the personal law of the spouses' matrimonial *régime* to foreign real property (*f*); and Bar does so if the *lex situs* treats the marriage property as an unity (*g*).

In England the effect of a marriage on real property is generally held to be governed by the *lex situs* (*h*) so far as capacity to deal with it and the mode and formalities of alienation of it *inter vivos* are concerned (*i*); but where the marriage in the absence of a marriage settlement imposes a certain *régime* on the parties by the law of their matrimonial domicil, it has been held that that law will govern the rights of the parties to real property in England on the footing of a contract between them, so far as is consistent with English law (*k*).

In the United States the effect of marriage upon the rights of the parties as to immovables is determined by the *lex situs*; but there a lien on a husband's estate created by the law of the matrimonial domicil to secure the wife's dotal portion can be enforced on real property in another State, and obligations of a wife, created by her and good by the law of her domicil, are similarly enforceable against her property in another State (*l*).

Ch. Rep. 460; Guier *v.* O'Daniel (1806), 1 Binney's Rep. 349, n.; Livermore's Dissert., pp. 128—132; Blake *v.* Williams (1828), 6 Pick. R. 286, 314; United States *v.* Crosby (1812), 7 Cranch, 115; Clark *v.* Graham (1821), 6 Wheaton's R. 597; Kerr *v.* Moon (1824), 9 Wheaton's R. 566; Harper *v.* Hampton (1805), 1 Harr. & Johns. Rep. 687; Goodwin *v.* Jones (1807), 3 Mass. R. 514, 518.

(*d*) See p. 766.

(*e*) See p. 790, n. (*j*).

(*f*) S. 379, Guthrie, pp. 292, 293.

(*g*) S. 411, Gillespie, 183.

(*h*) Dicey, 503, 504; Westlake, 70, 207.

(*i*) Dicey, 500—503.

(*k*) De Nicols *v.* Curlier, [1900] 2 Ch. 417. See Dicey, 512, 810—813; Westlake, 72—75, and 205, 273, 285; Richards *v.* Goold (1827), 1 Molloy, 22; Campbell *v.* Dent (1838), 2 Moo. P. C. 292.

(*l*) Dicey, 1st ed., American Notes, c. xxii., 527; Wharton, s. 195; Story, s. 187; Kendall *v.* Coons (1868), 1 Bush. Ky. 530.

In France, as has already been seen (*m*), the jurisprudence and jurists are not in agreement as to the respective limits of the personal law and the *lex situs* in questions concerning real property; but while, on the one hand, there are high authorities to the effect that a foreign law of the parties' matrimonial domicil will not apply to land in France (*n*), on the other, the spouses' capacity *inter se* with regard to property including land in France is determined by their personal law, and their matrimonial *régime* will govern it so far as French law allows (*o*).

Summary.—The interests which the husband and wife acquire or retain in the property of each other, are therefore governed, if the property be movable, by the law of the domicil, and if it be immovable, by the law of its actual *situs* unless the law of the matrimonial *régime* constitutes a contract between the parties. The nature and extent of that interest, the modifications or qualifications to which the husband's right in the wife's property is subject, the provision which is afforded her from his property or her own, either by her equity to a settlement, by allowing her to hold separate property, or to be treated as a *feme sole*, these and similar provisions, and in short, whatever affects the value, the enjoyment, or the duration of those interests, fall under the subjection to and determination of the law of the domicil or *situs*, according as the subject be movable or immovable property subject to the exception above (*p*).

(d) **Capacity of Spouses to Deal with Property.**—Burge (*pp*) next discussed the law which should govern the capacity of spouses to deal with marital property. It would seem also to follow from these principles that so essential a part of those interests as the power or capacity to alienate property *stante matrimonio*, would be governed by the same law as that by which the title or the validity of any disposition of property was governed.

Older Jurists Favoured Personal Law.—But there are jurists who consider that the capacity or incapacity to alienate property depends on the personal law as part of the person's status or

(*m*) P. 775.

(*n*) Cass. 1882, J. 87. See 1882, J. 293; 1894, J. 562 (case of succession), Cass.; 1899, J. 558, Algiers; Cass. 1881, J. 426, matrimonial contract does not apply to land in France so far as it conflicts with French law.

(*o*) 1887, J. 190, C. de Paris; 1903, J. 366, Seine; 1893, J. 413, Seine; 1893, J. 415, T. C. Bordeaux; 1891, J. 1171, Algiers.

(*p*) De Nicols *v.* Curlier, *ante*, and see p. 793.

(*pp*) Burge, 1st ed., i., 633.

condition, and is conferred and governed by the law of the domicil or nationality. Amongst these may be named Rodenburg (*q*), Herz (*r*), and Huber (*s*), and, subject to some qualifications, the greater number of the older French jurists (*t*).

The adoption of this opinion in respect of movable or personal property, would not have the effect of qualifying or abridging the rule which subjects this species of property to the law of its owner's domicil or nationality, because the status or capacity is conferred by the same law (*u*). But it tends greatly to abridge the force and extent of the rule which subjects immovable property to the law of its *situs*.

It has been controverted by Burgundus (*x*), Dumoulin (*y*), Stockman (*z*), P. Voet (*a*), and J. Voet (*b*).

Lex Situs Governs Dispositions of Immovables.—Burge's Conclusion.—The rule which subjects the disposition of immovable property to the law of its *situs* seems to require that the disponing capacity or power should be also governed by that law, because there can be no disposition, if there be not a capacity or power to dispone.

The decisions in the English, Scotch, and American Courts sanction the rule, that the validity of the title to immovable property, whether it be acquired by the act of the parties or by the operation of law, and whether it depends on the personal capacity of the party to alienate or on the capacity of the property itself to be a subject of alienation, is governed by the law of its *situs* (*c*).

(*q*) Rodenburg, De Stat. Div., tit. 2, c. 1, p. 10, and p. 1, tit. 1, c. 2.

(*r*) 1 Hertius, Opera, De Collis. Leg. s. 4, n. 23, p. 133, and n. 8, p. 123, 124, and n. 22, p. 133.

(*s*) Huber, lib. 1, tit. 3, s. 12.

(*t*) Burge, 1st ed., i., 633, citing 1 Boull. 57, 77, 78, 102, 154, 155, 175, 183, 194, 295, 499, 700, 705—731; 1 Boull. Pr. Gèn. 29, 30, 31; *ibid.* 101, 102; Merlin, Rep. tit. Testament, sect. 1, s. 5, art. 2; Majorité, s. 5; Autorisation Maritale, s. 10, art. 2; Puissance Paternelle, s. 7; 1 Froland, Mem. 65, 66, 156, 171; 2 Froland, Mem. 824, 825, 1576, 1594, 1595; Bouhier, Cout. de Bourg., c. 24, ss. 91—108, pp. 476, 477, 478, c. 23, ss. 90—96, p. 461; Pothier, Cout. d'Orleans, c. 1, s. 1, n. 7, p. 2; and see Bar, s. 183, Gillespie, 410—412; Weiss, iii. 557.

(*u*) But now see p. 793, *ante*.

(*x*) Boull., tom. 1, tit. 1, c. 2, obs. 6, p. 129.

(*y*) 1 Froland, Mem. 65.

(*z*) Decis. 125.

(*a*) P. Voet, de Stat., s. 4, c. 2, n. 7, p. 124.

(*b*) J. Voet, ad Pand., lib. 1, tit. 4, ss. 2, 9.

(*c*) Burge, 1st ed., i., 634; Dundas *v.* Dundas (1830), 2 Dow & Clark, 349; Coppin *v.* Coppin (1725), 2 P. Wms. 291, 293; *ante*, p. 793; and references in note (*k*); Story, 431—463; Dicey, 501, 502, 1st ed., Am. Notes, c. xxii., p. 527.

Modern opinion is to the same effect. But this does not prevent the rights given to the spouses by the matrimonial *régime* being enforced as an implied contract against their real property so far as the *lex situs* allows (*d*).

Mutual Rights of Spouses as regards Immovables.—Burge's Conclusion.—From the preceding principles it would follow as a necessary conclusion, and it is admitted by all jurists, that the title to *viduité* and *douaire*, and consequently, to curtesy, dower, and *terce*, is governed by the law of the country in which the immovable property is situated, out of which those interests are claimed. Hence that law determines the circumstances essential to the acquisition of the title, the quality of the immovable property which is subject to them, the measure or its proportionate value to the whole of the estate, the duration and manner of its enjoyment, the obligation which the survivor incurs, the burthens to which he is subject, the causes for which it is forfeited, in what manner, by what settlements before or after marriage, and by what testamentary or other provision it may be satisfied or barred (*e*).

Modern opinion is also in accordance with this. Thus in Quebec (*f*) customary dower and conventional dower consisting of real property is governed by the *lex situs* (*g*), and the latter is enforceable even though by the law of the matrimonial domicil there would be no such right (*h*).

(e) **Ante-nuptial Debts.—Burge's View** (*i*).—It has been already observed that in those countries where the *communio bonorum* prevails the debts contracted by either of the parties before the marriage become chargeable on the property of the community (*j*).

This liability is so necessary and equitable a consequence, and so essential a part of the community, that those who maintain that the community, if it exists by the law of the matrimonial domicil, continues, notwithstanding the domicil be removed to a country

(*d*) See *ante*, pp. 765, 793, 794.

(*e*) Burge, 1st ed., i., 635, citing Basnage, art. 367, ii., p. 4; Pothier, tit. Douaire, p. 1, c. 2, n. 127; Merlin, tit. Douaire, ss. 1, 2, p. 245; Merlin, tit. Effet Retro., xvii., Tiers-Coutume, Viduité, Gains Nuptiaux; Denisart, tit. Douaire; Boullenois, Froland; Argon., tom. 2, p. 133; Ilderton *v.* Ilderton (1793), 2 H. Black. p. 145.

(*f*) C. C. of L.C. art. 1442.

(*g*) Lafleur, 169.

(*h*) Erichsen *v.* Cuvillier (1880), 25 L. C. J. 80; Prunier *v.* Menard (1896), 5 R. de J. 153.

(*i*) 1st ed., i., 635.

(*j*) This is so by the Belgian Code Civil, art. 1409.

where it does not prevail, justly assume it to be an incontrovertible proposition that the liability of the community to the debts would continue to be that which had been once incurred according to the law of the matrimonial domicil.

Even in those countries where the community does not prevail, but the marriage is an absolute gift to the husband of the wife's movable property, justice requires that as he has acquired her movable property he should also pay her movable debts, and that as the gift of the wife's movable estate which had already been made by the law of the matrimonial domicil was not rescinded, so neither ought his liability for her debts to be abridged by any change of domicil.

The liability either of the property in community, or of the husband personally, in consequence, either of the relation in which the wife is placed or of the marital authority, or of the existence of the community or of the exclusive acquisition by the husband of the wife's movable estate, has been so universally admitted, that it seems not to have been supposed that upon any change of domicil there would exist a law exempting either the community or the husband from this liability. The effect of a change of domicil on such liability has not therefore been the subject of discussion.

Questions have, however, arisen on the character or quality of debts contracted by the wife before the marriage, as whether they were movable or immovable, and consequently whether the community was charged with them. It has been considered that the law of the creditor's domicil at the time of the marriage determined the quality of the debt as between the husband and wife, and that it retained the quality of movable or immovable *which then belonged to it*, notwithstanding the creditor may have changed his domicil to another country where it has not the same quality (*k*).

It seems consistent with the principle deducible from this opinion to hold that the husband's liability continues to be that which he had incurred on his marriage by the law of the matrimonial domicil, and that it will neither be excluded nor restricted in conformity with a different law prevailing in his actual domicil.

The law of the matrimonial domicil is, on this occasion, imported into the actual domicil, not to make, but to prevent any alteration

(*k*) Pothier, Tr. de la Com., p. 1, c. 2, n. 246; Lebrun v. Renusson, cited in Merlin, tit. Communauté, s. 3.

in the rights which had already been acquired, for it leaves the parties in the same condition in which they were placed on their marriage by the law of the matrimonial domicil. The interests of the creditors are not affected by adopting that law, because the husband's liability, whatever be its extent, is an additional security, which on his debtor's marriage he obtains for the payment of his demand.

Modern Opinion is to the same effect (*l*).

(f) **Debts and Charges on Immovables.—Burge's View.**—As the extent of the beneficial interest which the husband and wife take in the estates of each other by the titles of curtesy, *viduité*, *douaire*, dower, and *terce* must depend on the burdens to which those estates are subject, it belongs to the *lex loci rei sitæ*, which confers those estates and interests, to determine what are the real or immovable debts to which they are subject and to what extent the husband and wife are respectively bound to contribute to the payment of those debts (*m*).

(g) **Dispositions of Immovables to Spouses.—Burge's View.**—In selecting the law which should determine the effect of dispositions of real property made to the husband and wife, a distinction must be taken between those cases in which the import of the particular expressions used in the instruments containing those dispositions is to be ascertained and those in which the law acts on that import which has thus been ascertained.

Effect.—An instance of the latter description has been stated in that of a conveyance to a man and his wife in such *terms* as would give an estate in joint tenancy to two persons who were strangers, but will not, according to the law of England, give such an estate to the husband and wife, but cause them to take by entireties (*n*).

Such a rule is a law incident to and forming part of the title to

(*l*) See De Greuchy *v.* Wills (1879), 4 C. P. D. 362, where a Jersey woman's debts incurred in Jersey were held not recoverable (except to the extent of his assets derived from his wife) from her husband, a domiciled Englishman who had married her in England. See Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 13, Westlake, 298. If the spouses' personal law prohibits the system in force at the place of celebration of marriage they are presumed not to have intended it to apply: 1903, J. 366.

(*m*) 1882, J. 293; 1899, J. 558.

(*n*) Burge, *ubi cit. sup.* 638; and see Burge, 1st ed., i., 637; *supra*, p. 700.

immovable property acquired by husband and wife under a conveyance to them; and, therefore, without regard to the law of the domicil, or to that of the place where the instrument was executed, the law of England would prevail and prevent them from acquiring an estate thereunder in opposition to this rule.

Meaning.—In the former case the expressions in which the disposition is made may have an import in the country in which the instrument is executed different from that which they bear in the country where the subject-matter is situated.

It becomes, therefore, a question with respect to such dispositions, as well as to ante and post-nuptial contracts, which is the next head of the subject, whether the import prevailing in the place of the domicil, if the subject of the disposition be personal, or in *loco rei sitæ* or in *loco contractus*, should be adopted in their construction (*o*).

II. **Marriage Contracts.—Modern Opinion.**—If the spouses determine their mutual rights to property by specific contract either before marriage (*p*) or after marriage if they belong to a country where a marriage contract may be made either before or after marriage (as in Germany), in all systems of jurisprudence their rights are treated as governed by it with regard to all movable property then or afterwards acquired, subject to this not contravening the law of the place where the contract is sought to be enforced (*q*), or that of the place where the parties are resident or the property is placed (*r*). Such a contract may be to any effect that the parties choose, even adopting a foreign law if this is allowed by their personal law (*a*). The capacity of the parties to enter into it is governed by their respective personal laws (*b*). The formal validity of such a contract

(*o*) Burge, 1st ed., i. 638; Ramsay *v.* Ramsay, Fac. Coll. July 11th, 1833; Anstruther *v.* Adair (1834), 2 Mylne & Keen's Rep. 513.

(*p*) In France and Belgium a marriage contract made after marriage is void. Code Civ. (Belg.), art. 1394.

(*q*) Wharton, s. 199; De Lane *v.* Moore, 14 How. 233; Dicey, 655, citing cases; and 1st ed., American Notes, c. xxvi. 658; 1886, J. 730, Leipzig; 1894, J. 127, 128, Boulogne (Scotch wife); 1900, J. 520, Roumania.

(*r*) Wharton, s. 201.

(*a*) Este *v.* Smyth (1854), 18 Beav. 112; 1893, J. 1196; Weiss, iii. pp. 543, 544; Toulon, 1878, J. 596; 1888, J. 515, French Consular Court at Cairo; 1875, J. 131, Louisiana; 1885, J. 76. In Louisiana this has been denied; Bourcier *v.* Lanusse, 3 Mart. 587, and 1875, J. 131; Wharton, s. 201.

(*b*) England, In re Cooke's Trusts (1887), 56 L. J. Ch. 637; Cooper *v.* Cooper (1888), 13 App. Cas. 88; Duncan *v.* Dixon (1890), 44 Ch. D. 211; Viditz *v.* O'Hagan (1899), 2 Ch. 569; Dicey, 635, n.; Weiss, 532, 535; Bar, Gillespie, 419 *et seq.*; Germany, Keidel, 1899, J. 44, 1900,

is generally determined by the *lex loci contractus* (*c*); but if both parties are of the same nationality, according to some recent Continental opinions, the forms of the national law may be used; if they are of different ones the *lex loci* forms are generally obligatory (*d*). In England, if the parties' intentions are clear and one of them is English and the property is in England and under the control of the Court, the Courts will not hold the observance of local forms necessary (*e*).

The contract will generally be construed and given effect to according to the law which the parties shall be presumed to have had in their minds, and this is generally considered to be the law of the matrimonial domicil (*f*), though the view is also strongly supported

J. 635. In France the provisions of art. 1394, Code Civ., requiring the *contrat de mariage* to be made before a notary, are applicable to French persons abroad as well as in France (1881, J. 153, Rennes). But the French form is not obligatory abroad (see Vincent et Penaud, p. 296, and cases there cited). Art. 1395, making the marriage contract immutable after marriage applies apparently to foreigners in France as being *d'ordre public*: 1900, J. 987: see Weiss, iii. 534; and see 1882, J. 338, Cologne, Reichsgericht; 1902, J. 839. Certain authors think the provisions of arts. 1394 and 1395 do not apply to foreigners in France: Aubry, 1896, J. 721; Beauchet, 1884, J. 39; Jay, 1885, J. 527; and 1902, J. 361, T. C. Seine. In Italy the law on the similar art. 1385 is the same, regarding it as a question of public order. The French rules do not apply to foreigners whose personal law allows them to revoke such contracts: 1902, J. 361. In English law capacity to make a marriage settlement depends on the law of the domicil, Dicey, 635, n.

(*c*) Institute, 1888, Lausanne, art. 13; Ann. x. 78; Weiss, iii. 536; 1879, J. 175; Cass., 1881, J. 153. By German Civil Code, Intr. Law, art. 11, Germans can contract abroad in local form, but foreigners in Germany must comply with s. 1434; for Italy, see Cass. Turin, 1886, J. 617. See Cass. France, 1887, J. 179.

(*d*) Weiss, iii. 537. Foreigners in France can use French forms or those of their own law. Beauchet, 1884, J. 39; Douai, 1887, J. 57; Institute, *ubi cit. supra*, allows national form. This is not, however, yet generally accepted. Wharton, s. 199, adopts *lex loci actus* for form. Weiss thinks that the requirement in French law of publicity for marriage contracts by certificate given by the notary witnessing them does not apply to foreigners, iii. 538, 539; and similarly with regard to publication of judgments of separation of goods though the jurisprudence on this point takes the contrary view, iii. 540. See *post*; and so Surville, cited by him.

(*e*) Van Grutten *v.* Digby (1862) 1, 3 Beav. 561; Watts *v.* Shrimpton (1855), 21 Beav. 97.

(*f*) In re Muspratt-Williams (1901), 84 L. T. 191; Lansdowne *v.* Lansdowne (1820), 2 Bligh, 60, 87; Anstruther *v.* Adair (1834), 2 M. & K. 513; Wharton, s. 199; Chamberlain *v.* Napier (1880), 15 Ch. D. 614; Phillimore, 329; Dicey, 637; Foote, 331—338 *et seq.*; Lalleur, 162; and see Bar, Gillespie, 422. Story thought

that this should be the personal or national law of the parties (*g*). In England the parties are held to adopt a foreign law for this purpose either by express declaration to such effect or by inference from their use of terms or provisions of foreign law (*h*); and in France it has been authoritatively laid down that the intention of the parties is to be sought for as decisive (*i*).

A change of nationality or domicil will not affect the contract (*k*); and for carrying out the contract the law governing it when made will continue to determine the wife's capacity under it though it will not do so for a new agreement (*l*). Property not dealt with by the contract is governed by the rules applicable to the case where there is no contract (*m*). A change of nationality or domicil made by the marriage may, however, affect the capacity of the parties *inter se* under a marriage contract; and thus an infant wife acquiring by marriage a new domicil has been held in England capable of repudiating such a contract as *ultra vires* which by her former law she could not after that time have repudiated (*n*).

As regards real property, in England a marriage contract has not the effect of a conveyance if it is not in English form, but it will have full operation as a contract against such property (*o*), which will

that the *lex loci contractus* should govern interpretation: s. 276. See Ex parte Sibeth (1885), 14 Q. B. D. 417. But the true test is always intention: Foote, 336; Clunet, 1875, J. 281, 282; and so 1899, J. 825, French law. The law of the matrimonial domicil has the balance of authority on the Continent: 1875, J. 281, Prussia; 1899, J. 744, 746, T. C. Seine. Some opinions incline to the *lex loci contractus* in the sense of the place where the contract is to be executed, which comes to much the same thing as above: 1899, J. 423; Bar, 423.

(*g*) So Weiss, iii. 532, 546; Bar, *ubi cit. sup.*; 1893, J. 413. In France a Jewish marriage contract has been held governed by Jewish law: 1890, J. 298; 1899, J. 1023.

(*h*) Collis *v.* Hector, 1875, L. R. 19 Eq. 334; 1875, J. 445, provision that husband should not transfer his domicil abroad: In re Megret, [1901] 1 Ch. 547; In re Bankes, [1902] 2 Ch. 333; Surman *v.* Fitzgerald, [1903] 1 Ch. 933; [1904] 1 Ch. 574.

(*i*) 1899, J. 744, 746; 1902, J. 314, C. A. de Paris.

(*k*) Phillimore, 331—334; Duncan *v.* Cannan (1854), 18 Beav. 128; (1855), 7 De G. M. & G. 78; Dicey, 639.

(*l*) Guepratte *v.* Young (1851), 4 De G. & Sm. 217.

(*m*) Phillimore, p. 335; Dicey, 639, citing cases; 1897, J. 404, Brazil; Westlake, 72, 78, 81, citing Watts *v.* Shrimpton, above.

(*n*) Viditz *v.* O'Hagan, [1900] 2 Ch. 87; 1902, J. 870. See Gesling *v.* Viditz, 1904, J. 680 (C. A. d'Orleans).

(*o*) Westlake, 75; Dicey, 500—512, 572, 810—813; Williamson, Vendor and Purchaser, 851, 852; see Burge, 1st ed., 638.

ground a personal action to compel a transfer in the manner prescribed by the *lex situs*, unless the latter law prohibits such a disposition as that made by the contract. Thus, if the *lex loci rei sitæ* prohibits the reservation by contract of *douaire* to a greater amount than the law itself gives, a nuptial contract, in whatever place it was made, could not confer on the wife a title in contravention of that law (*p*). It has not been decided whether the formalities of such a contract relating to real property are governed by English law or the *lex situs*, but it seems that they will be governed by the latter (*q*). The rights given by the contract are subject to the *lex situs*, and Story thought that the same law governed all matters connected with land, including the effect of contracts relating thereto; but the view stated above is held by Westlake and is in accordance with the view which is receiving increased support on the Continent (*r*); and if the law of the matrimonial *régime* is subordinated to the *lex situs* in case of conflict between them, no difficulty is likely to arise. In the United States a marriage contract relating to land is construed according to the *lex situs* (*s*). In France, and, generally, on the Continent, the tendency seems to be to give full effect to the marriage contract with regard to all property of the spouses, real or personal, subject to the limits fixed by the *lex situs* (*t*).

The rights of the spouses in succession to each other are governed by the law of the domicil of the deceased so far as the contract does not provide otherwise (*u*). Their rights *inter se* by the contract are, however, liable in English law to be postponed to those of third parties in the case of bankruptcy of one of the spouses, in which case the *lex fori* determines the priority of creditors (*x*), but by the

(*p*) So Lafleur, 163, citing C. C. of L.C., art. 1259, and Wilson *v.* Wilson, 2 R. de L. 431, who thinks that some stipulations may be against public policy of the *lex situs;* France, Seine, 1899, J. 345, where dotal property was inalienable by (Swiss) *lex situs;* but in 1902, J. 177, Dutch law (C. C. 198), forbidding spouses to stipulate generally that a foreign law or obsolete law should govern their property, relates to form only. See 1903, J. 366, Italian law.

(*q*) Dicey, 502.

(*r*) Westlake, 75.

(*s*) Dicey, 1st ed., Am. Notes, 527, 528; Kelley *v.* Davis, 28 La. Ann. 773, effect of a contract between husband and wife as to realty is governed by *lex situs;* Long *v.* Hess, 154 Ill. 482.

(*t*) 1899, J. 744, T. C. Seine; 1902, J. 314, C. A. Paris.

(*u*) Westlake, 81, citing Foubert *v.* Turst (1703), 1 Br. P. C. 129; Lashley *v.* Hog (1804), *ante;* Hernando *v.* Sawtell (1884), 27 Ch. D. 284; Dicey, 643.

(*x*) Thurburn *v.* Steward (1871), L. R. 3 P. C. 478; Ex parte Melbourn (1870), L. R. 6 Ch. 64. See

adoption of a particular law in the contract the rights of creditors may be excluded (*xx*).

III. **Donations inter Conjuges.—Burge's View.**—The laws which prohibit or admit under certain restrictions donations by either of the married persons to the other *stante matrimonio*, are classed by some jurists as territorial laws, and they do not, therefore, extend their power beyond the territory in which they are established (*y*).

The donation, if the subject of it be immovable property, will be valid or invalid as it is permitted or prohibited by the *lex loci rei sitæ*, and if the subject of it be movable property its validity will be governed by the law of the domicil (*y*).

Modern View.—Although this view still occasionally is expressed (*z*), modern opinion treats the laws which govern donations *inter conjuges* as regulated by the question of capacity (*a*). On this ground a prohibition against such donations existing by the *lex situs* may not be applicable to married persons domiciled in another country (*b*). The personal law is thus applied to donations of real property as much as those of personal property (*c*), though there are authorities which subject real property to the *lex situs* (*d*).

The personal law for this purpose is that which the spouses have at the time of the act in question, according to the balance of opinion (*e*), though in Canada (Quebec) it was held in one case that the law of the matrimonial domicil would govern even after

Bar, Gillespie, 417, 418; Dicey, 655; Westlake, 175. In 1882, J. 233, a wife was allowed to prove for her share in the funds of the marriage settlement, which had been made abroad, and had not received executory force in the *forum* of the bankruptcy (Geneva).

(*xx*) In re Fitzgerald, [1904] 1 Ch. 573.

(*y*) Burge, 1st ed., i., 639; Pothier, Tr. des Don. entre mari et femme, art. 2, n. 19. So the majority of French authors on old French law; Merlin, during transition period between old law and Code Napoleon; and since the Code the Cour de Cassation, 1857 (D. 57, i., 102), 1 Foelix, i., nn. 60, 93.

(*z*) 1898, J. 935; 1899, J. 385, on appeal, held to be a contractual relation governed by the will of the parties and subject to the law of the country where it is to take effect.

(*a*) 1879, J. 385, n.; Bar, 419; see Savigny, s. 379; Guthrie, 297; Laurent, v., 221 *et seq.*; Wharton, s. 202.

(*b*) Bar, s. 187; Gillespie, 420; and cf. Broomer *v.* Arthur, [1898] A. C. 777, where deed of family arrangement as to land held not to be a conveyance by husband and wife prohibited by Jersey law.

(*c*) Bar, 420.

(*d*) 1891, J. 508; 1892, J. 940; 1894, J. 562, Cass., Zammaretti Case; 1899, J. 558, Algiers; 1882, J. 295, n.

(*e*) Savigny, s. 379; Guthrie, 297; Demangeat on Foelix, i., pp. 109, 228; Bar, 419; Lafleur, 174, on the ground that the tacit agreement theory cannot extend to matters not the subject of a contract. So Clunet, 1899, J. 407, n.

a change of domicil to a country where such donations are prohibited. But on appeal the Court found it unnecessary to decide this question, as they held that the alleged donations were not more than customary presents, and, as such, authorised by the law of the actual domicil. The view taken in the superior Court appears to be unsound (*f*). A distinction has been made between gifts made before and gifts made after such a change of domicil, the former being regarded as valid and not affected by the subsequent prohibitive law, being vested rights, while the latter are subject to the latter law (*g*). The same personal law decides if spouses can alter existing contracts of marriage after marriage has taken place, subject to any prohibitions imposed on the property of which the donation is made by the *lex situs* (*h*); but the proof of such gifts can only be admitted in France in accordance with the *lex fori* (*i*). Bar distinguishes between restrictions imposed on the legal capacity of the wife as such and the limitations on the wife's rights of disposal owing to the husband's rights, applying to the latter the law of the matrimonial domicil and to the former the law of the actual domicil (*ii*); and this distinction seems to be recognised by English Courts (*k*).

Special remedies or rights of the wife, given to her by her personal law, will, it seems, be recognised elsewhere if they are allowed by the *lex situs* (*l*). An example of such a remedy or right is afforded by the legal hypothec of the French law, which is only available between French spouses marrying in France or persons having that right by treaty between their country and France (*m*).

(*f*) Eddy *v.* Eddy (1897), 4 R. de J. 78; 1898, R. J. C. 7 Q. B. 300, under C. C. of L. C., art. 1265; 1899, J. 407. But this case is of doubtful authority. See Lafleur, p. 173.

(*g*) Pothier, Don. entre mari et femme, n. 19.

(*h*) Bar, Gillespie, 421; 1899, J. 558, above. So with regard to laws declaring the inalienability of *dot:* 1902, J. 314, C. A. Paris; 1892, J. 1060, Sweden; 1881, J. 355 and 1882, J. 411, gift by Spanish father, *par preciput*, in a marriage contract to his Italian daughter, prohibited by Spanish law, good by Italian law, only effective over land in France, not over land in Spain or movables in France.

(*i*) Thus, a gift of lace by an English husband to his wife in France could not be established by witnesses: Abdy *v.* Abdy, Cass., June 14th, 1899; 1899, J., p. 804; 1900, J., p. 977.

(*ii*) Bar, 417, 418 (see p. 763, *ante*); see 1879, J. 75, Turin, Cass.; 1899, J. 515, wife's power of disposal of real property without husband's sanction.

(*k*) See, *e.g.*, Viditz *v.* O'Hagan, [1900] 2 Ch. 87; De Nicols *v.* Curlier, [1900] A. C. 21.

(*l*) Weiss, iii. 560; even against creditors abroad, 1887, J. 116; 1898, J. 1087, Tunis, legal hypothec not allowed by *lex situs*.

(*m*) Code Civil, art. 2121. This does not apply to foreigners: 1881,

IV. **Separation of Property.**—As already seen, in certain contingencies, a spouse can obtain separation of his or her property brought into the marriage. In order that a Court may exercise this jurisdiction over foreigners it is considered that there must be something in the marriage to show that the parties contemplated the possibility of submission to that Court. Jurisdiction over the matrimonial property *régime* is generally regarded as belonging properly to the Courts of the domicil of the spouses (*n*). In France the Courts have not absolute competence over foreigners for this purpose (*o*), but the objection to their jurisdiction is one *ratione personæ* only and not *materiæ*, and it must be taken *in limine litis* (*p*). Thus they will not grant separation of goods in the case of foreign spouses unless the marriage contract was made in France and the marriage had there, or the parties have no domicil elsewhere, or the parties accept their jurisdiction (*q*). In Switzerland and in Belgium the jurisdiction in this matter is based on the parties having their domicil there (*r*); but the Belgian Courts will only grant a separation *de biens* if the personal law of the parties allows it. The French Courts will not allow to be executed in France judgments pronouncing separation of goods, whether in the case of French persons separated by foreign decree or foreigners separated by French decree, until they have been published as the Code directs (*s*). Belgian and Swiss Courts also recognise foreign separations of property (*t*).

J. 502, Cass.; 1879, J. 395; 1877, J. 42; nor to French women marrying foreigners, though the matrimonial contract adopted French law (1883, J. 511), even against husband's property in France (*ibid.*), nor is the right acquirable by subsequent acquisition of French nationality by annexation of territory: 1881, J. 253.

(*n*) Swiss Federal Constitution, art. 59; 1892, J. 524, Geneva, division of community, a case under the Franco-Swiss treaty.

(*o*) 1878, J. 370, Seine.

(*p*) 1900, J. 988, C. A., Nancy.

(*q*) France, 1880, J. 227; 1898, J. 895; 1900, J. 988; 1879, J. 550; 1889, J. 665; 1882, J. 543; 1886, J. 349; Monaco, 1893, J. 453; 1874, J. 127; 1883, J. 63, *contrà*, Amiens; 1885, J. 377, 378, Feraud Girand.

(*r*) 1885, J. 210; 1887, J. 379.

(*s*) Art. 1445; 1893, J. 577, Cass.; 1896, J. 170, Besançon. The effect of separation of goods is decided by the law in force at the time of marriage: 1892, J. 1021, St. Jean de Maurienne.

(*t*) Belgium, 1881, J. 485; Switzerland, 1887, J. 116, 379. Such separations are not within the Franco-Swiss treaty of 1869: 1890, J. 517, Neuchatel; 1885, J. 210. Swiss Courts can grant them for any foreigners domiciled in Switzerland. For Jewish law, see 1890, J. 299, Tunis, separation of goods only got by divorce.

CHAPTER XVI.

THE LAW OF DIVORCE AS IT EXISTS UNDER DIFFERENT SYSTEMS OF JURISPRUDENCE.

Introductory.

Termination of Status of Marriage.—The marriage may be dissolved, and the status or relation of husband and wife terminated, not only by death but also by divorce.

Divorce à mensâ et toro.—There are two species of divorce, the one is a separation of the parties from bed and board, *à mensâ et toro;* the other is an entire dissolution of the marriage. The former suspends but does not extinguish the obligations of marriage. The parties may, by reconciliation, resume their cohabitation, *separantur, sed remanent conjuges.* They cannot therefore contract any other marriage until their former marriage is dissolved by death or divorce *à vinculo.*

Divorce à vinculo matrimonii.—The divorce *à vinculo matrimonii* may be the effect of a judicial sentence which declares a marriage null, because it was never valid. The causes for which such a sentence may be pronounced have been already considered (*a*). But the divorce which is here intended, and is distinguished from that which awards the separation of the parties only, makes null a marriage which, *ab initio*, was perfectly valid.

There has prevailed, in different ages and countries, a great diversity of opinion and practice in relation to the dissolubility of the bond of marriage.

The provisions of the Roman and Canon Laws may be first briefly noticed.

Roman Law.—In the earliest history of Rome, its policy was opposed to divorces on slight and frivolous grounds. Although the law of the Twelve Tables is said to have allowed the husband to divorce his wife when it suited his inclination, tradition affirms

(*a*) See Chapter IV., Nullity of Marriage.

that for the next two centuries repudiation was unknown except for serious misconduct (*b*). The frequency of divorces and the frivolous causes for which they were granted in a succeeding age formed a striking contrast to the simplicity and purity of morals which distinguished the earlier period of Roman history (*c*).

The *manus* marriage of the old law required a formal act to dissolve it: if constituted *confarreatione*, there must be the religious ceremony of *diffareatio*; if arising *coemptione* or *usu*, there must be *remancipatio*, a form by which the husband released the wife from his *manus*. Under this system the husband alone had the right of divorce (*d*).

When marriage without *manus* had superseded the older type, freedom of divorce was expressly recognised (*e*), and the wife was given equal rights with the husband in the matter. No inquiry or decree, judicial or otherwise, was necessary—nothing beyond the intention to dissolve the marriage. The proper evidence of this intention was a notification from one spouse to the other (*repudium*), for which the presence of seven witnesses was required by the *lex Julia de adulteriis* (*f*); it was subsequently prescribed that the message should be in writing (*libellus repudii*) (*g*).

The adoption of Christianity did not avail to change the legal conception of marriage as a human institution resting on consent, and determinable by a private act at the will of either party or both. The legislation of the Christian Empire, however, aimed at restraining the laxity of divorce by specifying certain statutory grounds for repudiation, and punishing the party causing the divorce or separating without good cause by a forfeiture of the offender's interest in the marriage settlements (*dos* and *donatio propter nuptias*); but it never enacted that a causeless divorce should be null and void. The lawful grounds of divorce were numerous and

(*b*) Plutarch, Romulus, 22; Cic., Philipp., ii., 28; Aul. Gell., iv., 3; Muirhead, Hist. Intr., pp. 112, 234.

(*c*) It is exhibited by Martial in the following epigram:

"Aut minus, aut certè non plus, tricesima lux est;
Et nubit decimo jam Thelesina viro.
Quæ nubit toties, non nubit, adultera lege est.
Offendor mœchâ simpliciore minus."
(Lib. 6, Epig. 7.)

(*d*) Gai. Inst. i. 137.

(*e*) Cod. viii. 38. 2. "Libera matrimonia esse antiquitus placuit, ideoque pacta ne liceret divertere non valere: et stipulationes, quibus poenae inrogarentur ei qui divortium fecisset, ratas non haberi constat."

(*f*) Dig. 24, 2, 9.

(*g*) Cod. v. 17. 6.

varied from reign to reign; many of them had nothing to do with the violation of the duties of marriage. In the time of Justinian there still existed great facilities for procuring divorce. Divorce *communi consensu*, previously permitted without penalty, was now forbidden under pain of enforced retirement to a religious house and loss of the entire fortune; but the next emperor had to repeal the restriction (*h*).

Divorce *bonâ gratiâ*, *i.e.*, on some recognised but innocent ground such as impotence, vow of chastity, prolonged absence in captivity, involved no penalty for either spouse. In every other case divorce by one spouse entailed a penalty, its amount and the person affected by it depending on the adequacy or inadequacy of the motive (*repudium ex justa causa*, *repudium sine ulla causa*).

Among the grounds for divorce, common to both the husband and wife, were treason, or misprision of treason, certain other crimes, attempts to poison or murder each other, designs against the life of either, the concealment of those designs, personal violence, taking a vow of celibacy or chastity. The grounds on which the husband might divorce his wife were not only adultery, but various acts, including levity and indecorum of conduct. The wife could not divorce the husband for adultery committed by him, unless he brought his paramour into his house (*i*).

Canon Law.—The Church found divorce existing in various systems when it became itself in a position to influence law. The civil law had, as we have seen, allowed it for both spouses by mutual consent, and *inter alia* for slavery or captivity for five years. In the early German law system divorce was at first allowed only to the husband, but gradually the wife also acquired the right.

Western Church.—In early Christian times there was a diversity of opinion as to divorce. One view was that it was not admissible at all, another that on account of adultery either spouse could divorce the other. Finally the opinion of Augustine in favour of the former view prevailed, on the ground that marriage was a sacrament; and the secular causes for divorce, such as illness, captivity, or prolonged absence of a spouse, were rejected, though isolated examples of the latter principle occurred from time to time. Up to the ninth century the Church Councils, while upholding the principle of the

(*h*) Nov. 117, c. 10; 134, c. 11.
(*i*) Cod. v. 17. 10—12; Novv. xxii., cxvii., cxxvii.; Muirhead, p. 356; Hunter, p. 692.

indissolubility of marriage, yet tolerated relaxations of the rule in favour of persons resorting to divorce according to the civil law. After that date the rule was more rigidly enforced. The books of ecclesiastical practice, *libri penitentiales*, showed the same tendency. Thus divorce by mutual consent was at first allowed, and repudiation of a spouse was admitted for adultery or desertion by the wife; in case of captivity of one spouse the other could re-marry, and divorce was allowed for impotence of the husband or the servile condition of one spouse not known to the other. In France the ecclesiastical Capitulations of the Frank kings, such as those at Compiègne (757) and Verbery (758—759), allowed re-marriage to a spouse where the other had, with his or her consent, entered religious life, or where the other was a leper, and impotence of the husband, and attempts or injuries by the wife against the husband, were grounds for divorce; but no mention is made in these decrees of divorce for adultery, except where coupled with incest. There was a similar rule with similar exceptions in such early legislation on this head as the *Lex Romana Visigothorum*. Even up to the twelfth century there are examples of divorce allowed by Papal authority, *e.g.*, where a spouse, Catholic at marriage, had become a heretic or an infidel, and for prolonged absence of a husband; and divorce was allowed for serious infirmities making conjugal life impossible, in such systems as the *Assises de Jerusalem*.

These cases, however, must be regarded as of no account, and were not admitted by subsequent legislation.

The Western canon law thus rejected altogether divorce proper (*quoad vinculum aut foedus*), while allowing impotence and ignorance of servile condition to be causes of nullity of marriage; but admitted it in a qualified form (*quoad torum et mensam*), which released the parties from the duties of conjugal life. This was a judicial development of the *repudium* of the civil law, which was the act of an individual, and it required the decision of a bishop or Synod. Divorce was allowed for *fornicatio carnalis* of either party, a ground, however, which could be repelled by certain exceptions, *e.g.*, proof that the petitioner was guilty of adultery, or that the spouses had been reconciled, *i.e.*, that there had been condonation; or for *fornicatio spiritualis*, apostasy or heresy of a spouse, and for cruelty. The action was only available to the innocent spouse, and confession by the guilty one was sufficient proof. Pending

such a separation, the obligation of alimony to the wife still continued (*k*). Such a separation could be terminated by the parties coming together again, which, however, apparently required a judicial sanction. At the Council of Trent the question of divorce for adultery was discussed, and several views were stated; on the one hand, the indissolubility of marriage was upheld as the established principle of the Church, and as having been adhered to in the practice of the Roman Church; on the other hand, the long-standing permission of divorce by that Church and the traditional practice of the Eastern Church (*l*) was relied upon as a reason why the doctrine of indissolubility should not be made a dogma of faith.

Instead of the anathema being directed against those who held a doctrine contrary to that of the Church, it was pronounced against those who held that the Church erred in maintaining this doctrine: "*Si quis dixerit Ecclesiam errare, quum docuit et docet* juxta evangelicam et apostolicam doctrinam propter adulterium alterius conjugum, matrimonii vinculum non posse dissolvi; et utrumque, vel etiam innocentem qui causam adulterio non dedit, non posse, altero conjuge vivente, aliud matrimonium contrahere, mœchariique eum qui dimissâ adulterâ aliam duxerit, et eam quæ dimisso adultero alii nupserit, anathema sit" (*m*).

Other canons were also adopted, one condemning divorce (*a vinculo*) for difference of religion, prolonged absence, and incompatibility of temper (*molesta cohabitatio*, canon 9), and another allowing marriage to be dissolved, if not consummated, by either spouse entering religious life (canon 6). The canons approved of the practice of the Church allowing, for various causes besides adultery, separation for a definite or indefinite time (*quoad torum seu quoad cohabitationem*) (*n*), and penalties were prescribed against concubinage of laymen (*o*). However, concubinage was not accepted in France as a delict punishable by ecclesiastical courts, and by the

(*k*) See Athon, 58; but see Esmein, ii., 95.

(*l*) It appears from the proceedings of the Council of Trent that the Greek Church permitted a divorce on the ground of adultery committed by the wife, and that, in tenderness to its opinion, the Council, on the representation of the Venetian Ambassador, altered the terms of its anathema against those who maintained it: Burge, 1st ed., p. 643; Belgeri, Canones Tridentini et Vaticani, p. 443.

(*m*) Sess. xxiv., canon 7; Pothier, Traité du Mar., s. 497.

(*n*) Esmein ii., 309.

(*o*) Cap. VIII., de reform. matrim.

eighteenth century it was established law there that ecclesiastical officials could not take cognisance of lay concubinage (*p*).

The **Reformation** in dealing with divorce went back to Scriptural authority, but with regard at the same time to the rules of the Roman law and law of the ancient Church; and it treated as undoubted the right to dissolve marriage. At the outset certain causes were treated as dissolving marriage *ipso jure*, such as adultery and desertion, with the result that the proprietary relations of the spouses were placed on the same footing as in the event of the marriage being dissolved by death, and that the parties could remarry. But this power of the parties to separate from each other was subsequently forbidden, and a judicial declaration was required. Various grounds of divorce were recognised by the various Reformers, including adultery, giving up the faith, desertion, ill-treatment, refusal of conjugal intercourse, and offences entailing the penalty of death or banishment (*landesverweisung*) or life-long imprisonment. Separation was also admitted on grounds which were not sufficient for a divorce (*q*).

Eastern Church.—In the Eastern Church the system of divorce adopted by the civil law was retained, except that by mutual consent; and divorce was regarded as compatible with the Scriptural command that "man shall not put asunder those whom God has joined together," because the decree of divorce was regarded merely as a legal recognition of the fact that marriage no longer subsisted between the spouses.

The causes of divorce were prescribed partly by the Church and partly by the State, and the Church recognised certain of the latter as well as the former.

The canonical grounds for divorce are: (1) Adultery and certain circumstances raising the presumption of adultery, *e.g.*, actions by one spouse endangering the life of the other, when divorce was available to the innocent party. The husband could claim divorce if his wife wilfully committed abortion, or with criminal intent associated with strangers at assemblies, or stayed away at night without good cause or her husband's consent in strange houses, or visited public places of entertainment without his consent.

(*p*) Esmein, ii., 314; and see generally for the foregoing, *ibid.*, ii., chapters 2, 6.

(*q*) See, generally, Friedberg, Kirchenrecht (1903).

The wife could claim divorce if the husband made attempts against her honour, or publicly and falsely accused her of adultery, or publicly or secretly, either in his own house or elsewhere, conducted an intrigue with another woman. (2) Lapse from Christianity. (3) A spouse receiving a child in baptism. (4) The husband's acceptance of a bishopric. (5) Entry into monastic life.

The grounds of divorce established by State law, which are adopted and recognised by the Church, are: high treason, disappearance of the husband, and failure to perform marital duties. Others not so recognised are: lunacy, leprosy, condemnation to a prolonged term of imprisonment, and invincible repugnance (*r*).

Divorce is not, however, granted until all attempts to bring the spouses together again have failed and a justifying ground for the divorce has been established.

The effect of divorce is to restore the parties to the position in which they stood before the marriage. The necessary arrangements with regard to property are made in the Eastern Patriarchates by the competent Church authorities, and in the other autocephalous Churches by the State authorities. The parties can marry again, though a period is prescribed for the guilty party in which to make expiation, but in the case of adultery the guilty party may not re-marry. Separation *à mensâ et toro* is only recognised as a provisory measure, preliminary to divorce, and quite different from the separation admitted by the Western Church. It may be ordered by the Court, after all attempts at reconciliation have failed, for a period which may be a few months, or as long as three years in special cases, during which the husband must provide alimony for the wife and children (*s*).

SECTION I.

Roman-Dutch Law.

Early Law.—Among the Germanic races, as the husband was not bound to monogamy, he could not be guilty of adultery. It was, on the other hand, the wife's duty to remain faithful to her husband, and—in case she committed adultery—she might be sent out of the house, and even be liable to capital punishment.

(*r*) Milasch, 629—639. (*s*) Milasch, 639—641.

A marriage was the result of an agreement made between the husband and the *mond* or *momber* of the girl. This made a divorce by mutual consent an anomaly.

With the Franks a marriage was or might be dissolved on any of the following grounds, viz.: (1) by the death of either of the parties; (2) by agreement; for as the marriage was an agreement between the husband and the *mond*, or—afterwards—the relatives, of the wife, and still later the wife herself, it might be dissolved in the same manner as it had been made, by a subsequent agreement between the same parties as had formerly entered into the marriage contract; (3) by law, if the husband had been judicially declared *echteloos*, in consequence of his being excommunicated; (4) by the husband declaring his intention to divorce his wife, (a) either for good cause such as adultery of the wife, her attempting to take the life of her husband, or her refusal to follow him, indecent acts committed by the wife, poisoning, sterility; (b) or without good cause, by expelling the wife from his house. In such a case, however, the husband incurred a pecuniary liability, and he was bound to return to the wife all her property, and sometimes to pay a fine in addition (*t*).

On the other hand, the wife could not, merely of her own accord, divorce her husband. Under the influence of the civil law, however, she came to acquire in course of time certain rights in this respect under the laws of the Frankish kingdom (*u*).

Influence of the Church.—The Catholic Church did not allow "men to put asunder whom God had joined together" (*a*); and though adultery caused the severance of the bond between husband and wife, yet neither of the parties was allowed to re-marry. These rules militated against the customs of the people, and, in practice, such severity could not at first be maintained. The Church, in its endeavours to spread its doctrines and to obtain hold of the community, commenced by relaxing its requirements, and by recognising divorce under certain circumstances. But this was not the policy of the heads of the Western Church. Leniency of such a nature was neither contemplated nor sanctioned by them. Gradually it was discarded, and the resolutions of the Council of Trent settled

(*t*) Fock. Andr., Annot. ad Grot. Introd., i., 5, 18, p. 12.

(*u*) Fock. Andr., *loc. cit.*

(*a*) Matth. xix. 6.

the Church's policy. At the end of the eleventh century they were generally observed. Any marriage was then, as a rule, considered indissoluble (*b*).

During the Middle Ages in the Low Countries, as elsewhere, the Church had jurisdiction in matrimonial causes; consequently divorce proceedings appear to have been, as far as possible, prohibited.

As the Church allowed judicial separation *à mensâ et toro*, provided it was obtained with the co-operation of the spiritual authorities, such separation was continuously made use of. It was either pronounced by the Church authorities or with their co-operation. Unless so pronounced, the Church did not recognise the judgment. The grounds for judicial separation were various. To a great extent they were left to the discretion of the Court. Among them were adultery, infectious disease, malicious desertion, attempt by one spouse to take the other's life, and hatred endangering the life of either of the spouses. In Dordrecht, separation might be obtained by mutual consent (*c*).

When the canonical Courts lost their jurisdiction in secular affairs, the lay judge granted separation *à mensâ et toro;* but as divorces now became possible (*cc*), the separations grew rarer and were seldom mentioned by the legal authorities.

The authorities do, however, mention divorce and the grounds on which divorce could be asked and obtained from the Courts, the chief ones being adultery and malicious desertion (*d*). Capital punishment, banishment, punishment next in degree to capital punishment, and impossibility of access, were also mentioned as reasons for divorce (*e*).

Divorce was regulated by statute in the Political Ordinance of 1580 and the *Echtreglement* of 1665.

(*b*) Cf. pp. 809 *et seq.*; Fock. Andr., Annot. ad Grot., Introd., i., 5, 18, pp. 13, 14; Het Oud Ned. B. R., ii., 194.

(*c*) Fock. Andr., Annot. ad Grot. Introd., i., 5, 18, p. 14; Het Oud Ned. B. R., ii., 196, 198.

(*cc*) Cf. p. 811.

(*d*) Fock. Andr., Het Oud Ned. B. R., ii., 199—201; Groenewegen, Leg. Abr., Cod. v., 17, lex 7: "per hujusmodi enim malitiosam desertionem matrimonium solvi sentiunt reformatæ religionis professores"; H. Brouwer, De Jure Conn., ii., 18, 12.

(*e*) Fock. Andr., Het Oud Ned. B. R., ii., 199—201. The influence of the Church is, probably, the principal reason that no mention was made of divorce on account of malicious desertion in the Middle Ages. Wessels, History, pp. 469—471.

Separatio à Mensâ et Toro (*f*).—Separation is a temporary suspension of the marital life, which, without dissolving the marriage tie and with a view to a future reconciliation, relieves the spouses for the time being from the obligation of living together, or, in other words, separates them from bed, board and cohabitation (*g*).

Separation could only be granted by a judicial Court on proper grounds, and could not be arranged by mutual consent without such a judicial pronouncement (*h*).

The grounds were : (1) the same as those which would be grounds for divorce, viz., adultery and malicious desertion, if possibility of a reconciliation had not yet altogether gone (*i*) ; (2) serious quarrels and differences between the spouses which might have consequences dangerous to the life and safety of either of the spouses ; habitual cruelty and ill-treatment (*k*) ; (3) the husband's squandering away of his wife's fortune to such an extent that there would be danger of his reducing her to poverty (*l*) ; (4) venereal disease or any other cause of suspicion that adultery had been committed (*m*) ; (5) mutual consent (*n*) ; (6) attempt by either of the spouses on the life of the other ; refusal to live together ; compulsion on the part of the

(*f*) Grotius, Introd. i., 5, 20 ; Schorer's Notes ad Grot., Introd., *loc. cit.* ; Van Leeuwen, R. H. R., i., 15, 3, 4 ; Cens. For., i., 1, 15, 4 ; J. Brouwer, De Jure Conn., ii., 29 ; J. Cos, Huwelÿck, s. 170 ; J. Voet, Ad Paud., xxiv., 2, 16 *et seq.* ; Lybreghts, Reden. Vertoog, i., 12, 18—27 ; Van Zurck, Codex Batavus, *voce* "Houwelÿck," s. xxxi. ; Schrassert, Codex Geho. Zutf., *voce* Huwelycks-saecken, x., and Separatio à mensâ et toro ; Bynkershoek, Quæst. Jur. Priv., ii., 9 ; v. d. Keessel, Thes. Sel., Thes. 90 ; v. d. Linden, Koopmansh., i., 3, 9, p. 31.

(*g*) Echtreglement voor de Generaliteytslanden, 1656 ; Groot Placaatboek, ii., 2446, a, 92 ; Lybreghts, Reden. Vertoog, ii., 12, 18.

(*h*) Grotius, Introd., i., 5, 20 ; Schorer's Notes ad Grot. Introd., *loc. cit.* ; Neostadius, De Pactis Anten. Decis., 7, 8, *in notis* ; Lybreghts, Reden. Vertoog, i., 12, 20, and 22, 23 ; J. Voet, Ad Pand., xxiv., 2, 17, par. 2 ; J. Brouwer, De Jure Conn., ii., 29, 4 ; v. d. Linden, Koopmansh., i., 3, 9, pp. 31 *et seq.*

(*i*) J. Brouwer, De Jure Conn., ii., 29, 8 ; J. Voet, Ad Pand., xxiv., 2, 19 ; Lybreghts, Reden. Vertoog, i., 12, 23.

(*k*) J. Brouwer, De Jure Conn., ii., 29, 11 ; Lybreghts, Reden. Vertoog, i., 12, 19.

(*l*) Lybreghts, Reden. Vertoog, i., 12, 19.

(*m*) J. Brouwer, De Jure Conn., ii., 20, 10, who includes a number of other crimes of which the husband may be guilty and thus expose the wife to the risk of being punished as an accomplice ; Fock. Andr., Annot. ad Grot., Introd., i., 5, 18, p. 14.

(*n*) Fock. Andr., Annot. ad Grot., Introd., i., 5, 18, p. 14 ; Het Oud Ned. B. R., ii., 196.

husband to make his wife lead an immoral life (*o*). All these were grounds for which the judge, in his discretion, might grant separation, and every case was decided on its own merits (*o*).

As regards the consequences of a separation, much difference of opinion prevailed among the authorities. (a) If the parties had made their own arrangements, the judge had merely to sanction them, although much was left to his discretion. The decision of the Court was published and was binding upon the parties and upon third persons until, if at all, reconciliation took place (*p*). (b) If no private arrangements had been made, either of the parties was entitled to request the judge to pronounce, not only a separation from bed and board, but also a *separatio bonorum*. Upon the judgment being pronounced and published, the separated spouses proceeded to divide the community property—if they had been married under the system of community—and they ceased to be responsible any longer for each other's debts (*q*).

The *separatio à mensâ et toro*, of itself, did not affect the property of the community, or the system of community itself, nor the husband's marital power (*r*). If the judge did not pronounce otherwise, they remained as these had been previously; but the judge had full power to deal with them at his discretion, and might take into consideration the claims of the petitioner, the respective interests of the parties, &c. (*s*).

The judgment had to be published in order to be effectual against third parties.

The husband remained obliged to maintain his wife, if she needed it and had not herself given cause for the separation. He had to pay to her her dowry, if any (*t*).

(*o*) Fock. Andr., Het Oud Ned. B. R., ii., 196.

(*p*) v. d. Linden, Koopmansh., i., 3, 9, p. 31.

(*q*) Holl. Cons., iii. b., Cons. 242 *in fin.* (Grotius).

(*r*) J. Voet, Ad Pand., xxiv., 2, 16; Bynkershoek, Quæst. Jur. Priv., ii., 9; Schorer's Notes ad Grot., Introd., i., 5, 20; Lybreghts, Reden. Vertoog, i., 12, 18—27; v. d. Keessel, Thes. Sel., Thes. 90; v. d. Linden, Koopmansh., p. 31.

(*s*) According to Arntzenius, Inst. Jur. Belg. Civ., iii., 295, not only the *communio bonorum* came to an end, but also *mariti jura, cura et administratio;* A. v. Wesel, De Conn. Bon. Societ. Tract., ii., 4, 38 *et seq.*, similarly stated that, according to a decision of the Court at Utrecht, the marital power came *ipso jure* to an end upon the separation being decreed; Schorer's Notes ad Grot., Introd., ii., 11, 17; Fock. Andr., Het Oud Ned. B. R., ii., 198.

(*t*) Lybreghts, Reden. Vertoog, i., 12, 24, 25; v. d. Keessel, Thes. Sel., Thes. 90.

The separation came to an end upon the reconciliation of the parties, which removed *ipso jure* all consequences of the separation and restored the marriage to the same position as it would have had if no separation had ever taken place (*a*).

Colonies.—Judicial Separation.—South Africa.—The same rules apply (*b*) as those under the general law. The grounds of separation are: ill-treatment, cruelty, continuous quarrels and dissensions, habitual intemperance, serious assaults which render the continued living together of the spouses intolerable or dangerous to the life of one or other of them (*c*).

The consequences of separation are, as regards the persons, that the obligation to live together ceases; as regards the marital property, if the Court do not pronounce a special decree, the relations between the parties remain unaltered, whether they consist of the system of community or an arrangement by ante-nuptial contract. The spouses are, however, no longer responsible for each other's liabilities (*d*).

If the separation has been pronounced at the wife's request she can claim maintenance from her husband (alimony), unless her conduct was the cause of the separation order (*e*).

A voluntary deed of separation—that is to say, an extra-judicial separation—only takes effect as between the spouses, and not as regards creditors. As regards the spouses, an agreement for separation which provides for the division of the community to which the innocent spouse would have been entitled, if a judicial decree had been obtained, is considered a legal and effectual contract (*f*).

Such creditors will, however, be bound as have had notice of the deed of separation and its particulars previously to their entering into a contract with either of the spouses (*g*).

In **Ceylon** the same rules apply (*h*).

Separation *à mensâ et toro* may be applied for "on any ground on which by the law applicable" (to Ceylon) "such separation

(*a*) v. d. Linden, Koopmansh., p. 31.

(*b*) Maasdorp, Institutes of Cape Law, i., pp. 75—103; de Bruyn, Opinions of Grotius; Wessels, History.

(*c*) Maasdorp, Inst., i., p. 75, and cases quoted by him; Thelland *v.* Thelland (1909), S. A. L. J., xxvi., p. 421.

(*d*) Maasdorp, *loc. cit.*, i., p. 77.

(*e*) *Ibid.*, 78.

(*f*) *Ibid.*, 77.

(*g*) *Ibid.*

(*h*) Pereira, Laws of Ceylon, ii., 140, 141.

may be granted" (*i*), but only as a subsidiary petition to a petition for divorce (*k*). The separated wife has the status of an unmarried woman as regards property (*l*), contracts and torts (*m*). The Court may deal with the custody and maintenance of the children pending action (*n*) and after decree (*o*).

In **British Guiana** the general rules apply.

Divorce (*p*).—A divorce—that is to say, dissolution of the marriage during the lifetime of the spouses—could only be pronounced by the Court, and it could not be effected by mutual arrangement, though collusion was not absolutely excluded (*q*).

A decree was only granted by the Court on proper grounds (*r*). The two main grounds were: (a) adultery; (b) malicious desertion. Besides these, other grounds are mentioned by some authors, which were considered to form an extension of the principles on which these two grounds were based (*s*), viz., (c) unnatural crime, containing the principle of adultery; (d) condemnation to death; (e) imprisonment for life; (f) banishment; (g) long absence and subsequent re-marriage of the wife—all containing the principle of malicious desertion (*t*).

(*i*) Civil Procedure Code, s. 608.

(*k*) Pereira, Laws of Ceylon, ii., 139.

(*l*) Civil Procedure Code, s. 609.

(*m*) S. 610.

(*n*) S. 619.

(*o*) S. 620.

(*p*) Politic. Ordin., April 1st, 1580, art. 18, and Zeeland, 1583, art. 33; Zeeland Ordinance of 1666, art. 17; Echtreglement voor de Generaliteytslanden, 1656, art. 91; Grotius, Introduction, i., 5, 20, and note by Groenewegen; Schorer's Notes ad Grot. Introd., *loc. cit.*; Groenewegen, de Leg. Abr., Cod. v., 17, and ix., 9; Van Leeuwen, R. H. R., i., 15; Censura For., i., 1, 15; H. Brouwer, De Jure Conn., ii., 30—33, cap. ult. de Jure Divort. apud Batav. recept.; J. Cos, Rechtsgel. Verh., vii.; J. Voet, Ad Pand., xxiv., 2, 1—14; Lybreghts, Reden. Vertoog, i., 12, 1—17; v. Zurck, Codex Bat., *voce* "Huwelyck," ss. xxix., xxx.; v. Sande, Decis. Fris., ii., 6, Def. 2; v. d. Keessel, Thes. Sel., Thes. 88, 89; v. d. Linden, Koopmansh., i., 3, 9; Fock. Andr., Annot. ad Grot. Introd., i., 5, 18; Het Oud Ned. B. R., ii., 199—201.

(*q*) J. Voet, Ad Pand., xxiv., 2, 8; Fock. Andr., Het Oud Ned. B. R., ii., 199.

(*r*) After the Roman Catholic Church had lost its supremacy and hold over matrimonial causes, it was admitted that the grounds of divorce were based upon the Common Law. To the doctrines advanced by the Roman Catholic Church, the Reformers opposed their interpretation of the Biblical precepts, and those who might have religious scruples could refer to the authority of the Protestant professors of theology for the assurance that the Common Law was in harmony with the Scriptural authority.

(*s*) Cf. p. 814.

(*t*) Fock. Andr., Het Oud Ned. B. R., ii., 200.

The two main heads may be briefly considered.

I. **Adultery.**—By adultery was understood carnal connection of a married person, whether husband or wife, with any person other than his or her spouse. The distinction made by Roman Law between *adulterium* (carnal connection with a married woman) and *stuprum* (carnal connection with a single woman) was not recognised in Roman-Dutch Law (*a*).

Severe punishments were meted out against adulterers, though a difference was made between cases where both parties were married or only one of them was a married person (*b*).

The adultery must have been committed willingly. Rape committed on an unwilling married woman did not entitle her husband to sue for a divorce on the ground of adultery (*c*).

Divorce could not be sued for, if the act of adultery were forgiven and the parties had been reconciled. Such reconciliation might be the result either of an open act and the conduct of the offended spouse, or conveyed by express words, or it might be deduced from condonation—that is to say, from circumstances, *e.g.*, *concubitus* of the spouses after knowledge of the injured party that adultery had been committed, "for every person is allowed to renounce his rights" (*d*).

In a similar way a husband could not sue his wife for divorce on the ground of adultery, if he had known of her adulterous conduct, and had connived at it—that is to say, either done nothing to check it or encouraged it, *quæstûs gratia* (*e*).

Similarly a petition for divorce by the spouse who had committed adultery himself or herself could not be granted (*f*).

Nor could a husband petition the Court, in case he, by his cruelty,

(*a*) H. Brouwer, De Jure Conn., ii., cap. ult. 18; Van Leeuwen, R. H. R., iv., 37, 7; J. Cos, Regtsgel. Verh., vii., 2; v. d. Linden, Koopmansh., ii., 7, 2.

(*b*) Polit. Ord. (Holland), arts. 15—17; (Zeeland), arts. 30—32.

(*c*) J. Voet, Ad Pand., xxiv., 2, 5; J. Cos, Regtsgel. Verh., vii., 8, 9; Lybreghts, Reden. Vertoog, i., 12, 10 (b).

(*d*) J. Voet, Ad Pand., xxiv., 2, 5; Groenewegen, De Leg. Abr., Cod. v., 17, 8, par. 4; ix., 9, 2; J. Cos, Regtsgel. Verh., vii., 10; Lybreghts, Reden. Vertoog, i., 12, 10 (e); v. Sande, Decis. Fris., ii., 6, Def. 2.

(*e*) J. Voet, Ad Pand., *loc. cit.*; H. Brouwer, De Jure Conn., ii., cap. ult., par. 12; J. Cos, Regtsgel. Verh., vii., 12.

(*f*) H. Brouwer, De Jure Conn., *loc. cit.*, par. 13; J. Cos, Regtsgel. Verh., vii., ii.; J. Voet, Ad Pand., xxiv., 2, 6; Lybreghts, Reden. Vertoog, i., 12, 10 (a).

had morally forced his wife to commit adultery (*g*). This did not include, however, the case where a wife had been driven out of the house and had been reduced to poverty, for against such treatment by her husband the law provided her with a remedy by entitling her to apply to the Court for a separation (*h*). So it was not a case of adultery if a married person had connection with a person whom he or she *bonâ fide* thought was his or her spouse (*i*).

The right to petition for a divorce was lost if the innocent party waited longer than five years after the adultery had been committed and he or she had been aware of it (*k*).

Conclusive proof of the adultery was required. A presumption of adultery was not enough, nor the fact that the charge of adultery remained uncontradicted (*l*).

If the husband caught his wife in the very act of committing adultery, he was entitled to kill both her and the adulterer, provided that he did so on the spur of the moment and before he had had time to recover and control his impulses (*m*).

The husband was entitled to an action for damages against the person who committed adultery with his wife, independently of his claim for divorce against his wife, as the act of the adulterer was considered as an injury to the husband (*n*). This action could be instituted as a separate action, apart from the husband's rights against his wife, provided that there was no collusion between husband and wife. The damages to be recovered included those which the husband or the children came to suffer through the wife's act.

II. **Malicious Desertion.**—Malicious desertion was not admitted by the Roman Catholic Church as a proper ground for divorce, and accordingly it was not known as long as the Roman Catholic Church exercised jurisdiction over matrimonial causes in the Netherlands, nor mentioned by the early authors on Roman-Dutch Law.

Groenewegen states, however (*o*), that the professors of divinity who belonged to the Reformed Church (*reformatæ religionis Professores*) admitted malicious desertion as a proper ground (*p*), and

(*g*) H. Brouwer, *loc. cit.*, par. 12; J. Voet, Ad Pand., xxiv., 2, 7.

(*h*) J. Cos, Regtsgel. Verh., vii., 3.

(*i*) Lybreghts, Reden. Vertoog, i., 12, 10 (*c*).

(*k*) *Ibid.*, i., 12, 10 (f).

(*l*) *Ibid.*, i., 12, 11.

(*m*) *Ibid.*, i., 12, 7—9.

(*n*) Grotius, Introduction, i., 35, 9.

(*o*) De Leg. Abrog., Cod. v., 17, l. 7.

(*p*) On account of their reading of 1 Cor. vii. 15.

the Courts of law adopted their views. Hence, in the course of the sixteenth century malicious desertion is found to have been recognised as a proper ground for divorce (*q*).

The desertion must be malicious; it must have taken place without any other motive beyond the wish to leave the other spouse and to live separate from him or her, with the intention of not returning (*r*).

It was construed to amount to malicious desertion if the wife entered a convent, or the husband entered the service of the State's enemies, such acts being considered to indicate sufficiently the intention not to return (*s*).

A similar construction of malicious desertion was placed upon the refusal of the wife to follow a husband who had adopted the Protestant religion and had taken to flight in order to escape the Inquisition (*t*).

If a husband had been compelled to fly the country he was not considered to have deserted his wife, and she was bound to follow him. If she did not, she might be accused of malicious desertion (*u*). The deliberate refusal of access on the part of the wife, or of performing his marital duties on the part of the husband, was considered malicious desertion (*a*).

In order to obtain divorce on this ground, it was necessary for the petitioner first to summon judicially the deserter to return. The Court, on granting the summons, indicated a period within which the deserter was bound to return. If he or she did not do so, the marriage would be declared dissolved and the deserted party allowed to marry again (*b*). These orders could be made by one and the same sentence, and both orders might be prayed for in the same petition (*c*).

(*q*) Wessels, History of Roman-Dutch law, pp. 470—472.

(*r*) Groenewegen's Notes ad Grot. Introd., i., 5, 18; Schorer's Notes ad Grot. Introd., *loc. cit.*; Holl. Cons., iv., Cons. 151; v., Cons. 46—48; Echtreglement (1656), art. 19; J. Cos, Regtsgel. Verh., vii., 14; H. Brouwer, De Jure Conn., ii., 18, 12, who gives a full review of the controversy and the opinions of the Protestant Theologians; Van Leeuwen, R. H. R., i., 15, 4; Lybreghts, Reden. Vertoog, i., 12, 13 (a).

(*s*) Lybreghts, Reden. Vertoog, i., 12, 13 (b), (d); v. Alphen, Papegaei, ii., p. 4.

(*t*) Holl. Cons., v., Cons. 46—48; Lybreghts, Reden. Vertoog, i., 12, 13 (a).

(*u*) J. Voet, Ad Pand., xxiv., 2, 13; J. Cos, Regtsgel. Verh., vii., 16.

(*a*) J. Cos, Regtsgel. Verh., vii., 17.

(*b*) Lybreghts, Reden. Vertoog, i., 14, 15; Van Alphen, Papegaei, ii., p. 4.

(*c*) Holl. Cons., v., Cons. 48 *in fin.*

The action came to an end if the deserter returned and complied with the orders of the Court. If the other spouse refused to receive the deserter, it was the deserter's turn to petition for a divorce (*d*).

III. **Other Grounds.**—As already stated (*dd*), certain authorities who lived and wrote in the eighteenth century mention as other grounds for divorce besides these two: imprisonment for life; sentence of death if the prisoner escaped, or his sentence was transmuted into imprisonment for life; perpetual banishment (*e*). Van der Keessel, in his Dictata, gives a number of decisions beginning with the year 1732. These divorces appear to have been granted by the States who, by virtue of their authority as the civil power, could create new grounds for divorce.

In the works of authors who lived at an earlier period no mention is made of these grounds of divorce. Evidently they appear to be properly considered as an extension of "malicious desertion," as the main characteristic of them all is that the purpose of the marriage cannot be fulfilled, and that the wife is not bound to follow the husband into a place of punishment (*f*); another ground of divorce was long absence and subsequent re-marriage of the spouse who remained behind.

In ancient times presumption of death was unknown, partly because it was not required, except that a Longobardian law of 720 (*g*) provided that the death could be presumed of a sailor who had been absent for three years, and his wife could obtain a licence from the King to marry again. But this provision ceased to be effective after the *capitula Lotharii* had abolished all grounds for divorce except adultery (*h*).

In the Middle Ages presumption of death was unknown. At a later period the right of the heirs of an absentee to succeed to his property was again recognised, and presumption of his death was admitted.

(*d*) J. Voet, Ad Pand., xxiv., 2, 11.

(*dd*) See p. 818, *ante*.

(*e*) v. d. Keessel, Thes. Sel., Thes. 88, 89; J. J. van Hasselt, Regtsgel. brieven 300, p. 275; Schomaker, Cons. et Resp. Juris., iii., Cons. 90, par. 30; v. d. Linden, Koopmansh., i., 3, 9, p. 31; Versameling van Gerrysden, i., Cons. 32; Fock. Andr., Annot. ad Grot. Introd., ii., p. 15; Het Oud Ned. B. R., ii., p. 200.

(*f*) J. Cos, Regtsgel. Verh., vii., 16; J. v. d. Linden, *loc. cit.*

(*g*) Lex Luitprandi, 19, par. 1.

(*h*) Fock. Andr., Het Oud Ned. B. R., ii., p. 255.

At the time of the Dutch Republic, the wife was allowed to enter into a new marriage on account of the presumed death of her husband after she had remained five years without any news from him. She had to obtain authority for such marriage from the magistrate.

In Holland, the States could grant this authority, though a special ordinance to that effect did not exist (*i*). Proof of the husband's presumed death was not always insisted upon, and his death was not unfrequently presumed when the man was still alive and afterwards appeared. The consequences of a conflict of interests were not considered very serious. The cases were decided according to circumstances, and as it suited the parties best (*k*).

Refusal to comply with marriage duties was considered malicious desertion (*l*).

Effect of Divorce.—Through divorce marriage came to an end. The spouses were each of them placed in the same position as they were in previously to their marriage (*m*). Both parties were allowed to marry again (*n*), except that the spouse who had been guilty of adultery was not allowed to marry the person with whom adultery had been committed (*o*). Even persons who had been married to each other could not be joined together again except by going through the ceremony of marriage a second time, and a child born in the meantime of parents who had previously been divorced was considered illegitimate (*p*). The proprietary relation created by the marriage ceased to exist, the community of goods came to an end, and the common property was divided between the spouses, either according to law, or according to the provisions of an ante-nuptial contract (*q*). The innocent petitioner, if successful, was entitled to maintenance from the guilty party, if

(*i*) Lybreghts, Reden. Vertoog, i., 12, 17, pp. 177 *et seq.*; J. Cos, Regtsgel. Verh., vii., pp. 244 *et seq.*; Fock. Andr., Het Oud Ned. B. R., ii., 256 *et seq.*

(*k*) Fock. Andr., Het Oud Ned. B. R., ii., 200.

(*l*) J. Cos, Regtsgel. Verh, vii., 17, 18.

(*m*) Grotius, Introd., ii., 21, 11.

(*n*) Holl. Cons., i., Cons. 307 (by Groenewegen in 1644); Utrecht, Cons. ii., Cons. 159 (1661); Schorer's Notes ad Grot. Introd., i., 5, 18; Bynkershoek, Quæst. Jur. Priv., ii., 10; Lybreghts, Reden. Vertoog, ii., 12, 12; J. Voet, Ad Pand., xxiv., 2, 8.

(*o*) Placaat Holl., March 18th, 1654; Echtreglement, par. 83; Placaat Holl., July 18th, 1674; Bynkershoek, Quæst. Jur. Priv., ii., 10.

(*p*) J. Voet, Ad Pand., xxiv., 2, 5.

(*q*) Grotius, Introd., ii., 11, 13 pr.

the innocent party were impecunious and the guilty one could afford to make such payment (*r*).

When a division of the marriage property was made, the party at whose petition the divorce was pronounced, was entitled to demand any pecuniary advantages which the law allowed, *e.g.*, the forfeiture of property on account of adultery which remained in force independently of the divorce.

Forfeiture of property was a legal provision attached by law to the fact of adultery when proved, and granted to the offended party independently of the remedy of divorce. There are extant sentences to that effect of the Supreme Court of Holland in the years 1545 and 1609 (*s*).

In 1545, it was decided that a husband who had committed adultery, forfeited all property which he had brought to the marriage, in favour of his wife.

In 1609, the Supreme Court decided that a wife who had committed adultery forfeited in favour of her husband all profits and shares to which she was entitled in the property of her husband, either by community or marriage articles (*t*).

As a general rule it may be stated that the guilty party forfeited to the successful petitioner all that part of the marriage property which he or she would have received from the other party by community of property or by marriage articles (*a*).

The wife loses her right to the *dos* and dowry and even her claim for maintenance against her husband (*b*).

This forfeiture had to be prayed for from the Court and obtained at the same time that the divorce was pronounced. It could not be obtained afterwards by a separate action (*c*).

The custody of the children was, generally speaking, given to the innocent party, in order that they might be educated by that party, but the guilty spouse had, if possible, to contribute to their education and maintenance, in accordance with the Judge's decision (*d*).

(*r*) J. Voet, Ad Pand., xxv., 3, 8.

(*s*) Holl. Cons., vi., p. 321.

(*t*) *Ibid.*, iii., App., p. 27; vi., p. 321; Lybreghts, Reden. Vertoog, i., 12, 5.

(*a*) van den Berg, Nederl. Advysb., i., Cons. 118, p. 298.

(*b*) Groenewegen's Note ad Grot. Introd., ii., 12, 7; Holl. Cons., i., Cons. 331; Bynkershoek, Quæst. Jur. Priv., ii., 8; J. Voet, Ad Pand., xxiv., 3, 23.

(*c*) v. d. Berg, Nederl. Advysb., i., Cons. 118, p. 298.

(*d*) J. Voet, Ad Pand., xxv., 3, 6, *in fin.*; Lybreghts, Reden. Vertoog, i., 12, 6.

This was a matter to be decided by the Court, and in deciding the Court had a very extensive power and full discretion as to how to exercise it in the interest of the children, it being borne in mind that the Court was entitled in the interest of the children to deviate from the rule that the custody of them should be given to the innocent spouse, and that it was necessary for the petitioner to ask for the custody of the children to be granted to him (*e*).

Colonies.—Divorce (*f*).—**South Africa.**—The Courts do not possess jurisdiction to pronounce a decree of divorce unless the matrimonial domicil of the parties is in South Africa, or the parties were married in South Africa.

The Court may, however, grant a judicial separation if the wife is resident within its jurisdiction, though they cannot order a division of immovable property (*g*).

The grounds of divorce are : (a) Adultery ; and the committing of an unnatural crime is tantamount to adultery. (b) Malicious desertion : and condemnation to death, if commuted to imprisonment, or avoided by escape ; and lifelong imprisonment, amount to malicious desertion.

I. **Adultery** (*h*).—A petitioner can be deprived of his or her rights to a divorce on the following grounds, viz. : (a) adultery on the part of the petitioner (*i*) : (b) collusion between the parties (*k*). The Court is entitled to make investigations of its own accord and to inquire into the conduct of both parties as well as into their motive and the good faith of the proceedings ; (c) condonation (*l*) ; (d) connivance (*m*) ; *e.g.*, if the petitioner by his acts and conduct has either knowingly brought about, or conduced to, the adultery of his wife, or if he has so neglected and exposed her to temptation, as, under the circumstances of the case, he ought to have foreseen would, if the opportunity offered, terminate in her fall.

Proof of the adultery must be given to the satisfaction of the Court, either by direct or circumstantial evidence (birth of a child,

(*e*) S. van Leeuwen, Cens. For., i., 1, 15, 16.

(*f*) Maasdorp, Institutes of Cape Law, i. ; de Bruyn, Opinions of Grotius ; Morice, English and Roman-Dutch Law ; Roos-Reitz, Principles of Roman-Dutch Law ; Wessels, History of Roman-Dutch Law.

(*g*) Murphy *v.* Murphy (1902), T. S. 179.

(*h*) Maasdorp, Institutes of Cape Law, i., pp. 82 *et seq.*

(*i*) Maasdorp, *loc. cit.*, p. 82.

(*k*) *Ibid.*, p. 83.

(*l*) *Ibid.*, p. 83.

(*m*) *Ibid.*, pp. 84, 85.

venereal disease), or a conviction for rape. A mere confession is not sufficient.

Malicious Desertion.—In Cape Colony divorce on the ground of malicious desertion is now prayed for by one and the same action, the petition being for restitution of conjugal rights—failing which, decree of divorce. The Court may then order restitution, and direct the respondent to show cause, on a day named in such order—not being less than seven days after the day fixed for the restitution of conjugal rights—why a decree of divorce should not be granted. If on such return day it is proved that the respondent has not returned, the Court is entitled to grant a divorce (*n*).

In the Transvaal, the former practice of two separate actions is followed.

Desertion must be wilful, and has to be proved as a question of fact. The petitioner must not himself or herself have been guilty of any offence for which the respondent might pray for a decree of divorce (*o*).

Ceylon.—The matrimonial law applicable to British and European residents in Ceylon is the Roman-Dutch law as it existed in the Colony at the date of the Royal Proclamation of September 23rd, 1799 (*a*). The original jurisdiction in matrimonial causes is vested in the District Courts (*b*), from whose decision an appeal lies to the Supreme Court (*c*), but not to the Privy Council unless by special leave (*d*).

Neither under the Roman-Dutch law, however, nor under local legislation (*b*) can the Courts of Ceylon decree a divorce *a vinculo matrimonii* between parties who are domiciled, and were married, elsewhere than in Ceylon (*a*). Under such circumstances, according to international law, which is authoritative in the absence of any municipal law to the contrary, the permanent domicil of the spouses within the territory affords the only test of jurisdiction to dissolve their marriage (*e*). A so-called "matrimonial domicil," in the

(*n*) C. C. 371st Rule of Court; Maasdorp, Institutes of Cape Law, i., pp. 86—90.

(*o*) Maasdorp, *ibid.*

(*a*) Le Mesurier *v.* Le Mesurier, [1895] A. C. 517; 1 N. L. R. 160.

(*b*) Courts Ordinance, 1889 (No. 1 of 1889), s. 61; Civ. Proc. Code (No. 2 of 1889), ss. 596 *et seq.*

(*c*) Civ. Proc. Code, s. 624. A decree *nisi* for dissolution of a marriage under s. 604 of the Code is an appealable decree: Ziegan *v.* Ziegan (1891), 1 S. C. R. 3.

(*d*) Le Mesurier *v.* Le Mesurier (1894), 3 C. L. R. 45.

(*e*) *Ibid.*, [1895] A. C. 517; 1 N. L. R. 160.

sense of one said to be created by a *bonâ fide* residence of the spouses within the territory of a less degree of permanence than is required to fix their true domicil, cannot be recognised as creating such jurisdiction (*e*). Although, however, a District Court cannot decree a dissolution of marriage in the case of spouses whose true domicil is not in Ceylon, it may, under the rules of international law, administer as between them other remedies, such as judicial separation on the ground of cruelty, and alimony for desertion (*e*).

Grounds of Divorce.—The grounds of divorce *a vinculo* are—adultery, subsequent to marriage; malicious desertion, and incurable impotence at the date of marriage (*f*). Divorce cannot be granted on confession or admission or by consent (*g*); or where *compensatio* or condonation (*h*) or connivance or laches (*i*) is proved. A pertinacious, malicious and unreasonable denial of conjugal rights is a species of desertion, which must, however, be affirmatively proved by the spouse relying on it (*j*). Where only simple desertion has been proved, the Court has allowed judgment to be entered for the petitioner by assuming that there was malicious desertion if—after the Court had given a reasonable time (say, a year) for the defendant to return—the defendant remained absent and refused to comply with the order of the Court (*k*). On the expiry of that period, divorce was granted on petitioner's motion (*k*).

Effects of Divorce.—When a marriage is dissolved by divorce, the matrimonial rights of the offending spouse are forfeited (*l*).

Procedure.—The procedure in divorce cases is similar to English practice (*m*). Where adultery is alleged by the husband, the adulterer is to be made a co-respondent unless (a) the wife is leading the life of a prostitute, and the petitioner knows of no one with whom the adultery has been committed; (b) the name of the adulterer is unknown, though the petitioner has made due efforts

(*e*) Le Mesurier *v.* Le Mesurier, [1895] A. C. 517; 1 N. L. R. 160.

(*f*) No. 19 of 1907, s. 20 (2).

(*g*) King *v.* King (1823), Ram. 1820—33, p. 60; Ratnavira *v.* Ensohamy (1885), 7 S. C. C. 116.

(*h*) King *v.* King, *ubi supra*; Civ. Proc. Code, ss. 600, 602. Resumption or continuance of cohabitation is a necessary element of condonation: s. 602.

(*i*) D. C. Colombo, 62489 (1874), Gren. 1874, D. C. 59.

(*j*) Anon. *v.* Anon. (1881), 4 S. C. C. 107.

(*k*) D. C. Colombo, 55353 (1871), Vanderstraaten, 237.

(*l*) See Dias *v.* Philips (1882), 5 S. C. C. 36; Wijesurendra *v.* Bartholomeus (1884), 6 S. C. C. 141.

(*m*) Civ. Proc. Code, ss. 596 *et seq.*

to discover it; (c) the adulterer is dead (*n*). Damages may be claimed against a co-respondent in the plaint (*n*). A decree *nisi* is made in the first instance; the decree absolute follows three months later (*o*). The practice is the same as in England with regard to alimony *pendente lite* (*p*), permanent alimony (*q*), settlement of property (*r*), custody and maintenance of children (*s*). Parties may marry again when the decree *nisi* has been made absolute or confirmed on appeal (*t*).

Divorce proceedings cannot be commenced by a *curator ad litem* on behalf of a lunatic husband (*u*).

Muhammadan Divorces in Ceylon.—These are governed by the Code of August 5th, 1806 (*x*). The fact that a Muhammadan has taken a concubine does not justify his wife in refusing to cohabit with him unless he proposes that she do so in the same house in which he is keeping the concubine (*y*).

Restitution of Conjugal Rights.—It has been held that suits for restitution of conjugal rights are not maintainable in Ceylon (*c*).

Nullity of Marriage.—The District Courts have original jurisdiction to decree nullity "on any ground which renders the marriage contract between the parties void by the law applicable to the Colony" (*a*). The parties may re-marry on the expiry of three months from the decree of nullity or its confirmation on appeal (*b*).

British Guiana.—The general rules apply (*d*).

Statutory provision is made for the divorce of Asiatic immigrants upon misconduct of one entitling the other to a divorce by summary

(*n*) S. 598; and the co-respondent may be ordered to pay costs; but no costs are to be ordered or damages awarded if the wife was at the time of the adultery living apart from her husband and leading the life of a common prostitute, or the co-respondent had not, at the time of the adultery, reason to believe her to be a married woman: s. 612.

(*o*) S. 604.

(*p*) S. 614. The English rule by which, in proceedings for divorce or judicial separation, the husband is generally liable for his wife's costs is also followed: Silva *v.* Silva (1905), 8 N. L. R. 280; Abeyagoonesekere *v.* Abeyagoonesekere (1909), 12 N. L. R. 95.

(*q*) S. 615.

(*r*) Ss. 617, 618.

(*s*) Ss. 619—622.

(*t*) S. 625.

(*u*) Pereira, Laws of Ceylon, ii., 137.

(*x*) Rev. Laws, i., p. 41, arts. 74 *et seq.*

(*y*) Mammadu Nachchi *v.* Mammatu Kassim (1908), 11 N. L. R. 297.

(*a*) Civ. Proc. Code, s. 607.

(*b*) S. 625.

(*c*) Andres *v.* Bastiana (1862), Ram. 1860—62, p. 133.

(*d*) See Digest of Cases in Supreme Court of British Guiana, 1901—1905, Husband and Wife, 82.

proceedings before a magistrate, followed by an order of the Chief Justice (*e*); and for the protection of the property of a woman immigrant deserted by her husband or man deserted by his wife by order of a magistrate (*f*).

Effect of Dissolution through Death of a Spouse.—The consequences attached by Roman-Dutch law to a dissolution of a marriage through the death of either of the spouses, as far as the common property was concerned, and the continuation of the community (Boedelhouderschap), have been already described (*g*), as well as the consequences attached to the dissolution of a marriage through the death of either of the spouses as far as the children were concerned (*h*).

The surviving spouse could re-marry, but had certain rules to observe as to the time of mourning, the arrangements regarding his or her property, &c. (*i*).

SECTION II.

Laws of France and Belgium.

Among the Continental systems, the law of France, and the derivative system of Belgium so far as the Code Civil is concerned, may be first considered. So far as the British Dominions are concerned, that law has now no effect.

Old French Law.—In the earliest age of the monarchy of France, it seems divorces *à vinculo* were permitted. But that kingdom adopted the prevailing opinion of the Catholic Church that the marriage was indissoluble, and admitted only a divorce *à mensâ et toro*, or as it is called, *la séparation de corps et de biens*.

This species of divorce was granted at the instance of the wife, when the husband had falsely accused her of a capital crime, or had treated her cruelly, not only by offering her personal violence, or withholding from her the necessary means of subsistence, but by habitually treating her before the visitors of the house, the domestics and children, with contempt.

The wife could not obtain a divorce for adultery committed by the husband, although the adultery of the wife afforded a ground on which the husband might obtain a divorce from her.

This separation could only be effected by judicial sentence. The

(*e*) No. 18 of 1891, ss. 162, 163.
(*f*) *Ibid.*, ss. 154, 155.
(*g*) Cf. pp. 425 *et seq.*, Chapter IX., *passim*.
(*h*) *Ibid.*
(*i*) *Ibid.*

parties could not by any act or agreement between themselves, or by any admission of the facts on which the separation could be awarded, withdraw from the Judge the full and entire cognisance of and adjudication on them. The law of France not only discountenanced frivolous causes of separation, but endeavoured, by the procedure to which it subjected the application for a separation, to prevent its being obtained by consent or collusion (*k*).

Such continued to be the law of France until the Revolution swept away every institution which had a tendency to maintain religion, morals, or social order. Its law of September 20th, 1792, not only permitted divorces *à vinculo matrimonii*, but greatly encouraged them by the facilities with which it enabled the parties to obtain them. In fact a marriage ceased to be obligatory on those who had contracted it.

Code Civil.—The Code Civil corrected much of the guilty excess of the revolutionary law (*l*). Incompatibility of temper was no longer a cause of dissolution, and divorce by mutual consent was only possible under procedure surrounded by special difficulties. *Séparation de corps* was re-established.

The *régime* which succeeded the Empire and which proclaimed the Roman Catholic religion as that of the State saw in the numerous causes still allowed by the new Code as reasons for which the bond of marriage might be dissolved a danger to that stability of family relations on which the welfare of society depends, and the law of May 8th, 1816, consequently abolished divorce, and for the time being the only relief to which an aggrieved husband or wife was entitled was that of a *séparation de corps*.

Law of July 27th, 1884.—But various efforts had not been wanting to restore divorce under modified conditions, and ultimately Monsieur Naquet succeeded in carrying the law of July 27th, 1884, re-enacting the divorce of the Code Civil but not admitting mutual consent as one of the grounds for it (*m*), and recognising in general such causes as had hitherto been permitted in cases of *séparation de corps* (*n*).

(*k*) Pothier, tit. Mariage, part 6, c. 2.

(*l*) Hume's Essay on Polygamy and Divorce; Gibbon, Bury's edition, 1898, iv. 180. See the discussion in the conferences relative to this branch of the law in the Code Civil and particularly the arguments of MM. Portalis and Tronchet.

(*m*) Law of July 27th, 1884, art. 1.

(*n*) See p. 835, *post*.

The old procedure contained in arts. 234 *et seq.*, Code Civil, was simplified by the law of April 18th, 1886, since which period there has been no further legislation on the subject beyond the laws of February 6th, 1893, December 5th, 1901, December 15th, 1904, and July 13th, 1907, hereafter referred to.

Grounds of Divorce.—The grounds on which divorce can now be pronounced are :—

A. Adultery (*o*) ;

B. *Excès*, *sévices*, and *injures graves* (*p*);

C. A conviction for crimes involving certain aggravated punishments (*q*).

A. **Adultery.**—Husband and wife are exactly on the same footing, one single act of adultery on the part of either, committed under any circumstances, is sufficient. Under the old divorce law, the husband's adultery only gave rise to a divorce where the relations were habitual, and took place under the marital roof, except where the adultery was construed as falling under the next class.

B. **Excès, Sévices, and Injures Graves.**—*Excès* are acts of violence exercised by one spouse towards the other and endangering the health or life of their victim (*r*). *Sévices* constitute a diminutive of *excès*. They consist in acts of bad treatment which, without involving danger to life or health, render existence in common insupportable (*s*).

Injures graves cannot be precisely defined. The term comprises insults or outrage resulting either from words spoken or written (*injures verbales*) or from actions (*injures réelles*) (*t*), and has been held to include—(i.) abandonment of the conjugal domicil or refusal by the husband to receive the wife there (*u*) ; (ii.) refusal of marital rights (*v*); (iii.) injurious sexual relations (*x*) ; (iv.) the existence or concealment of a venereal disease (*y*) ; (v.) misconduct compromising

(*o*) Code Civil, arts. 229, 230, as defined by the law of July 27th, 1884. See Bourgoin *v.* Bourgoin (1901), Sirey, 1901, i., 400.

(*p*) Art. 231.

(*q*) Art. 232.

(*r*) C. *v.* C. (1899), Montpellier ; Dalloz, 1896, ii., 101.

(*s*) Baudry-Lacan., iii., p 25.

(*t*) *Ibid.*, and see De Lambertye *v.* De Lambertye (1890), Sirey, 1890, i., 344.

(*u*) Messelet *v.* Messelet, Paris (1875), Sirey, 1877, ii., 119.

(*v*) M. *v.* M. (1900), Sirey, 1901, i., 80 ; X. *v.* X. (1897), Montpellier, Sirey, 1901, ii., 137, and nn. 1 and 2.

(*x*) D. *v.* D., Nimes (1894), Sirey, 1896, ii., 142 ; but see Rennes, 1841 ; Dalloz, 1842, ii., 85.

(*y*) Baudry-Lacan., iii., p. 31.

the dignity of the *ménage* (*z*); (vi.) refusal of assistance, succour, and, on the part of the wife, obedience (*a*); (vii.) unreasoning jealousy (*b*); (viii.) insult to religious feelings (*c*); (ix.) habitual and degrading drunkenness (*d*).

C. **Conviction for certain Crimes.**—The text of the law speaks of "the condemnation of the husband or wife to *peine afflictive* et *infamante*." The Code Penal classifies punishments *inter alia* as *afflictives et infamantes* or as *infamantes* only. The condemnation to a punishment of the former class is now alone a sufficient ground of divorce. The punishments in question are (1) hard labour for life or years; (2) deportation; (3) detention; (4) reclusion. Deportation and detention have a political character. In the case of all the above (except deportation, which is for life) the minimum term is five years (*e*).

Procedure as Settled by the Law of April 18th, 1886.—The original procedure prescribed by the Code Civil for cases of divorce was purposely made complicated in order to render the dissolution of marriage a matter of difficulty (*f*). The parties had to appear twice before the President of the Tribunal before leave to sue was granted; and the Tribunal had three judgments to deliver before the case was disposed of—a judgment giving leave to sue, a judgment ordering an *enquête*, which was held before the entire Tribunal, and the definitive judgment. In practice this procedure involved great expense and waste of judicial time, and although the law of July 27th, 1884—re-establishing divorce—left it practically intact, it was soon afterwards annulled by the law of April 18th, 1886. The main changes introduced by that law were the following: (a) Procedure in divorce was assimilated to ordinary civil procedure, a change which involved the taking of the *enquête* by a single Judge; (b) the divorce must be pronounced by the Tribunal, instead of as theretofore by the officer of civil status; (c) either party, and not merely the spouse at whose instance the divorce was granted can require the transcription of the divorce on the registry of civil status.

(*z*) Fournont *v.* Fournont (1885), Sirey, 1886, i., 16.

(*a*) Baudry-Lacan., iii., p. 36.

(*b*) *Ibid.*

(*c*) Demolombe, iv., p. 484, s. 390.

(*d*) Baudry-Lacan., iii., p. 36.

(*e*) See P. P. Miscellaneous, No. 2 (1894), Reports on the Laws of Marriage and Divorce in Foreign Countries, p. 54.

(*f*) "Exposé des motifs" of the law of April 18th, 1886, Sirey, Lois Annotées, 1886, 51.

The preliminary stages in proceedings in divorce are first the formulation of the petition before the President of the Tribunal or competent Judge (*g*) and the *essai de conciliation* (*h*). If conciliation fails the case is tried on the merits (*i*), the respondent being entitled to bring counter-charges (*i*). The Court may sit with closed doors and the press is forbidden to publish the proceedings (*i*), except when the ground on which the divorce is claimed is the condemnation of the respondent to an afflictive or infamous punishment (*k*). The Tribunal, although the case is proved, may adjourn the proceedings for a period of not more than six months to give time for possible reconciliation (*l*). The judgment pronouncing a divorce cannot be acquiesced in so as to prevent an appeal (*m*). An appeal lies as in civil cases (*n*). The decree must be transcribed on the register of civil status (*o*), and, according to the weight of authority (*p*), it is from the date of this transcription that the marriage is dissolved. In default of transcription within a prescribed delay the divorce is null (*q*).

In the course of the proceedings provisional measures may be sanctioned allowing the wife a separate residence (*r*), regulating the custody of the children (*s*), and securing the wife's alimony (*t*). Conservatory measures may also be taken for the protection of the property of the spouses (*u*). The right of obtaining a divorce is barred (a) by reconciliation (*x*); (b) by the death of one of the spouses before transcription of the decree (*x*); (c) by thirty years' prescription (*y*).

Effects of Divorce.—(i.) **As regards the Person of the Spouses.**—(a) Each spouse resumes the use of his (*a*) or her own name (*b*);

(*g*) Art. 234.
(*h*) Art. 238.
(*i*) Art. 239.
(*k*) Art. 232.
(*l*) Art. 246.
(*m*) Art. 249. See Collinet *v.* Collinet (1903), Nancy, Sirey, 1903, ii., 190. As to decrees by default, see art. 247.
(*n*) See art. 248.
(*o*) Arts. 251, 252.
(*p*) Baudry-Lacan., iii., p. 153, s. 245.
(*q*) Art. 252.
(*r*) Art. 236.
(*s*) Arts. 238, 240.
(*t*) Art. 238. Alimony may apparently also be allowed to the husband petitioner: *ibid.*
(*u*) Arts. 242, 243.
(*x*) Art. 244. See I. *v.* I. (1902), Sirey, 1903, i., 477.
(*y*) Art. 2262. Baudry-Lacan., iii., p. 150, s. 239.
(*a*) In certain parts of France and Switzerland it is customary for the husband to add to his own name that of his wife.
(*b*) Law of February 6th, 1893 (new art. 299).

(b) the matrimonial rights and duties end; (c) either party may re-marry. The spouses may re-marry each other, a fresh celebration being necessary, unless in the interval either party has contracted a second marriage followed by a second divorce (*e*). In such a re-marriage the spouses cannot adopt a matrimonial *régime* different from that which originally regulated their union (*e*). Once re-united they cannot petition for divorce again on any other ground than that of the condemnation of either to a *peine afflictive et infamante* since their re-union (*e*). The divorced wife may re-marry as soon as the judgment or decree granting the divorce has been entered on the register of marriages, provided that three hundred days shall have elapsed since the first interlocutory judgment otherwise than by default, or judgment on the merits was pronounced (*d*); and a woman separated from her husband, when such separation has been converted into a divorce according to art. 310 of the Code, may marry again as soon as the judgment of divorce has been entered and thus rendered irrevocable (*e*). In the case of divorce on the ground of adultery the guilty spouse could not before the law of December 15th, 1904, marry his or her accomplice (*f*).

(ii.) **As regards the Property of the Spouses.**—(a) The spouse against whom the divorce has been pronounced loses the legal usufruct of the children's property (*g*); (b) he or she loses also all the benefits accruing to him or her from the other spouse either by the marriage contract or since the marriage (*h*); (c) the spouse at whose instance the divorce has been pronounced preserves all the benefits accruing to him or her from the other spouse although they were stipulated to be reciprocal and reciprocity has not in fact ensued (*i*); (d) where either there is no property available or it is insufficient as a subsistence, an alimentary pension not exceeding a third of the revenues of the guilty spouse may be accorded to the innocent consort (*j*). This pension is revocable when it ceases to be necessary (*k*).

(*c*) Law of July 27th, 1884 (new art. 295).

(*d*) Law of July 13th, 1907, art. 1.

(*e*) *Ibid.*, art. 2.

(*f*) Art. 298. It was not essential that the name of the accomplice should be mentioned in the judgment; it was sufficient for his identity to be established by the documents of the cause: Sirey, Table Décennale, 1891—1900, No. 250.

(*g*) Arts. 384, 386.

(*h*) Art. 299.

(*i*) Art. 300.

(*j*) Art. 301.

(*k*) *Ibid.*

(iii.) **As regards Relatives by Marriage.**—The effects of relationship by marriage, *e.g.*, the impediment to the intermarriage of brothers-in-law and sisters-in-law (*l*), and, *semble*, the alimentary obligation between each spouse and the parents of the other (*m*), subsist after divorce.

(iv.) **As regards the Children of the Marriage.**—(a) The custody of the children is entrusted to the spouse who has obtained the divorce, unless the Tribunal, in the interest of the child and on the application of the family or the *Ministère Public*, commits the custody of all or some of the children to the other parent or to a third party (*n*); if a parent fails to comply with an order of the Tribunal to give up the custody of a child he incurs liability to fine and imprisonment (*o*); (b) the father and mother preserve, however, the right of superintending the maintenance and education of the children and are bound to contribute thereto in proportion to their resources (*p*); (c) divorce does not deprive children born of the marriage of any of the advantages secured to them by the law or by the matrimonial conventions of their parents, but their rights only accrue in the same way and under the same circumstances as if there had been no divorce (*q*).

Judicial Separation.—In all cases in which there exist sufficient grounds for sustaining a suit for divorce, it is competent to the parties, if they think fit, to bring their suit for a separation from bed and board only (*séparation de corps*) (*r*).

No provision was made for judicial separation in the *projet* of the Civil Code. It was added to conciliate Catholic feeling and in the discussions judicial separation was frequently styled the *divorce des catholiques* (*s*). The original provisions of the Code on the subject were meagre. They have been expanded by the laws

(*l*) Art. 162. X. *v.* X. (1897), Paris, Dalloz, 1897, ii., 200; Min. Pub. *v.* Robillon (1894), Trib. Civ. Seine, Dalloz, 1895, ii., 6.

(*m*) See art. 206. Ledanseur *v.* Mougeot (1889), Paris, Sirey, 1890, ii., 1; Callaye *v.* Winders (1891), Trib. Antwerp, Sirey, 1892, iv., 16; contra, L. *v.* M. (1891), Sirey, 1891, i., 311.

(*n*) Art. 302.

(*o*) Law of December 5th, 1901. See Sirey, Lois Annot., 1902, p. 385, and Exposé des motifs. See also *ibid.*, 449, the text of the Avis du Conseil d'Etat of November 18th, 1899, as to the powers of administration of the father after divorce. They are considered to be as extensive after the divorce as before it, unless the contrary has been prescribed by the judgment.

(*p*) Art. 303.

(*q*) Art. 304.

(*r*) Art. 306.

(*s*) Baudry-Lacan., iii., p. 193, s. 296.

before mentioned of July 27th, 1884, April 18th, 1886, and February 6th, 1893.

The suit must be commenced, proceeded in, and adjudicated upon in the same manner as any other civil action (*t*), but in no case is a suit for separation to be sustained on the ground of mutual consent (*u*). Whenever a separation from bed and board has continued for three years the judgment *may* be converted into a judgment of divorce on the demand of either of the spouses (*x*). By a law of June 7th, 1908, the grant of this demand is obligatory and not facultative.

Effects of Judicial Separation.—(a) Separation from bed and board in all cases implies separation in goods (*y*); (b) the judgment pronouncing separation or a posterior judgment may prohibit the wife from bearing or authorise her not to bear her husband's name (*z*); where the husband has joined to his own name the name of his wife, the latter may equally claim that her husband should not be permitted to bear her name (*z*); (c) judicial separation restores to the wife her full civil capacity, *i.e.*, it dispenses her from the necessity of obtaining for any act the authorisation of her husband (*a*); (d) where the spouses become reconciled three alternatives are open to the wife as regards her civil capacity (*b*): (i.) She may resume the common life purely and simply. Here she passes, as regards her husband, again under the common law, but retains, as regards third parties, her civil capacity, unless they were aware of the resumption of the common life at the time of dealing with her. (ii.) The spouses may by common consent substitute for their original matrimonial *régime* separation of goods pure and simple. Here the wife has the free administration of her property (*c*), and may dispose of and alienate movables but cannot alienate immovables without marital or judicial authorisation. The reconciliation must be evidenced by a notarial act

(*t*) But arts. 236—244, Code Civil, are applicable: art. 307; law of April 18th, 1886.

(*u*) Art. 307.

(*x*) Art. 310, as defined by laws of July 27th, 1884, and April 18th, 1886.

(*y*) Art. 311.

(*z*) Art. 311 (law of February 6th, 1893).

(*a*) *Ibid.* This change in the law was made to obviate the delay and cost of obtaining such authorisation, and also to put a stop to husbands trading on their wives' need for it: Exposé des motifs, Sirey, Lois Annot., 1893, 473.

(*b*) Baudry-Lacan., iii., p. 214, s. 323; and see Code Civil, art. 311 (law of February 6th, 1893).

(*c*) See art. 1449.

published as the law directs. (iii.) The spouses may re-establish their original matrimonial *régime* on conforming with the conditions and prescriptions of art. 1451.

Res Judicata.—(i.) A decree of divorce or judicial separation has the force of *chose jugée*, and in view of the fact that the parties by whom proceedings for divorce or separation can be brought are limitatively defined (*d*), it has such force *erga omnes* (*e*). (ii.) The spouse who has failed in a suit for separation cannot sue for divorce on the same facts (*f*). (iii.) Whether the converse holds good is doubtful (*g*).

(iv). There is also controversy as to whether a subsidiary claim for judicial separation can be combined with a principal claim for divorce (*h*).

Voluntary Separation.—The law attaches no value to a voluntary (*i*) separation, and agreements regulating the conditions of such separation, although not uncommon, cannot be enforced in the Courts (*j*).

Belgium.—In Belgium the rules of the French Civil Code of 1804 are still in force. Both divorce and *séparation de corps* are admitted, and that not only *pour causes déterminées*, but by mutual consent. The grounds for such divorce or separation are *excès, sévices, injures graves*, adultery, and certain criminal condemnations. Separation may always be converted into divorce at the end of three years, but the right of demanding such conversion is denied to a wife against whom decree of separation has been pronounced on the ground of adultery. Otherwise effect must be given to the claim unless the original petitioner consents at once to bring the separation to an end (*k*). The procedure is modified by a law of February 11th, 1907 (*l*).

(*d*) See Code Civil, arts. 229 *et seq.*, and 307.

(*e*) Baudry-Lacan., iii., p. 242, s. 354.

(*f*) *Ibid.*, s. 355. Where the facts arise subsequently there is not the same cause: see art. 1351. Query as to the result if the facts were not subsequent but had not been founded on in the former proceedings: Baudry-Lacan., iii., p. 243. s. 358.

(*g*) For the affirmative, see Delorme *v.* Delorme (1897), Amiens, Sirey, 1898, ii., 65. For the negative, see Decourt *v.* Decourt (1888), Cass. Sirey, 1888, i., 374.

(*h*) Baudry-Lacan., iii., p. 243, s. 358, and authorities collected in n. 1.

(*i*) Cass., January 27th, 1874, Sirey, 74, i., 214; Trib. Seine, May 15th, 1895 (Gaz. Trib., September 9th, 1895).

(*j*) Cass., June 14th, 1882, Sirey, 82, i., 421.

(*k*) Weiss, iii., pp. 578 *et seq.*; and see Baudry-Lacantinerie, iii., pp. 245 *et seq.*; Dalloz, Suppl., tit. Divorce, arts. 17 *et seq.*

(*l*) Ann. de Lèg., &c., 1906, 296.

Divorce by Mutual Consent.—For this the following conditions are necessary :—

1. The husband must not be under twenty-five years of age, the wife not under twenty-one years (*m*).

2. Parties must have been married at least for two years (*n*) and not more than twenty years (*o*). The wife must not be over forty-five years of age.

The parties have also to obtain the consent of their father and mother, and if these are deceased they require the consent of their grandfathers and grandmothers. They also have to make an authentic inventory of all their properties, and one-half of such property will from that moment belong to their children.

Parties wishing to divorce by mutual consent have to agree between themselves on the following points :—

(a) Whether the husband or the wife will have possession of the children.

(b) Where the wife will have her residence during the proceedings.

(c) What alimony the husband is to pay to his wife.

It is not until all these conditions are fulfilled that the parties can request the President of the Court to receive their application. The application must be repeated at intervals of three months during one year. Upon the Public Prosecutor stating that every requirement of law has been carried out, the Court can then allow the divorce to take place. Parties divorced by mutual consent are not allowed to re-marry (except between themselves) until three years have elapsed.

SECTION III.

Other Continental Systems.

Comparative Legislation (*p*).—The other principal Continental systems in regard to divorce may be conveniently grouped under the following heads : —

A. Systems recognising only judicial separation.

B. Systems recognising only divorce.

C. Systems recognising both divorce and judicial separation.

(*m*) Art. 275, Cod. Civil.

(*n*) Art. 276.

(*o*) Art. 277.

(*p*) In addition to other authorities cited in the text, see the Parliamentary Reports on Divorce Laws, 1857 (C. 12, February 12th, 1857): 1894 (C. 144, 145); and 1903 (Cd. 1468).

A. Systems recognising only Judicial Separation.—To this class belong the Austrian, the Spanish, the Italian, and the Portuguese systems, owing to the predominance of the Roman Catholic Church.

Austria.—In Austria (*q*), judicial separation on prescribed grounds, or by mutual consent only, is open to spouses of whom one was a Roman Catholic at the time of the marriage. The causes of separation are adultery, a crime committed by one spouse, unjustifiable desertion, criminal attempts, *sévices, injures graves;* dissipation by one spouse of the fortune of the other; every injury to the morality of the family; inveterate and contagious corporal defects.

Spouses who are not Roman Catholic may obtain divorce in conformity with their own religious law by mutual consent, or for the following causes: Adultery, condemnation to seclusion for five years at least, or to any higher penalty; abandonment of the conjugal roof, attempts, *sévices, injures graves*, invincible aversion, manifested by several separations (*r*). Jews in Austria may be divorced by mutual consent, or for adultery of the wife (*s*).

Spain.—In Spain, only the ecclesiastical authorities can deal with canonical marriages (*t*); divorce *à vinculo* is not recognised; but such marriages may be annulled or judicial separation (*divorcio*) may be pronounced. In the case of civil marriages divorce *à vinculo* is equally unknown, but judicial separation may be decreed on the following grounds (*a*): (a) Adultery by the wife or, if accompanied by aggravating circumstances, by the husband; (b) cruelty or *injures graves;* (c) violence used by the husband towards the wife to oblige her to change her religion; (d) a proposal by the husband to cause his wife to become a prostitute; (e) attempt by husband or wife to corrupt their children, or prostitute their daughters, or connivance at such corruption or prostitution; (f) condemnation of one spouse to chains or seclusion.

In every case, whether of canonical or of civil marriage, it is the civil law that regulates the consequences of judicial separation.

Italy.—The Italian Civil Code (*b*), like the Spanish, recognises no divorce, but allows judicial separation, either by mutual consent, if homologated by the tribunal, or for the following reasons:

(*q*) Civil Code of 1811, arts. 111 *et seq.*

(*r*) Civil Code, art. 115.

(*s*) Arts. 133—135.

(*t*) Civil Code, arts. 75, 80—82; p. 168, *ante*.

(*a*) Arts. 67, 104 *et seq.*

(*b*) Arts. 148—158.

(a) Adultery; (b) wilful desertion: (c) *excès, sévices*, threats, *injures graves;* (d) condemnation to a criminal punishment, posterior to marriage, or unknown by the complaining spouse at the time of marriage; (e) as regards the wife, if the husband does not take up a fixed abode, or if, having the means to do so, he refuses to provide one suitable to his position (*c*).

Portugal.—The Portuguese Code (*d*) recognises only judicial separation and that for the following grounds: (a) Adultery of the wife or (if accompanied by aggravating circumstances) of the husband; (b) condemnation of one spouse or the other to perpetual punishment; (c) *sévices, injures graves*.

Judicial separation alone is also recognised in the Argentine Republic (*e*), Brazil (*f*), Chili (*g*), and Mexico (*h*). In all these adultery, cruelty and desertion, and in Brazil and Mexico, after two years' marriage, mutual consent, are causes for separation.

B. **Systems recognising only Divorce.**

Russia (*i*).—In Russia dissolution of marriage is only allowed in a restricted number of cases, and divorce is difficult to obtain except for Jews. The rules by which cases of divorce are decided in Russia are provided for in the Ordinances of each Church, which are embodied in the General Code of Laws, and all such cases come under the cognisance of the Ecclesiastical or Consistorial Courts of the several religious denominations existing in Russia, no secular tribunal having jurisdiction in these matters.

Orthodox Church.—Members of the Orthodox Church may seek divorce on the grounds of: (a) Adultery of either husband or wife; (b) physical impotence (the suit must be brought not before three years after the celebration of the marriage, and the impotence must be proved to have existed already before the marriage); (c) sentence to loss of civil rights, involving deportation (to the dissolution of marriage, however, on this ground it is necessary that the other party should refuse to follow the condemned party into deportation,

(*c*) Art. 152.

(*d*) Arts. 1204 *et seq.*

(*e*) Civil Code, art. 198.

(*f*) Law of May 24th, 1890. The remedy allowed by this law does not dissolve the marriage tie, but goes somewhat beyond judicial separation, inasmuch as all questions of property between the dissevered couple are treated as if the marriage had been really dissolved: Parl. Pap., C. 144, 145, June 14th, 1894, p. 48.

(*g*) Civil Code, arts. 123, 168.

(*h*) C. C. art. 226; Parl. Rep. of 1894, p. 94.

(*i*) Parl. Rep. of 1894, pp. 129, 130.

and in that case either of the parties has the right to demand dissolution; and should the husband or wife, as the case may be, follow the condemned into exile, the marriage is not dissolved); (d) desertion of husband or wife during a period of five years if their whereabouts are not known. Suits in divorce are adjudicated by the Ecclesiastical Courts, namely, by the Consistorial Court of the Bishopric in which the husband to the suit resides, and the final confirmation of the divorce pronounced by such Court lies with the Holy Synod at St. Petersburg. The petition for divorce is rejected if the party which filed the petition is found to be guilty of adultery; or if that party at the same time or previously had started against the guilty party a criminal prosecution on that ground. After the dissolution of a marriage both parties are allowed to contract new marriages, except in cases in which one of them is condemned to celibacy for bigamy. However, the party found guilty of adultery is by law forbidden to contract a new marriage for a certain period of time.

Lutheran Church.—Members of this body may seek divorce in their Consistorial Courts on the grounds of adultery, concealed loss of virginity of the wife before marriage, attempt to poison, five years' desertion, incompetence and repugnance to marital intercourse, refusal to fulfil conjugal duties, incurable infectious diseases, madness, depravity of life, cruelty and offensive treatment, attempted dishonour, unnatural propensities, grave crimes involving sentence of death, or a punishment in substitution, or penal exile. Together with the sentence of divorce, the Court decides as to the custody of the children.

Russian Jews.—Jews are allowed to divorce each other by mutual consent with permission of their Rabbi. Cases of divorce among Russian Jews are decided by a Rabbi or his assistant, with a right of appeal to the Rabbinical Commission of the Ministry of the Interior.

Muhammadans.—Muhammadan marriages are dissolvable by Mollahs, against whose judgments in such cases an appeal lies to the higher Muhammadan ecclesiastical authorities at St. Petersburg, or to the Ministry of the Interior.

In Poland divorce is not recognised, but judicial separation, limited or unlimited, exists, and may be effected by mutual consent.

Roumania.—The Civil Code of Roumania (*k*) does not allow

(*k*) Arts. 211—215, cited by Weiss, iii. 582.

judicial separation, but recognises divorce either on prescribed grounds or by mutual consent. The grounds of divorce are: (a) Adultery; (b) *excès, sévices* and *injures graves;* (c) condemnation of either spouse to hard labour or seclusion; (d) the fact that one spouse has attempted the life of the other, or, having had knowledge that such an attempt was meditated by a third party, has not at once endeavoured to frustrate it.

Divorce by mutual consent can only take place when the husband has completed his twenty-fifth, and the wife her twenty-first, year, and when at least a year has passed since the celebration of the marriage. It cannot be admitted after the parties have been married for twenty years, or the wife is more than forty-five years of age.

Servia (*l*).—All matrimonial causes are tried by the Spiritual Court. Divorce is granted for the following reasons: (1) Proved adultery; (2) attempt on the life of the partner, or participation in cruel or murderous measures with that object; (3) treason; (4) abjuration of the Christian faith, and, according to the interpretation of the canons of the Church by Bishop Nicanor (*m*), secession from the Orthodox Church to any other branch of the Christian faith would be a ground of divorce; (5) the frequenting by the wife, without her husband's consent, of suspicious places of resort; (6) unproved charges by the husband of infidelity on the part of the wife; (7) incitement by the husband of his wife to immorality; (8) sentence of either spouse to more than seven years' imprisonment or to hard labour; (9) desertion during seven years. Under the Civil Code, the wife may obtain a divorce after three years' desertion, where the husband has left the country without the knowledge or permission of the Government and cannot be traced; and after four years, on proof that the desertion is wilful.

Greece (*n*).—Separation *a mensa et toro* is not permitted by the Greek law. The grounds of divorce are established in No. 117 of the Novels of Justinian with some unimportant amendments made by the treatise of Harmenopoulos (*o*).

1. **Reasons for Divorce on the Husband's Side.**—(a) If the wife has concealed from him a conspiracy against the King of which she was cognisant. If, however, the husband having known this, keeps silent, the woman may denounce the crime through any person, and

(*l*) Parl. Rep. of 1894, pp. 135, 136.
(*m*) Edition of 1886, p. 17.
(*n*) Parl. Rep. of 1894, pp. 77, 80.
(*o*) Law of February 23rd, 1835.

the husband cannot claim her silence to himself as a ground for divorce; (b) adultery; (c) attempt against the life of the husband on the wife's part, or concealment of such intended attempt by others; (d) attendance at banquets or baths, together with men, against the husband's will; (e) passing the night away from her husband's house without his consent, unless either at the house of her parents or unless she has been turned out by her husband and has had no place to go to; (f) attending theatres, races, or shooting expeditions against the will or without the knowledge of the husband.

2. **Reasons for Divorce on the Wife's Side.**—(a) If the husband conspires against the King or does not denounce such a conspiracy if known to him; (b) attempt by the husband against the wife's life or his failure to inform her of an intended attempt by others, or to have recourse to the law with a view to bringing the criminals to justice; (c) if he tries to induce her to commit adultery; (d) if he denounces her falsely for adultery; (e) if he has intercourse with another woman in the same house or town, notwithstanding the advice of his relatives; (f) if he is convicted of adultery with a married woman; (g) if he has entered a monastery.

Divorce by mutual consent is unknown to the Greek law, but, in the absence of any check upon collusion undefended actions for divorce often amount to the same thing. Some of the more trivial grounds above stated are, as far as possible, discouraged by the Courts.

Penalties.—By the 117th, 127th, and 134th Novels various penalties are enacted if divorce be asked and granted, owing to the fault of the person against whom it is asked—particularly in the case of the woman, who, if divorce is granted on the ground of adultery committed by her, loses both her dowry and a great portion of her own private property. The provisions above-mentioned have been applied by the Greek Courts on several occasions, but latterly the opinion has prevailed that such penalties have been abolished by the penal law, and therefore, they are not applied. Damages may, however, be claimed.

Procedure and Co-operation of Ecclesiastical Authority.—The party desiring a divorce addresses a petition in writing to the Bishop, who thereupon summons both parties before him with a view to their reconciliation. If after three months all his efforts to bring about a reconciliation fail, the Bishop makes a report to that effect to the Civil

Tribunal of First Instance. Until it has received the Bishop's report, the Tribunal cannot entertain a petition for divorce. When the Tribunal declares the marriage dissolved, and its decision is finally and irrevocably pronounced, the Procureur du Roi sends the decree to the ecclesiastical authority, in order that the spiritual dissolution of the marriage may also be pronounced.

Ionian Islands.—After the union of the Ionian Islands with Greece the laws of Greece became obligatory in the Ionian Islands as enacted by the law of January 20th, 1866. The above-mentioned rules as to divorces prevail in the Ionian Islands.

C. Systems recognising both Divorce and Judicial Separation.—Of these systems, which are found in countries where the law on this subject is modern, some, like the English and Scotch, leave the choice of the remedy (assuming the grounds for it to exist) to the parties themselves.

Germany.—(A) **Divorce.**—(1) **Grounds of Divorce.**—Either of the spouses is entitled to a divorce *à vinculo* on one of the following grounds: (a) If the respondent has been guilty: (α) of adultery, bigamy, or sodomy (*p*); (β) of any attempt on petitioner's life (*q*); (γ) of wilful desertion (such wilful desertion is deemed to exist in the case of wilful disobedience to an order for the restitution of conjugal rights continuing for a period of a year, or in the case of wilful absence for a period of a year under circumstances under which it is impossible to serve any process) (*r*). (b) If owing to gross breaches of marital duty or to acts of cruelty or dishonourable or immoral conduct on the part of the respondent the relations between the spouses have been disturbed to such an extent that the petitioner cannot reasonably be expected to continue them (*s*). (c) If the respondent (while married to the petitioner) has for a period of not less than three years been afflicted with mental disease of a nature so severe that the intellectual ties between the spouses have become severed, and if, having regard to the nature of the disease, all hope of renewal of such ties seems excluded (*t*).

The right to obtain a divorce on any of the grounds mentioned under (a) and (b) is lost by condonation; an offence belonging to the class described under (a) (α) is not a sufficient ground for obtaining

(*p*) German Civil Code, s. 1565.
(*q*) *Ibid.*, s. 1566.
(*r*) *Ibid.*, s. 1567.
(*s*) *Ibid.*, s. 1568.
(*t*) *Ibid.*, s. 1569.

a divorce if it was committed with the petitioner's connivance (*u*). The fact that the petitioner was himself guilty of one of the offences in question does not bar his right.

(2) **Rules as to Time.**—The right to obtain a divorce on one of the grounds mentioned under (a) and (b) is lost unless the proceedings are instituted within six months from the date at which the offence giving rise thereto became known to the petitioner. No proceedings can be taken after the lapse of ten years from the date of the commission of the offence. The time does not run while the spouses are living apart from one another (*v*).

(3) **Finding as to Guilt of Parties.**—If a decree is granted on one of the grounds mentioned under (a) and (b) the decree must mention that the divorce was caused by the respondent's fault, but where the petitioner himself was guilty of a matrimonial offence and such offence has been pleaded by the respondent, either by means of a cross-petition or by means of a defence to the petition, the decree must contain a declaration as to the fault of both parties (*w*).

(4) **Effects of Divorce.**—A divorce decree under German law becomes absolute automatically on the day on which it ceases to be appealable (*x*). An absolute divorce decree has the following effects—

(a) **Freedom to Re-marry.**—The petitioner as well as the respondent is free to re-marry, but this rule is subject to the following exceptions :

(1) If the adultery of one of the parties was a ground on which the divorce was granted, such party cannot contract a valid marriage with the person with whom the adultery was committed, unless dispensation is obtained from the competent authority (*y*) ; (2) a divorced wife is not allowed to marry before the expiration of a period of ten months running from the date at which the decree becomes absolute, unless she has in the meantime given birth to a child or has obtained dispensation from the competent authority (*z*). The last-mentioned prohibition is merely in the nature of a "hindering impediment" (*a*).

(b) **Divorced Wife's Rights as to Husband's Family Name.**—If the wife is declared to be the exclusively guilty party, the husband may

(*u*) German Civil Code, ss. 1565, 1570.
(*v*) *Ibid.*, ss. 1571, 1572.
(*w*) *Ibid.*, s. 1574.
(*x*) *Ibid.*, s. 1564.
(*y*) *Ibid.*, ss. 1312, 1328.
(*z*) *Ibid.*, s. 1313.
(*a*) *Ibid.*, ss. 1323, 1330 ; see p. 115.

compel her to resume her maiden name; in every other case a divorced wife retains the name of the husband from whom she is divorced, unless by a formal act she re-assumes her maiden name or the name which she had immediately before marrying the husband from whom she is divorced (*b*).

(c) **Mutual Rights of Divorced Spouses as to Property and Maintenance.**—As the divorce dissolves the marriage, it follows as a matter of course that in the case of the spouses living under the statutory *régime* (*c*) the husband's rights of usufruct and management cease *ipso facto*, and that in the case of the spouses living under any *régime* of community of goods the community is dissolved *ipso facto* by the divorce of the spouses. In the last-mentioned case an innocent spouse as well as a spouse whose mental disease has been the ground of divorce, has certain advantages on the division of the common fund (*d*). In addition to this an innocent spouse may claim from the spouse declared to have been the exclusively guilty party, a restitution of all the gifts made during the marriage or in contemplation of the marriage (*e*). After divorce the guilty spouse is liable to supply the other spouse with suitable maintenance so far as he or she cannot maintain themselves (*f*).

(d) **Rights as to Care and Custody of Children.**—If the marriage is dissolved on one of the grounds mentioned above under 1 (a) and (b), the following rules apply during the joint lives of the divorced spouses: If one of them has been declared the exclusively guilty party, the innocent party has the care and custody of the infant children's persons; if both parties are declared to be guilty the wife has the custody and care of all infant sons who have not completed their sixth year, and of all infant daughters, and the father has the custody and care of all infant sons who have completed their sixth year. This rule may, however, be modified by the Guardianship Court in any case in which such modification appears desirable in an infant's interest. The parent who is deprived of his or her infant children's custody and care is entitled to continue his or her personal intercourse with such children subject to such regulations as the Guardianship Court may direct (*g*). The father's

(*b*) German Civil Code, s. 1577.

(*c*) See pp. 590 *et seq.*

(*d*) German Civil Code, ss. 1478, 1549.

(*e*) *Ibid.*, s. 1584.

(*f*) See Burge, vol. ii., p. 570. As to the maintenance of the children of divorced spouses, see German C. C., s. 1585.

(*g*) German Civil Code, ss. 1635, 1636.

right to act as statutory agent for his children is not affected by the divorce (*h*).

(B) **Judicial Separation.**—The judicial separation (*Aufhebung der ehelichen Gemeinschaft*) of the German Civil Code differs in several essential respects from the *divortium a mensa et toro* of the canon law and also from the "judicial separation" of the English Divorce Act. The separation from board and bed was the only remedy for matrimonial offences recognised by the canon law, and it was either temporary or permanent according to the nature of the offence; the judicial separation of the English law, on the other hand, is a remedy open to a petitioner: (a) in a case in which the respondent's matrimonial offences though justifying a separation do not justify a divorce; (b) in a case in which the petitioner, though entitled to a divorce, does not wish to obtain it. Under both systems of law, a separation has to be decreed if the petitioner claims it; under neither law is it possible for the petitioner to transform the separation into a divorce *à vinculo* (*hh*).

Under the German Civil Code the following rules apply: (a) A judicial separation may be claimed on the same grounds as a divorce and cannot be granted on any other grounds; (b) on a petition for judicial separation the Court is bound to decree a divorce if the respondent prefers a divorce to a judicial separation; (c) either party may at any time subsequent to the pronouncement of a decree for separation apply to the Court for a transformation of the separation into a divorce, and the Court is bound to order such transformation unless the parties, after the pronouncement of the decree for separation, have resumed cohabitation; (d) a decree for separation must, like a divorce decree, contain a declaration as to the guilt of the respondent, or as to the guilt of both spouses; (e) except as regards the right to re-marry, the effects of a decree for judicial separation are the same as those of a divorce decree (*i*).

Hungary.—In Hungary the matrimonial law of 1894 prescribes the same causes for divorce and judicial separation. These are nine in number: (a) Adultery or an unnatural crime; (b) the act of knowingly contracting a new marriage during the subsistence of a prior one; (c) wilful and unjustifiable desertion, if the deserting spouse fails, after six months' absence, to re-establish the conjugal home within the period allowed for that purpose by judicial decree,

(*h*) German Civil Code, s. 1635.
(*hh*) See pp. 809—812.
(*i*) German Civil Code, ss. 1575, 1576.

or if the deserting spouse, whose residence is unknown, does not return within a year from an official citation to do so; (d) attempt on the life, or *sévices* endangering the bodily health, of either spouse by the other; (e) sentence of death, or condemnation for five years at least to seclusion, or hard labour, for a crime posterior to marriage, and unknown to the other spouse at the time of marriage; (f) serious wilful default in the discharge of the duties of marriage; (g) the fact of inciting or attempting to incite a child belonging to the family of the spouses to an immoral or criminal act; (h) incorrigible misconduct; (i) condemnation posterior to marriage for less than five years' seclusion, or hard labour, for an offence committed from love of gain. In the last four cases, the tribunal is required to take into consideration whether in fact under the circumstances the common conjugal life has become impossible. In all cases except that of desertion, the action ought to be instituted within six months from the time when the petitioner had knowledge of the ground for the proceedings, unless the prescription has been suspended by disability, and the action cannot be entertained after the expiry of ten years from the time when such grounds took place. The wife for whose benefit divorce has been pronounced may obtain a fixed alimony, but not the husband. The guilty divorced wife cannot continue to bear her husband's name; the innocent wife may do so if she has applied for leave to the tribunal which had cognizance of her suit. In the absence of agreement to the contrary between the divorced spouses, children up to seven years of age are entrusted to the mother, thereafter to the innocent spouse. If both spouses have been declared guilty, sons are given into the custody of the father, daughters into that of the mother. But the tribunal may, in the interests of the children, and notwithstanding any agreement by the parents, commit them to the care of a third person (*j*).

Switzerland.—Divorce in Switzerland is regulated for the whole country by the Federal Law of Marriage and Civil Status of December 24th, 1874, frequently above referred to, which has been in force since January 1st, 1876 (*k*). Divorce by mutual consent may be decreed if, in the opinion of the tribunal, the continuation of the common life is incompatible with the nature of marriage (*l*). Divorce *pour cause déterminée* may be applied for by husband or wife

(*j*) See *ante*, chaps. v., vi.
(*k*) Arts. 43—47.
(*l*) Art. 45.

on the grounds of: (a) Adultery, provided that not more than six months have elapsed since the injured spouse had knowledge of the offence; (b) attempt by one spouse on the life of the other, *sévices* (*schwere Misshandlungen*) or *injures graves* (*tiefe Ehrenkränkungen*) (*m*); (c) condemnation to a *peine infamante* (*entehrende Strafe*) (*n*); (d) malicious desertion which has lasted for two years, provided that a judicial citation fixing a delay of six months for return has proved ineffectual; (e) insanity lasting for three years and declared incurable. In the case of divorce *pour cause déterminée*, the guilty spouse cannot re-marry till the expiry of a year from the decree, and this delay may be extended to three years by the judgment of the Court. Where none of the prescribed causes for divorce exist, but the circumstances show that the conjugal tie has been gravely injured, the Courts may nevertheless make a decree of divorce (*o*) or judicial separation (*p*). A decree of judicial separation may not be pronounced for more than two years; if during that period there is no reconciliation between the spouses, the application for divorce may be renewed, and the Court may then deal with the matter according to its discretion. The ulterior effects of divorce or judicial separation are determined by the laws of the canton to the jurisdiction of which the husband is subject, but the Court which makes the decree of divorce may, at the same time, decide such questions *ex officio* or upon the application of the parties (*q*).

As from January 1st, 1912, this law will be replaced by the Federal Civil Code, arts. 137—158. What has been above called divorce by mutual consent (*r*) will disappear, and the grounds of divorce upon the application of one party are more clearly defined. Thus causes (a) and (b) can no longer be set up after the lapse of

(*m*) For definition, see Entscheidungen des Bundesgerichts, x. 542, xv. 756, xix. 167, xxi. 760; Curti, 2397, 2398, 2399, 2428.

(*n*) Defined by Entscheidungen des Bundesgerichts, ii. 329, vii. 543; Curti, 2400, 2401.

(*o*) Law of 1874, art. 47. Only the injured spouse can sue: Entscheidungen des Bundesgerichts, iii. 273, 500; Curti, 2402, 2403.

(*p*) No action may be brought for judicial separation: Entscheidungen des Bundesgerichts, iii. 373, x. 105; Curti, 2404, 2425.

(*q*) Art. 49. For the cantonal laws on the effect of divorce and judicial separation, see Hüber, Schweizerisches-recht, i., 201—237.

(*r*) This view of art. 45 is not accepted by all Swiss writers; Rossel and Mentha, Manuel du Droit Civil Suisse, i. 198. The text of the law says, "upon the application of both spouses."

five years, nor if pardoned; nor is adultery, consented to by the other spouse, a cause of divorce (*s*); criminal and dishonourable conduct again will be a ground for divorce, without any conviction by a Court, provided that it is of such a nature that the other spouse cannot reasonably be expected to continue cohabitation (*t*); malicious desertion will include a refusal to return to cohabitation made without sufficient reason (*u*); and mental disease will only be a ground of divorce if it is of such a kind that the continuance of cohabitation cannot reasonably be required of the other spouse (*a*). The indeterminate causes of divorce provided for by the old art. 47 (*b*) are now limited to cases where they are sufficiently serious to render it unreasonable to require the party injured to continue cohabitation (*c*).

Under the present law the only lawful claim in an action is for divorce; under the Code the action may be either for divorce or for judicial separation, and no decree of divorce may be made in an action for separation only (*d*). On the other hand, a judicial separation may not be granted in an action for divorce unless there is a prospect of reconciliation (*e*). Judicial separation may, under the Code, be pronounced for a definite period of one to three years, or indefinitely. If it is for a definite period, it will expire upon the determination of that period, and either spouse will then be free to demand a divorce, unless a reconciliation has occurred; and, subject to the same exception, either spouse may, after the expiration of three years of an indefinite period, claim a divorce or the rescission of the separation (*f*). Upon any such application as is mentioned in the last sentence, either spouse has a right to a divorce, unless the causes are such that he or she is exclusively to blame; and even if this is so, a divorce must nevertheless be pronounced if the other party refuses to resume cohabitation (*g*).

If a divorce is pronounced, the Judge must make an order delaying the re-marriage of the guilty party (*h*) for from one to two years

(*s*) See arts. 137, 138.

(*t*) Art. 139.

(*u*) Art. 140.

(*a*) Art. 141.

(*b*) See above, p. 849, n. (*o*).

(*c*) Art. 142.

(*d*) A claim may of course be for separation or divorce alternatively; Rossel and Mentha, *op. cit.*, i. 210.

(*e*) Arts. 143, 146.

(*f*) Art. 147.

(*g*) Art. 148.

(*h*) The marriage of a divorced woman is in any case illegal until the expiration of 300 days from the divorce; but this period is terminated

(in the case of adultery the period may be extended to three years); but this period includes the duration of any judicial separation which may have been pronounced (*i*). The Code will also regulate the consequences, pecuniary and other, of divorce, which under the present law are left to be determined by cantonal law, and agreements with regard to such matters will be subject to the sanction of the Court (*k*). Thus, where a divorce is pronounced, the guilty spouse must compensate the innocent for any loss of property or expectations that the latter may suffer thereby; and the Court may also require the payment of a sum of money by way of satisfaction (*Genugtuung, réparation morale, riparazione*) for any grave injury to personal relations which may result from the circumstances which have given rise to the divorce (*l*). An innocent spouse who would fall into great destitution by reason of a divorce may also be granted a contribution toward his or her subsistence (*Unterhaltsbeitrag, pension alimentaire, pensione alimentare*) at the expense of the other, even if he or she was not in fault (*m*). Such a contribution may, upon the application of the spouse who is liable to pay it, be extinguished or reduced if the destitution no longer exists or is considerably diminished, or if the contribution is no longer proportionate to the circumstances of the applicant (*n*). Any life-annuity payable by reason of a judgment or by agreement, whether by way of compensation, satisfaction or contribution to subsistence, will be extinguished by re-marriage (*o*).

The effect of a decree of divorce upon the matrimonial *régime* is to divide the property of the spouses into husband's and wife's property, any increase being divided according to the existing *régime*, while a diminution is borne by the husband, except in so far as he can show that it has been caused by the wife. A divorce likewise extinguishes any right of inheritance, or claim under a testamentary disposition or marriage contract between the spouses (*p*).

On a judicial separation the Court will decide, upon a con-

by a birth, and may be abridged by the Court, if no pregnancy of the wife can have arisen from the marriage, or where divorced spouses re-marry (arts. 103, 104).

(*i*) Art. 150.

(*k*) Art. 158.

(*l*) Art. 151.

(*m*) Art. 152.

(*n*) It appears that such a contribution cannot in any case be increased; Rossel and Mentha, *op. cit.*, i. 122.

(*o*) Art. 153.

(*p*) Art. 154.

sideration of the duration of the separation and of the circumstances of the spouses, whether the existing *régime* shall be maintained or dissolved; but a separation of property may not be refused if either of the spouses demands it (*q*).

A divorced wife retains the civil status which she has acquired (*e.g.*, as regards citizenship) by the marriage, but takes the name which she had before its solemnisation, and if she was at that time a widow she may be authorised by the Court to take her maiden name (*r*).

The relations of the parents to the children and the parental power are determined by the Court after hearing the parents, and, if necessary, the guardianship authority. A spouse from whom the children are withdrawn must contribute reasonably, according to his or her circumstances, to the expenses of their maintenance and education, and remains entitled to reasonable personal intercourse with them (*s*).

The Court may also, upon the application of the guardianship authority or of either parent, make such variations of its orders as regards these matters as may be rendered necessary by a change of circumstances, such as the re-marriage, death, or change of residence of a parent (*t*).

In the Scandinavian countries (*a*), besides divorce, separation has always been recognised by the common law, and in Norway is now placed on a statutory basis.

Denmark.—Divorce in Denmark is regulated by the Code of Christian V. of 1684, and Ordinances of December 13th, 1750, and September 11th, 1839 (*b*).

(*q*) Art. 155.

(*r*) Art. 149.

(*s*) Art. 156.

(*t*) Art. 157.

(*a*) See I. H. Deuntzer, Den nordisk Familie og Arveret, Kjobenhavn, 1878 (in Nordisk Retsencyclopædi II.); I. H. Deuntzer, Dansk Familierret, 3 vols., Kjobenhavn, 1892; Winroth, Svensk Civilratt, 1, 2, Aktenskap, Stockholm, 1898; Dr. Oscar Platou, Om Olgteskab og Skilsmisse efter norsk Ret., Christiania, 1899.

(*b*) The laws of Denmark, according to the Code of Christian V., contain the following rules relative to divorces:

"Si conjux cum conjugis fratre, sorore, vel personâ sanguine ipsi proximè conjunctâ, contra legem Divinam, corpus misceat, et, singularem ob causam, remissionem pœnæ capitalis impetret; conjugibus individuo matrimonii vinculo permanere conceditor, nisi innocens nocentem connubio suo exigi desideret.

"Si maritum vel maritam leprâ, vel morbo venereo, quam ante nuptias non

A divorce can be obtained—

(1) By *judicial* sentence: (a) On the ground of an act *antecedent* to marriage, namely, (α) concealed impotence, (β) concealed and communicated leprosy, or venereal disease, (γ) incurable insanity; (b) on the ground of an act *subsequent* to marriage, namely, (α) adultery, (β) bigamy, (γ) malicious desertion.

(2) By *administrative* sentence on the grounds of: (α) Criminal sentence of not less than seven years' penal servitude passed on either spouse; (β) incurable insanity; (γ) three years' actual living apart in accordance with a decree of separation.

Divorce on the ground of adultery may be refused where the petitioner has been guilty of the same offence or of some other grave misconduct. If such allegations are made against a petitioner, the Judge ought to scrutinise his petition jealously. When divorce has been pronounced on the ground of adultery, the innocent spouse may re-marry freely. The guilty wife can only re-marry with the permission of the King, at the end of three years, and on condition of establishing good conduct in the interval. She is prohibited from marrying and living in the parish, district, or town where her former husband resides.

Sweden (*c*).—**Grounds of Divorce.**—Adultery on the part of either husband or wife, if not condoned and should no marital relations be resumed after knowledge of the offence, entitles the innocent

detexit, laborasse, posteaque contagionem a morbida ad sanam personam serpsisse probabile sit; parti læsæ divortii cum lædente faciendi potestas esto. Si maritus aut marita furtum aut aliud infame facinus designasse deprehenditur, capitali quidem supplicio dignum, sed cui pœnæ capitalis remissio singulari magistratûs indulgentia conceditur: non ideo conjugii vinculum dissolvitor. Quod si talis persona malefica exilio fuerit multata aut profugerit: restitutione in integrum a magistratu intra triennium non impetratâ; liberum esto parti innocenti ad novum transire conjugium, dummodo se interea honestam atque impollutam egisse vitam legitime queat ostendere.

"Si quis exilio multatus sit; nec tamen ob facinus infamia dignum; septennium uxor maritum expectato; si interea magistratum sibi propitium reddere ac restitutionem in integrum queat impetrare: sin minus, elapso septennio, novum uxori conjugium permittitor." Burge, 1st ed., i., 652, 653.

This Code does not mention separation, but the common law, based on long custom, recognised it.

(*c*) Parl. Rep. of 1894, pp. 146, 147; Code of 1734, Pr. (Giftermals Balk); and as to the divorce of foreigners, see law of July 8th, 1904. The Code allows the consorts, if there is ill-feeling or hatred between them, to obtain judicial separation: ch. 14.

party to a divorce, the guilty party forfeiting half his or her share in the joint property. Complaint must be made within six months after discovery of the offence, and no divorce will be granted if both parties have committed adultery, unless such has been previously condoned. Divorces may also be obtained on the grounds of infidelity after betrothal on either side, or if the wife confess to immorality previous to her betrothal and the husband refuse to condone it, or if either husband or wife suffer from bodily incapacity or have concealed deliberately the fact of being affected with any incurable *contagious* disease or be sentenced to imprisonment for life, or have been found guilty of attempting the life of the other party, or if for three years one of them have been insane and competent physicians declare that there is no hope of recovery. The most usual way of obtaining a divorce, however, is under the Code of 1734 (*d*), which enacts that if one of them leaves home with the intention of no longer living with the other and goes out of the kingdom, then the abandoned party may apply for a summons for malicious desertion from the proper Judge. If the absconding party's whereabouts be unknown, the Judge causes a notice to be read from the pulpits of the churches within his jurisdiction citing such party to return within a year and a day to his or her home. If this notice be neglected, a divorce is granted on the expiry of such period, the absconder forfeiting all claims on the joint property. If, on the other hand, the abode of the absconding party be known, a writ of summons may be at once served on him or her, and the divorce can then be obtained by judgment within a very short time, depending on the distance of the absconder from the place of jurisdiction. About one week will often suffice.

Application to the King (*e*).—Divorces may also be applied for by direct appeal to the King in the following cases: (1) Sentence to loss of life, or of civil rights, notwithstanding the grant of a pardon; (2) conviction of grave crime and sentence to penal servitude for a term of years; (3) conviction of prodigality, drunkenness, or a violent temper, or where such differences are proved to exist between the parties as to cause mutual detestation and hatred. In this last case the offending party must have been warned first by

(*d*) Pr. (Gifternuals Balk), ch. 13. (*e*) Ordinance, April 27th, 1810. ss. 4—6.

the rector of his parish, and, if he persist in his conduct, by the superior ecclesiastical authority. If such warnings fail, separation *a mensa et toro* is ordered for a year, and on the expiry of that period divorce can be obtained on proof of the preliminary proceedings.

Where a divorce is granted on the ground of one party having attempted the life of the other, the guilty party forfeits all share in the joint property. Where insanity is the cause of the divorce, each party retains his or her legal share in the joint property, and, moreover, the applicant for the divorce will be still bound to contribute out of his or her means towards the future maintenance of the other party as well as of the children, if any.

Norway.—In Norway divorce may be demanded on the grounds of: (a) Adultery; (b) unjustifiable desertion, during three years at least; (c) absence for at least seven years, when there is no presumption of death; (d) condemnation to hard labour for life, unless pardon is granted within the first seven years (*f*); (e) sentence of either party to imprisonment exceeding three years, or to a period of uncertain duration, or to imprisonment exceeding three months for any crime committed against the petitioner, or for any act by which his or her life has been deliberately endangered, or being finally sentenced to imprisonment, irrespective of time, for specified crimes of an outrageous or unnatural character; (f) the judicial deprivation of either spouse of the custody of, and of authority over, the children of the marriage, or the sentencing of either for vagrancy, intemperance, or other misconduct.

Where a dissolution of marriage has been pronounced both parties are entitled to marry again, but before doing so a party found guilty of adultery requires the Royal licence, which as a rule cannot be obtained for a period of three years after the decree of divorce has been pronounced. A marriage can, moreover, be dissolved by a Royal decree—(1) when three years have elapsed since a grant to the parties of a judicial separation; (2) when the parties have been actually living separate for seven years, although no judicial separation may have been granted to them. Royal decrees dissolving a marriage do not enable either party to marry again. A special licence is necessary for that purpose, and such

(*f*) Ordinance of December 18th, 1750.

special licence can usually be obtained on proof that the party applying for it has been of good conduct during the three or seven years of separation as the case may be.

By a recent law (*g*) a marriage can also be dissolved upon the requirement of the one party, if the other, when contracting the marriage, suffered, without the knowledge of the former, from some bodily deficiency, rendering him or her unfitted for marriage, or from epilepsy, leprosy or contagious venereal disease, or mental disease, or has been made pregnant by another. Dissolution of the marriage can also be required, if one of the parties during marriage has been guilty of a certain category of crimes, or has for two years deserted the home, or has for three years been mentally diseased without reasonable prospect of recovery; likewise, when the husband and wife, after separation, have lived apart for two years. Living apart for one year is sufficient if both parties require divorce. By this law separation *a mensa et toro* is recognised, and is to be granted, after a previous attempt at reconciliation, when both parties, husband and wife, are agreed thereon. Separation may also be granted upon the requirement of either party if the other fails in the obligation of maintenance, or otherwise is guilty of breach of matrimonial duties, or has fallen a victim to the abuse of alcoholic liquors, or leads a scandalous life, or has been convicted with loss of civil rights, or when such disagreement has arisen between husband and wife that it cannot reasonably be required that they shall continue to live together (*g*). The law furthermore contains provisions on legal points regarding the dissolution of the marriage, the settlement of property, the obligation of maintenance (alimony), and the custody of the children (when young they are as a rule to follow the mother).

SECTION IV.

British Dominions and United States.

Scots Law.—History of Divorce.—The marriage law of Scotland as regards the dissolution, as well as the constitution, of the nuptial tie, rests upon the basis of the canon law (*h*). Before the Reformation all jurisdiction in matrimonial causes belonged to the Bishops'

(*g*) August 20th, 1909.

(*h*) This and the following passages are taken from the judgment of Lord Watson in Collins *v.* Collins (1884), 9 A. C., at p. 245.

Courts, from which an appeal lay, not to the Civil Courts of Scotland, but to Rome. By a charter dated February 8th, 1563, Queen Mary, however, with the advice of the Lords of her Secret Council, in order to provide a remedy for the lapse of ecclesiastical jurisdiction, appointed four principal Commissaries at Edinburgh to have an original and privative jurisdiction in all marriage, divorce, and bastardy cases, subject to the review of the Court of Session only. In the year 1592 that appointment was ratified by the Scottish Parliament (*i*). The jurisdiction of the Commissaries was transferred to the Court of Session in 1830 (*k*). Considerable changes were, however, made in the matrimonial law previously administered in the Ecclesiastical Courts by the legislation of the Reformation period. Under the canon law, from the Council of Trent to the Reformation, the marriage tie was universally regarded as indissoluble, and *separatio tori* was the only remedy given for adultery in the Courts of the Church. The Act of 1573, c. 55, established in Scotland the remedy of divorce *à vinculo* for desertion. Divorce *à vinculo* for adultery seems to have been previously adopted by the new Consistorial Courts in compliance with legislation for the establishment of the reformed religion (*l*). The Commissaries, however, in the administration of matrimonial suits, closely followed the canon law, in so far as it remained unaltered by express statute or by legislative recognition of the reformed faith (*m*); and the canon law has received equal regard from the Court of Session.

Grounds of Divorce.—The grounds of divorce in Scots law are adultery and wilful desertion for four years.

Defences.—The defences to an action on the ground of adultery are similar to the defences under English law (*n*), but a few special points are worthy of notice.

1. **Collusion** (*o*).—The plea of collusion may be set up by the defender (*p*); by the co-respondent, by any creditor whose rights would be prejudiced (*q*), or by the Lord Advocate (*r*). The powers

(*i*) Scots Act. 1592, c. 64.

(*k*) 11 Geo. IV. & 1 Will. IV. c. 69, ss. 31, 33, 36.

(*l*) Scots Acts, 1560 and 1567.

(*m*) See Stair, i., 1, 14; Bankton, i., 1, 42. See p. 44.

(*n*) See p. 866, *infra*.

(*o*) See p. 868, *infra*.

(*p*) Mackay's Manual of Practice, 483.

(*q*) Ersk., i., 6, 45.

(*r*) Conjugal Rights Act, 1861 (24 & 25 Vict. c. 86), s. 8.

of the Lord Advocate have, however, remained practically a dead letter (*s*). It has been held to be grave misconduct for a law agent to assist parties in withholding from the Court the facts of a case (*a*).

2. **Condonation** (*b*).—By the law of Scotland, full condonation of adultery, followed by cohabitation as man and wife, is a *remissio injuriæ*, absolute and unconditional, and affords an absolute bar to any action of divorce, founded on the condoned acts of adultery (*c*). Nor can any condonation of adultery, cohabitation following, be made conditional by any arrangement between the spouses (*c*). Although the condoned adultery cannot be founded upon, condonation does not, however, extinguish the guilty acts entirely, and they may be proved so far as they tend to throw light upon charges of adultery posterior to the condonation (*c*).

3. **Delay in Instituting Proceedings** (*d*).—Delay may imply condonation (*e*).

4. **Connivance** (*f*).—The technical term in Scots law for connivance is *lenocinium*. Strictly speaking, the word *lenocinium* involves the idea of a profit being made out of the adultery connived at; but in law it is not necessary that this element of pecuniary gain should be present (*g*). It appears that this plea has been sustained in only one reported case in Scotland where a husband, having married a prostitute, deserted her without supplying her with means of support, and recommended her to return to her former mode of life (*h*). In a recent case it was held that passive acquiescence by a husband in the conduct of his wife did not amount to *lenocinium* (*i*).

5. **Effects of Divorce.—(1) As regards the Person and Status of the Spouses.**—As in England (*j*), divorce severs the marriage tie. No distinction is drawn in Scots law between decrees *nisi* and decrees

(*s*) Encyclo., Scots Law, tit. Collusion, iii., p. 101.

(*a*) S. S. C. Society *v.* Officer (1893), 20 Rettie, 1106.

(*b*) See p. 866, *infra*.

(*c*) Collins *v.* Collins (1884), 9 A. C. 205; Graham *v.* Graham (1878), 5 Rettie, 1093; Smeaton *v.* Smeaton (1900), 2 Fraser, 837.

(*d*) See p. 866, *infra*.

(*e*) Fraser, Husband and Wife, ii., 1199.

(*f*) See p. 866, *infra*.

(*g*) Wemyss *v.* Wemyss (1866), 4 Macph. 660.

(*h*) Marshall *v.* Marshall (1881), 8 Rettie, 702.

(*i*) Thomson *v.* Thomson (1908), Session Cases, 179.

(*j*) See p. 870, *infra*.

absolute. The marriage is dissolved as from the date of the decree, unless the judgment of the Court of First Instance is reversed on appeal. After the expiry of the delays for appeal (reclaiming days) either party may marry again; and it seems (*k*) that a marriage at any time after the decree would be valid, subject to its liability to be a nullity if the decree should be reversed on appeal. A decree of divorce may be subsequently "reduced" on the grounds of subornation of witnesses or collusion (*l*). If a spouse, divorced for adultery, marries the co-respondent named in the decree the marriage is null (*m*), and a woman who contracts such a marriage, whether the co-respondent is named in the decree or not, cannot dispose of her heritage, onerously or gratuitously, to any person in prejudice of her lawful heirs (*n*).

(2) **As regards the Property of the Spouses.**—The Scottish Courts have no power to order a settlement in cases of divorce. But by the Scots Act of 1573, c. 55, in cases of divorce for desertion—and, subject to a possible exception (*o*), the same rule applies to divorces for adultery (*p*)—the guilty party shall "forfeit and lose *tocher* and *donationes propter nuptias*." The effect of this rule is that the interest provided by a marriage contract, or resulting from the law, for the benefit of either of the spouses is, by the adultery of the delinquent, lost for the benefit of the other (*p*). "There is a forfeiture by the statute of all such pecuniary advantages as the offending spouse has gained by the contract, with the result, but with nothing more, that the other spouse acquires such rights as he or she may have under the contract free and disburdened from any such pecuniary advantages. There is no transfer of rights to any other party, or any enactment that the rights of children or beneficiaries are to be thereby created, or enlarged, or changed, as these have been settled by the marriage contract provisions" (*q*). As regards *legal* rights, the innocent wife who divorces her husband becomes at once entitled to *terce*, or one-third of the rents of

(*k*) Encyclo., Scots Law, tit. Divorce, iv., p. 311.

(*l*) See Bonaparte *v.* Bonaparte, [1892] P. 402.

(*m*) Scots Act, 1600, c. 20.

(*n*) Scots Act, 1592, c. 119.

(*o*) Namely, whether a husband divorced for adultery is bound to restore a *tocher* paid to him in cash and immixed with his own funds: Justice *v.* Murray (1761), Mor. Dict. 334.

(*p*) Harvey *v.* Farquhar (1872), L. R. 2 Sc. 192; Dawson *v.* Smart, [1903] A. C. 457.

(*q*) Per Lord Shand in Dawson *v.* Smart, *ubi supra cit.*, at p. 463.

her husband's heritage (*r*), and to *jus relictæ*, or one-half, or one-third, of the capital of his movable estate (*s*); while the innocent husband, under the same circumstances, would be entitled to *curtesy*, or the life-rent of his wife's heritage; the guilty spouse, on the other hand, losing all claim to legal rights on the death of the innocent spouse (*t*). As regards contractual rights, the innocent wife or husband, as the case may be, is entitled to claim at once all provisions made by the guilty spouse, or by any one on his or her behalf, the guilty spouse losing all interest under the contract (*a*). This latter statement does not, however, apply to contingent interests of the guilty spouse in funds proceeding from his side (*b*). Donations made by the innocent spouse to the guilty spouse are revoked *ipso facto* by the divorce, while those made by the guilty spouse become irrevocable at the date of the decree (*c*).

Judicial Separation.—Judicial separation is granted only on the grounds of adultery and cruelty (*sævitia*). The Scotch cases in regard to this judicial remedy will be noted below in dealing with the analogous procedure in England (*d*). The decree does not dissolve the marriage or enable either party to marry again, but it entitles the innocent spouse to live apart from the other. After a decree of separation *a mensa et toro*, obtained at her instance, all property which the wife may acquire, or which may devolve upon her, is held to be property from which the husband's *jus mariti* and right of administration are excluded; it may be disposed of by her as if she were unmarried, and on her death intestate it passes to her heirs and representatives as if her husband had been then dead (*e*). If she resume cohabitation with her husband all such property as she may then be entitled to is equally excluded from the *jus mariti* and right of administration of the husband, subject, however, to any written agreement between herself and her husband (*e*). During a judicial separation the wife can contract, and incur liability for wrongs, and sue and be sued, as if she were unmarried, and her husband is not liable on her contracts or for her wrongs (*e*).

(*r*) As to *terce*, see p. 635, *ante*.

(*s*) See p. 653, *ante*, and Johnstone-Beattie *v.* Johnstone (1867), 5 Macph. 340.

(*t*) Ersk., i., 6, 46—48.

(*a*) *Ibid.*

(*b*) Harvey's Judicial Factor *v.* Spittal's Curator *ad litem* (1893), 20 Rettie, 1016.

(*c*) Ersk., i., 6, 31.

(*d*) See pp. 864, 865, *infra*.

(*e*) Conjugal Rights Act, 1861 (24 & 25 Vict. c. 86), s. 6.

But if, on the separation being decreed, aliment has been ordered to be paid to the wife and the husband has not duly complied with such order he is liable for necessaries supplied to her use(*f*).

Adherence.—The proceeding in Scotland analogous to the action for restitution of conjugal rights is the action of adherence, which is competent only in the Court of Session (*g*). It is still uncertain whether a less degree of misconduct than will be a defence to an action of judicial separation will be a sufficient defence to an action of adherence (*h*).

English Law.—Dissolution by Act of Parliament.—It has been considered that the law of England, at a more remote period, allowed a marriage to be dissolved on the ground of the wife's adultery (*i*). Since *Foljambe's Case* (*j*) its undoubted doctrine was that a marriage valid *ab initio* could not be dissolved by any judicial tribunal for adultery or any other cause. The Ecclesiastical Courts, which had the exclusive cognisance of matrimonial questions, might *declare* the marriage to be dissolved, and the parties divorced *à vinculo* for a cause which existed at the time of the marriage and which rendered it void *ab initio*, but they had no power to annul the marriage for a cause arising *subsequently* to it. The Legislature reserved to itself the power of entirely dissolving the marriage.

The first instance of an application to Parliament was in the case of Lord de Roos, afterwards Earl of Rutland, in 1669, who had previously obtained a sentence of divorce *a mensa et toro* in the Ecclesiastical Court.

The next was the celebrated case of the Duke of Norfolk in 1692.

For some time, however, divorce bills were rarely granted, and down to the accession of the House of Hanover only five such Acts were passed; after that period their number rapidly increased.

(*f*) Conjugal Rights Act, 1861 (24 & 25 Vict. c. 86), s. 6.

(*g*) 13 & 14 Vict. c. 36, s. 16; and cf. 11 Geo. IV. & 1 Will. IV. c. 69, ss. 33, 36.

(*h*) See Mackenzie *v.* Mackenzie, [1895] A. C. 384; the authorities for and against the recognition, in actions of adherence, of defences which would not be grounds for judicial separation are collected in Professor Walton's article on Adherence, in Encyclo. of Scots Law, i., 2nd ed., 145.

(*i*) 2 Burn's Eccles. Law, 503; Roberts, Divorce Bills in the Imperial Parliament (1906), p. 1. The first Divorce Act, prior to Foljambe's Case, is said to be that of the Marquis of Northampton in 1551 (5 & 6 Edw. VI.). But this Act was repealed by 1 Mary, sess. 2.

(*j*) (1601), 3 Salk. 138.

Between 1715 and 1775 there were sixty; from that date to 1800 seventy-four, and from 1800 to 1830 about ninety. In the session of 1829 alone seven divorce bills received the Royal assent, and in the short one of 1830, from February to July, no fewer than nine (*k*). Up to and including the year 1857, 317 divorce bills passed (*l*).

The Commissioners appointed by Henry VIII. and Edward VI. for reforming the ecclesiastical law, in their elaborate report recommended divorces *a mensa et toro* to be abolished and complete divorces to be allowed for adultery, desertion, bad treatment, &c., the innocent party to be allowed to marry again, the offending party to be punished by banishment or imprisonment. When this plan of reformation failed, the practice of divorce bills originated (*m*).

Although the decision of Parliament on a petition for divorce was in form of an Act or *privilegium* and not of a judicial decree, yet the Act was granted upon evidence proving that the case came within the scope of rules established by a long series of precedents. The proceeding was in spirit a judicial, though in form a legislative act. The justice of divorce was recognised, but no forensic tribunal was entrusted with the power of applying the remedy. But the law and practice of Parliament were well known and in fact Parliament acted as a Court of Justice (*n*).

A desire had been often publicly expressed by eminent statesmen and lawyers that the subject of divorce for adultery should be submitted, by an enactment of the legislature, to some regular judicial Court, where the crime, and the provocation to the crime, would be carefully balanced, and facts and circumstances could be investigated with the temper, deliberation and caution which ought to accompany such an investigation (*o*).

Divorce by Judicial Decree.—Divorce à Vinculo.—This result was, however, achieved by the Matrimonial Causes Act, 1857 (*p*), which transferred the jurisdiction in matrimonial matters, formerly exercised by the Ecclesiastical Courts, to a new tribunal created

(*k*) See Dr. Phillimore's speech in the House of Commons, 1830, in moving for leave to bring in a bill to alter the law of divorces: Hansard, 1830, xxiv., 1260–1268.

(*l*) Roberts, Divorce Bills in the Imperial Parliament, p. 7.

(*m*) See Reformatio Legum Ecclesiasticarum, 1640; Gibson's Cod. J. E., p. 447.

(*n*) Shaw *v.* Gould (1868), L. R. 3 E. & I. App., per Lord Westbury, p. 84.

(*o*) See Shelford, Marriage, Divorce, and Registration, p. 384.

(*p*) 20 & 21 Vict. c. 85.

for the purpose, and legalised divorce *à vinculo matrimonii*. The powers of that tribunal are now, since the Judicature Act, 1873 (*q*), vested in the Probate and Divorce Division of the High Court of Justice. The Matrimonial Causes Act, 1857 (*r*), does not extend to Ireland, where the complete dissolution of the marriage tie can still be obtained only by Act of Parliament (*a*).

Grounds of Divorce.—The grounds of divorce are (a) in the case of a husband, the adultery of his wife; (b) where the wife is petitioner, incestuous adultery (*i.e.*, adultery with a person with whom, if the husband were single, he could not contract a valid marriage) (*b*); bigamy with adultery; rape (it has been held that the term "rape" is satisfied as a ground of divorce by a conviction under s. 4 of the Criminal Law Amendment Act, 1885 (*c*), of an attempt to have unlawful and carnal knowledge of a girl under thirteen) (*d*); sodomy (*e*) or bestiality; cruelty coupled with adultery, or adultery coupled with desertion without lawful excuse for the space of two years and upwards.

Judicial Separation.—Moreover, a sentence of judicial separation, which has the effect of a divorce *a mensa et toro* under the old law, may be obtained either by the husband or by the wife, on the ground of adultery or cruelty, or desertion without cause for two years and upwards (*f*).

The following points in connection with the grounds of divorce above stated must be noted.

(a) **Adultery, Proof of.**—It is a fundamental rule, that it is not necessary to prove the direct fact of adultery; because, if it were otherwise, there is not one case in a hundred in which that proof would be attainable.

In every case almost, the fact is inferred from circumstances that

(*q*) 36 & 37 Vict. c. 66, s. 34.

(*r*) 20 & 21 Vict. c. 85.

(*a*) See, *e.g.*, Westropp's Divorce Bill (1886), 11 A. C. 294, and p. 877, *infra*.

(*b*) Although marriage with a deceased wife's sister has now been legalised (7 Edw. VII. c. 47), adultery with a wife's sister is still "incestuous adultery" for the purpose of the wife's petition for divorce: s. 3 (1).

(*c*) 48 & 49 Vict. c. 69.

(*d*) Coffey *v.* Coffey, [1898] P. 169; Bosworthick *v.* Bosworthick (1902), 86 L. T. 121; Thompson *v.* Thompson (1901), 85 L. T. 172.

(*e*) Sodomy committed by a husband with his wife against her consent is a matrimonial offence within s. 27 of the Matrimonial Causes Act, 1857: C. *v.* C. (1905), 22 T. L. R. 26.

(*f*) 20 & 21 Vict. c. 85, s. 16.

lead to it by fair inference as a necessary conclusion, and unless this were the case, and unless this were so held, no protection whatever could be given to marital rights.

What are the circumstances which lead to such a conclusion cannot be laid down universally, because they may be infinitely diversified by the situation and character of the parties, by the state of general manners, and by many other incidental circumstances apparently slight and delicate in themselves, but which may have most important bearings in decisions upon the particular case.

The only general rule that can be laid down upon the subject is that the circumstances must be such as would lead the guarded discretion of a reasonable and just man to the conclusion (*g*).

As a general rule of practice the Court will not act on an uncorroborated confession of adultery. But there is no rule of law preventing it from doing so if satisfied that the story put forward is true and that there is no collusion (*h*).

(b) **Bigamy with Adultery.**—Here proof of the adultery as well as of the bigamy must be given (*i*). But a slight proof on the former head will suffice.

(c) **Cruelty.**—In recent years the scope of the term "cruelty" for the purposes of divorce has been carefully considered by the Courts, and the only general definition that can be laid down is that the acts complained of must amount either to injury, or to a reasonable apprehension of injury, to life, limb, or health, bodily or mental (*k*). Acts falling short of actual physical violence may, however, for the purpose of divorce proceedings, constitute legal cruelty. In many cases it must depend on the wife's health and constitution and the consequent effect upon her of the particular acts (*l*). In spite, however, of this general rule, there are many acts which, although not *per se* legal cruelty, are yet admissible as

(*g*) Loveden *v.* Loveden (1810), 2 Hagg. C. R., p. 2; Burgess *v.* Burgess (1817), *ibid.*, 223, at p. 229; Elwes *v.* Elwes (1796), 1 Hagg. C. R. 278; Soilleux *v.* Soilleux (1802), 1 Hagg. C. R. 373, and cases referred to.

(*h*) See Curtis *v.* Curtis (1905), 21 T. L. R. 676; Getty *v.* Getty, [1907] P. 334.

(*i*) Ellam *v.* Ellam (1889), 61 L. T. 338.

(*k*) See Russell *v.* Russell, [1897] A. C. 395 (where all the authorities are collected and examined). As to Scotland, see Paterson *v.* Russell (1850), 7 Bell, App. 363; Graham *v.* Graham (1878), 5 Rettie, 1095.

(*l*) Barrett *v.* Barrett (1904), 20 T. L. R. 73; and cf. Jeapes *v.* Jeapes (1903), 89 L. T. 74; Thompson *v.* Thompson (1901), 85 L. T. 172.

evidence of general conduct (*m*). It has been held also that a woman who marries a drunkard and is at the time aware of his intemperate habits does not thereby take without redress the risk of anything he may do when intoxicated (*m*). Supervening insanity does not *per se* constitute a ground either for divorce or for judicial separation (*n*); but cruelty does not cease to be a cause of suit if it proceeds from violent and disorderly affections or want of moral control falling short of positive insanity (*o*); and possibly even cruelty springing from intermittent or recurrent insanity might be held a ground for a judicial separation, since in such cases the party offended cannot protect himself or herself by securing the permanent confinement of the offending spouse (*p*).

(d) **Desertion.**—Desertion was not a matrimonial offence in the old Ecclesiastical Courts (*q*). In order to constitute desertion there must be a cessation of cohabitation and an intention on the part of the accused person to desert the other (*r*). Desertion is not to be tested by merely ascertaining which party left the matrimonial home first (*r*). The party who intends to bring the cohabitation to an end, and whose conduct in reality causes its termination, commits the act of desertion (*r*). There is no substantial difference between the case of a husband who intends to put an end to the state of cohabitation and who does so by leaving his wife, and that of the husband who, with the like intent, obliges his wife to separate from him (*r*). Cohabitation may be of two sorts, one continuous, the other intermittent. The parties may reside together constantly or there may be only occasional intercourse between them, which may nevertheless amount to cohabitation in the legal sense of the term. Such cohabitation may indeed exist, together with an agreement to live apart. The circumstances of life, such as business duties, domestic service, and other things, may separate husband and wife, and yet, notwithstanding, there may be cohabitation;

(*m*) Walker *v.* Walker (1898), 77 L. T. 715; and cf. the Scotch cases, Fulton *v.* Fulton (1850), 12 Dunlop, 1104; McGaan *v.* McGaan (1880), 8 Rettie, 279.

(*n*) Hayward *v.* Hayward (1858), 1 Sw. & Tr. 84; Hall *v.* Hall (1864), 3 Sw. & Tr. 349.

(*o*) White *v.* White (1859), 1 Sw. & Tr. 592; Hanbury *v.* Hanbury, [1892] P., at p. 225; Baron *v.* Baron (1908), 24 T. L. R. 273.

(*p*) See authorities cited in n. (*o*).

(*q*) Hodgson *v.* Hodgson, [1905] P. 233.

(*r*) *Ibid.*; and see Sickert *v.* Sickert, [1899] P. 278; Koch *v.* Koch, [1899] P. 221.

and the refusal of either spouse to resume cohabitation after a temporary separation for mutual convenience may amount to "desertion" in the eye of the law (*s*). Previous cohabitation is not necessary in order to constitute "desertion." A husband may be guilty of desertion although he and his wife parted immediately after the marriage ceremony (*t*). A wife is not justified in refusing marital intercourse to her husband unless she has some reasonable ground for doing so; and if she refuses to live with him unless he promises to abstain from exercising his marital privileges he may leave her without being guilty of desertion "without reasonable excuse," even though he subsequently commits adultery (*u*).

Bars to Divorce.—These are either *absolute* or *discretionary*. The *absolute* bars are connivance, condonation and collusion. The *discretionary* bars are cruelty on the part of the petitioner, or such wilful neglect or misconduct on the part of a petitioner as has conduced to the offence proved against the respondent; desertion by the petitioner without just cause; adultery on the part of the petitioner; unreasonable delay in presenting or prosecuting the petition (*x*).

Absolute Bars.—(a) **Connivance.**—In order to establish connivance by a husband at a wife's adultery it must be shown that he gave a willing consent to it, that he was in fact an accessory before the fact; mere proof of negligence, indifference, inattention or dulness of apprehension will not suffice (*y*).

(b) **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 occupied before the offence was committed" (*z*). Condonation must be voluntary (*a*); it does not necessarily result from continuance of cohabitation (*b*); it must be made with full

(*s*) Huxtable *v.* Huxtable (1899), 68 L. J. P. 83; cf. Pape *v.* Pape (1888), 20 Q. B. D. 76; Reg. *v.* Leresche, [1891] 2 Q. B. 418; Chudley *v.* Chudley (1893), 62 L. J. M. C. 97.

(*t*) De Laubenque *v.* De Laubenque, [1899] P. 42.

(*u*) Synge *v.* Synge, [1901] P. 317.

(*x*) See Johnson *v.* Johnson, [1901] P. 193; Paton *v.* Lewthwaite (or Paton), [1903] W. N. 44.

(*y*) Allen *v.* Allen (1859), 30 L. J. P. 2. But see Robinson *v.* Robinson, [1903] P. 155. The Court takes cognisance of connivance although not pleaded: Divorce Act of 1857, s. 29.

(*z*) Keats *v.* Keats (1859), 1 Sw. & Tr. 334; and see Act of 1857, s. 29, last preceding note.

(*a*) Cooke *v.* Cooke (1863), 3 Sw. & Tr. 163.

(*b*) Curtis *v.* Curtis (1858), 1 Sw. & Tr. 192. This rule applies particularly to continuance of cohabitation

knowledge of the facts (*c*); but a matrimonial offence may be condoned although the guilty party conceals from the other the commission of other matrimonial offences (*d*). It is settled in England (*e*), that condonation is conditional on no offence, of which the Court can take cognisance, being in future perpetrated (*f*), and the conditional character of condonation is a doctrine applying to both sexes (*g*). Thus it has been held that condoned adultery will be revived by subsequent cruelty (*h*) or by subsequent misconduct falling short of adultery (*i*), incestuous adultery by subsequent adultery not incestuous (*k*), condoned desertion and adultery by subsequent adultery (*l*) and desertion by not complying with a decree for restitution of conjugal rights by subsequent adultery (*m*).

The effect of condonation of an offence which is specified as a ground of complaint within the terms of the Summary Jurisdiction (Married Women) Act, 1895 (*n*), does not depend on the wording of any section of that Act but on the common law, and therefore the resumption of cohabitation during the course of proceedings under the Act, but before any order has been made by the justices or magistrate, puts an end to the cause of complaint by force of the common law, even although the law itself deals only with condonation by the resumption of cohabitation after the date of such an order (*o*).

In order that the Court should exercise the discretion conferred on it by the Matrimonial Causes Act, 1857 (*p*), to pronounce a decree in favour of a petitioner guilty of adultery, it is not enough that the petitioner's misconduct was more or less pardonable or capable of

after one or even several acts of cruelty—cruelty generally consisting in a series of acts: *ibid.*

(*c*) Peacock *v.* Peacock (1858), 1 Sw. & Tr. 183; Campbell *v.* Campbell (1857), 5 W. R. 519.

(*d*) Bernstein *v.* Bernstein, [1893] P. 292; 12 Rul. Cas. 783.

(*e*) *Aliter* in Scotland; Collins *v.* Collins (1884), 9 A. C. 205; and as to the English decisions, see the observations of Lord Blackburn in Collins *v.* Collins, *ubi supra*, at p. 237.

(*f*) Palmer *v.* Palmer (1860), 2 Sw. & Tr. 61.

(*g*) Copsey *v.* Copsey, [1905] P. 94.

(*h*) See Dent *v.* Dent (1865), 4 Sw. & Tr. 105.

(*i*) Ridgway *v.* Ridgway (1881), 29 W. R. 612.

(*k*) Newsome *v.* Newsome (1871), L. R. 2 P. & D. 306; Houghton *v.* Houghton, [1903] P. 150.

(*l*) Blandford *v.* Blandford (1883), 8 P. D. 19.

(*m*) Paine *v.* Paine, [1903] P. 263.

(*n*) 58 & 59 Vict. c. 39.

(*o*) See s. 7, and Williams *v.* Williams, [1904] P. 145.

(*p*) 20 & 21 Vict. c. 85, s. 31. See Hansard, cxliv. (1857), 1685.

excuse; it must have been caused directly by the matrimonial offence or offences of the respondent (*q*).

Condonation may be implied from delay in instituting proceedings, as when the delay is not specifically accounted for by the party complaining or is not apparent from the circumstances of the case. A delay thus unexplained founds a presumption of passive acquiescence in the complainant (*r*).

But there is no legal limitation and there may be reasons of discretion which may make the husband passive; that has never been held to amount to a condonation.

It is not necessary, however, to avoid a condonation of this character that a husband should instantly close his doors upon an offending, and it may be, a repentant wife; recollecting her former innocence, he may indulge at least in some feelings of pity for her degraded situation, and until a fit retirement is provided, allow her the protection of his roof but not the solace of his bed. Yet after condonation a fresh cause of complaint gives a new title to the sentence of the Court; for condonation is always presumed to be conditional and does not deprive the forgiving party of the right of complaint in the event of the repetition of the offence (*s*). In case of such a repetition, subsequent facts *revive* the criminal effect of those which the condonation had absolved. But unless the latter offence be satisfactorily proved, mere evidence of former criminality will be ineffectual to entitle the complainant to the remedy sought for. This observation applies also to the condonation of cruelty, the effect of which may be effaced by subsequent events (*t*).

But repeated condonation as respects adultery, it seems, would be held as amounting almost to licence, and a person proved to have submitted easily to frequent injury would be scarcely allowed to complain of what appeared hardly to be considered as an evil (*u*).

(c) **Collusion.**—In its simplest forms collusion is an agreement either, on the positive side, to put forward true facts in support of a false case, or false facts in support of a true case; or, on the

(*q*) Wyke *v.* Wyke, [1904] P. 149, distinguishing Constantinidi *v.* Constantinidi, [1903] P. 246.

(*r*) Betcher *v.* Betcher (1787), cit. 2 Phill. 155; Best *v.* Best (1814), *ibid.* 161; Nash *v.* Nash (1790), 1 Hagg. C. R., p. 142.

(*s*) Walker *v.* Walker (1813), 2 Phill. 153.

(*t*) Ferrers *v.* Ferrers (1788, 1791), 1 Hagg. C. R. 130.

(*u*) Dunn *v.* Dunn (1817), 2 Phill. Rep. 411.

negative side, to suppress facts which would prevent, or tend to prevent, the Court granting a divorce (*x*). But the term has also a wider range. If the initiation of a suit be procured, and its conduct (especially if abstention from defence be a term) provided for by agreement, that constitutes collusion, although no one can put his finger on any fact falsely dealt with or withheld (*x*). The concealment of facts only amounts to collusion if the facts are material, *i.e.*, are such as, if disclosed, would lead the Court to refuse a decree (*y*).

Discretionary Bars.—This subject has already been practically disposed of by anticipation (*z*), and all that it seems necessary to add here is that while adultery on the part of a petitioner comes within the category of discretionary bars (*a*), the Courts treat it rather as an absolute one and refuse to grant a decree of divorce in such cases unless satisfied that the adultery has been committed under an erroneous view of the law or under exceptional and excusable circumstances (*b*).

The discretion given to the Court in regard to bars of this character is a judicial, and not an arbitrary one (*c*). Where the wife has been proved guilty of adultery and the husband of cruelty, the principle which ought to guide the Court in determining whether the husband's cruelty ought to constitute a bar to relief, rests, as a general rule, upon the consideration of the question whether or not the petitioner's cruelty has been of such a nature as to conduce to the wife's misconduct. The cruelty may, however, be of such a wanton and unprovoked description that the Court ought to refuse a decree, even though it has not conduced to the adultery of the respondent (*c*). Where the husband who seeks a dissolution of his marriage has been previously convicted of desertion under

(*x*) Churchward *v.* Churchward, [1895] P. 7; cf. Scotch case, Graham *v.* Graham (1881), 9 Rettie, 327.

(*y*) Hunter *v.* Hunter, [1905] P. 217, following Alexandre *v.* Alexandre (1870), L. R. 2 P. & M. 164, and questioning and declining to follow Roche *v.* Roche, [1905] P. 142.

(*z*) *Supra*, p. 866.

(*a*) See 20 & 21 Vict. c. 85, s. 31; and as to the construction of this section, Constantinidi *v.* Constantinidi and Lance, [1903] P. 246; [1905] P. 203.

(*b*) See Symons *v.* Symons, [1897] P. 167; Burdon *v.* Burdon, [1901] P. 52; Evans *v.* Evans and Elford, [1906] P. 125, disapproving the decision of Lord St. Helier in Constantinidi *v.* Constantinidi, [1903] P. 246. See also Todd *v.* Todd and Cunniam (1907), 23 T. L. R. 9; 24 T. L. R. 28.

(*c*) Pryor *v.* Pryor, [1900] P. 157.

the Summary Jurisdiction (Married Women) Act, 1895 (*d*), the Court will go into all the circumstances of the case and consider whether he is entitled to a decree; the mere fact of his conviction will not of itself be sufficient to establish a bar (*e*).

Under the Matrimonial Causes Act, 1857 (*f*), the decrees pronounced by the Court were final in the first instance; but under existing legislation (*g*) a decree *nisi* is now granted on the conclusion of the hearing, if a proper case for a divorce is made out: and it is only after the expiry of an interval of six months thereafter that this inchoate divorce is converted into a decree absolute. At any time before the decree absolute, the King's Proctor may intervene if he becomes aware of reasons which ought to constitute a bar to the divorce. The decree *nisi* does not alter the status of the parties (*h*). Neither petitioner nor respondent can marry again; and if the petitioner die in the interval the decree cannot be made absolute on the application of his legal representatives. After the decree absolute, however, the divorced "woman is no longer a wife; she has not the rights, nor has she the duties of a married woman. She is at liberty to marry again. The equitable doctrines of separate use and restraint against anticipation have no application to her until she does marry again. Whatever property she may have or acquire is her own; her former husband has no interest in it. He, on the other hand, is not bound to support her; she has no implied authority to pledge his credit, even for necessaries. She is free from him, and he from her" (*i*).

Maintenance.—Alimony.—Variation of Settlements.—The Divorce Court has, however, power to make orders for the maintenance of a divorced wife (*k*), for the custody of the children of the marriage (*l*), and for the variation and execution of settlements "either for the benefit of the children or of their respective parents" (*m*), and may

(*d*) 58 & 59 Vict. c. 39.

(*e*) Lloyd *v.* Lloyd (1901), 84 L. T. 728.

(*f*) 20 & 21 Vict. c. 85.

(*g*) See 23 & 24 Vict. c. 144; 25 & 26 Vict. c. 81; 29 & 30 Vict. c. 32, s. 3.

(*h*) Norman *v.* Villars (1877), 2 Ex. D. 359.

(*i*) Watkins *v.* Watkins, [1896] P. 222, per Lindley, L.J., at p. 225. As to the right of a wife to her husband's name after the dissolution of the marriage by divorce, see p. 276, *ante*.

(*k*) Act of 1907 (7 Edw. VII. c. 12), s. 1.

(*l*) Act of 1857 (20 & 21 Vict. c. 85), s. 35.

(*m*) *Ibid.*, s. 45; Matrimonial Causes Acts, 1859 (22 & 23 Vict. c. 61), s. 5, and 1878 (41 Vict. c. 19), s. 3. Sums of money ordered under s. 1 of the Matrimonial Causes Act, 1907

exercise its power even if there are no children of the marriage (*n*). It has always been the practice of the Court, in exercising the power of variation, to consider what is for the benefit of the children, if any, they being innocent parties, and to see that nothing is done which would be for their disadvantage. At the same time, however, the Court ought in every case to consider what the effect of the whole order it is about to make would be, and not merely the effect of any particular portion alone (*o*). Thus, on a motion for the variation of a settlement of a wife, who had obtained a dissolution of her marriage, the Court extinguished all the husband's interests in it, as though he were dead, and gave the petitioner power to appoint part of the fund, if she should marry again, for the benefit of the second husband and the children of such second marriage. This power had been given to the wife by her settlement, in case she survived her husband, but not otherwise. The ground of the decision was that the children of the marriage having, by reason of the acceleration of their interests, owing to the extinction of the interests of the husband, acquired a substantial benefit, there was nothing unfair in asking them to concede such a power of appointment to their mother (*o*). The Court acts also on the principle that where the breaking up of the family life has been caused by the fault of the respondent, the petitioner and the children should be placed in a position, as nearly as circumstances will permit, the same as if the family life had not been broken up (*p*). But a settlement may be varied, in exceptional cases, at the instance, and in favour of, the guilty party, *e.g.*, a guilty wife, who had settled all her property on her husband, and would otherwise be left penniless (*q*); or the husband may be ordered, under such

(7 Edw. VII. c. 12), to be paid by a husband for the maintenance of his divorced wife are a purely personal allowance, and so long as the order subsists can neither be alienated nor released: Watkins *v.* Watkins, *ubi supra*. See further as to the construction of these provisions and the powers exercisable under them, Blood *v.* Blood, [1902] P. 190; Morrissey *v.* Morrissey, [1905] P. 90; Savary *v.* Savary (1899), 79 L. T. 607. The power of varying or making settlements under these Acts cannot be exercised after the death of the petitioner in a matrimonial cause by making the executor a party: Thomson *v.* Thomson, [1896] P. 263.

(*n*) Matrimonial Causes Act, 1878, s. 3.

(*o*) Whitton *v.* Whitton, [1901] P. 348.

(*p*) Hartopp *v.* Hartopp, [1899] P. 65.

(*q*) Wootton Isaacson *v.* Wootton Isaacson, [1902] P. 146.

circumstances, to secure to his wife a permanent compassionate allowance (*r*). As to the amount of maintenance, the general rule is that one-third of the joint income of the husband and wife should be given as permanent maintenance to a wife who is petitioner and has obtained a dissolution of her marriage (*s*). But where such income is very large, the test is what would be considered an adequate jointure for the wife, as widow, in case of her husband's death (*s*). The Court has no power to order a lump sum to be paid over to the petitioner by way of permanent maintenance (*t*).

Damages.—In lieu of the old action of criminal conversation, a husband may either in a petition for dissolution of marriage or judicial separation on the ground of adultery, or in a petition limited to such object only, claim damages from a co-respondent (*u*); and whenever, in any petition presented by a husband, the alleged adulterer has been made a co-respondent and the adultery has been established, the Court may order the co-respondent to pay the whole or any part of the costs of the proceedings (*x*).

Loss of *consortium* is not the only ground on which damages ought to be assessed against a co-respondent; and the mere fact that a man was separated and living apart from his wife at the time she was seduced, is no answer to a claim for damages by the husband against the adulterer, though it may be a good reason for assessing the damages at a lower rate (*y*). The burden of showing that the co-respondent knew that the respondent was a married woman is cast on the petitioner, and, in the absence of evidence, a jury should assume that the co-respondent had no reason for believing that the respondent was other than a single

(*r*) Ashcroft *v.* Ashcroft (1902), 71 L. J. P. 125. Here the Court was satisfied that the wife was in delicate health and unable to support herself, and that she had no means, nor any friends or relations who would support her.

(*s*) Kettlewell *v.* Kettlewell, [1898] P. 138. As to whether the *dum sola et casta* clause should limit permanent maintenance, see S. C., and cf. Smith *v.* Smith, [1898] P. 29; Squire *v.* Squire, [1905] P. 4.

(*t*) Twentyman *v.* Twentyman, [1903] P. 82.

(*u*) 20 & 21 Vict. c. 85, s. 33.

(*x*) *Ibid.*, s. 34. As to the position of the executor of a co-respondent who has died after damages have been given against him and between decree *nisi* and decree absolute, see Brydges *v.* Brydges (1909), 25 T. L. R. pp. 412; [1909] P. 187 (C. A.).

(*y*) Evans *v.* Evans, [1899] P. 195.

woman (*z*). Damages may, however, be recovered from a co-respondent whether he knew that the respondent was a married woman or not (*z*). But knowledge is an important element in assessing what amount of damages ought to be paid (*z*). Damages awarded to a petitioner against a co-respondent and ordered to be paid into Court, although they will not support a bankruptcy petition against the co-respondent, are nevertheless a debt provable in bankruptcy (*a*). A petition for damages only presented by a husband under s. 33 of the Matrimonial Causes Act, 1857 (*b*), is, by the same section, to be dealt with subject to all the enactments of the same Act with reference to petitions presented thereunder. Where, therefore, a husband who presents such a petition has himself been guilty of a matrimonial offence, which, in the exercise of the discretion vested in the Court, would lead it to refuse to grant him a decree in a suit for dissolution of the marriage, he is, on the like ground, debarred from recovering damages from the adulterer (*c*).

The Matrimonial Causes Act, 1907 (*d*), provided (*e*) that in every case, not already provided for by law, in which any person is charged with adultery with any party to a suit or in which the Court may consider in the interest of any party to a suit that such person should be made a party to the suit, the Court may, if it thinks fit, and on such terms as it thinks just, allow that party to intervene. Intervention was formerly confined to a person charged in the *petition* (*f*) or application for *cross-relief* (*g*). The hardship to which this state of things gave rise is well illustrated by such cases as *Harrop* v. *Harrop* (*h*) and *Lowe* v. *Lowe* (*i*).

Restitution of Conjugal Rights.—Where one of the parties to a marriage has, without lawful excuse, withdrawn from cohabitation, the other may institute proceedings for the restitution of conjugal rights. Such proceedings are now governed by the Matrimonial

(*z*) Lord *v.* Lord, [1900] P. 297, applying the rules at common law in action for *crim. con.* See Calcraft *v.* Harborough (Earl of) (1831), 4 C. & P. 499, at p. 501. See also Watson *v.* Watson (1905), 21 T. L. R. 320.

(*a*) In re O'Gorman, Ex parte Bale, [1899] 2 Q. B. 62.

(*b*) 20 & 21 Vict. c. 85.

(*c*) Cox *v.* Cox, [1906] P. 267.

(*d*) 7 Edw. VII. c. 12.

(*e*) S. 3.

(*f*) Act of 1857 (20 & 21 Vict. c. 85), s. 28.

(*g*) Matrimonial Causes Act, 1866 (29 & 30 Vict. c. 32), s. 2.

(*h*) [1899] P. 61.

(*i*) [1899] P. 204.

Causes Act, 1857 (*k*), but s. 22 of that Act provides that the principles and rules on which the Ecclesiastical Courts formerly acted in these cases are, as far as possible, to be followed. Contrary, however, to the practice of the old ecclesiastical tribunals, conduct on the part of a petitioner for restitution of conjugal rights falling short of a substantive matrimonial offence may now be sufficient to justify the Court in refusing a decree (*l*).

Down to 1884 disobedience to a decree for the restitution of conjugal rights might be punished by attachment and imprisonment. But the Matrimonial Causes Act of that year (*m*) abolished imprisonment as a means of enforcing decrees for restitution, providing as an alternative that wilful disobedience to such a decree might be pleaded as desertion, although the statutory period of two years had not expired, and that the aggrieved party might sue for judicial separation on the strength of it.

A written demand for restitution of conjugal rights must precede action (*n*), and the proceedings may be stayed if the respondent intimates a readiness to resume cohabitation (*o*).

Judicial Separation.—The grounds of judicial separation at the instance of either husband or wife have been stated already (*p*). Petitions for judicial separation are to be dealt with on principles and rules which, in the opinion of the Court, are as nearly as may be conformable to those on which the Ecclesiastical Courts acted and gave relief, but subject to the provisions of the Matrimonial Causes Act, 1857, and the rules and orders under it (*q*).

Compensatio Criminis.—Under the old ecclesiastical law of England the only grounds for which divorce *a mensa et toro* was granted were adultery, cruelty, and unnatural practices (*r*). Desertion, as already stated (*s*), was not a matrimonial offence till it was made so

(*k*) 20 & 21 Vict. c. 85.

(*l*) Russell *v.* Russell, [1895] (C. A.) P. 315; Oldroyd *v.* Oldroyd, [1896] P. 175; and see Mackenzie *v.* Mackenzie, [1895] A. C., per Lord Herschell, at p. 389.

(*m*) 47 & 48 Vict. c. 68, s. 2.

(*n*) Divorce Rules, r. 175. The demand must be of a friendly and not of a hostile character; but it is not to be expected that a letter written under such circumstances should be of an affectionate nature; nor will the Court inquire too closely into the peremptory character of the words used, provided that the request is clear: Elliott *v.* Elliott (1901), 85 L. T. 648.

(*o*) Divorce Rules, r. 176.

(*p*) See p. 863, *ante*.

(*q*) Act of 1857, s. 22.

(*r*) Bromley *v.* Bromley (1793, 1794), 2 Adams, 158, n. (*c*); Burge, 1st ed., i., 655, n. (*d*).

(*s*) See p. 865, *supra*.

by the Matrimonial Causes Act, 1857 (*t*). The Ecclesiastical Courts, however, acted on a principle which sometimes seems to have been thought restrictive, and which has been variously defined as follows: "Compensatio criminis est si pars rea probaverit partem agentem etiam adulterium commisisse, absolvenda est pars rea, quoad petita in libello partis agentis" (*u*). "Id ita accipi debet, ut ea lege quam ambo contempserunt neuter vindicetur. Paria enim delicta mutuâ pensatione dissolvuntur" (*v*). Adopting the above maxim, which has been termed the doctrine of *compensatio criminis*, the Ecclesiastical Courts held that a suit for divorce *a mensa et toro* might be barred if both parties were convicted of the same fault (*w*). But the doctrine of *compensatio criminis* did not supply an exhaustive canon, for it was decided that a person who had been guilty of adultery could not maintain an action for cruelty (*x*); and although there are authorities (*y*) for the proposition that cruelty could not be pleaded in recrimination to a charge of adultery, and as a bar to divorce for such adultery, because the *delictum* was not the same, the rule of *compensatio criminis* has been very much questioned; and it is now, at any rate, settled that a judicial separation should only be granted where the petitioner comes to the Court free from any matrimonial misconduct.

Accordingly where a husband and wife had both been found guilty of adultery, and the husband of aggravated cruelty also, it was held that a decree of judicial separation, on the ground of such cruelty, could not be made in favour of the wife (*a*). And where a petitioner's desertion of his wife conduced to her adultery a decree of judicial separation was refused (*b*).

Summary Jurisdiction.—By the Summary Jurisdiction (Married

(*t*) 20 & 21 Vict. c. 85.

(*u*) Oughton, Ordo Judiciorum, tit. 214, 1.

(*v*) Pothier, ad Pand., ix. (ed. 1821), 24, 2, 12. The passage deals, however, with dower. See judgment of Sir Gorell Barnes, P., in Hodgson *v.* Hodgson, [1905] P., at pp. 238, 239.

(*w*) See Beeby *v.* Beeby (1799), 1 Hagg. E. R. 790; Forster *v.* Forster (1790), 1 Hagg. C. R. 144; Proctor *v.* Proctor (1819), 2 Hagg. C. R. 299; Astley *v.* Astley (1828), 1 Hagg. E. R. 714; Timmings *v.* Timmings (1792), 3 Hagg. E. R. 82.

(*x*) Drummond *v.* Drummond (1861), 2 Sw. & Tr. 269.

(*y*) Collected and examined by Sir Gorell Barnes, P., in Hodgson *v.* Hodgson, *ubi supra*, pp. 239 *et seq.*

(*a*) Otway *v.* Otway (1888), 13 P. D. 12, 141.

(*b*) Hodgson *v.* Hodgson, [1905] P. 233.

Women) Act, 1895 (*c*), a married woman, whose husband has been convicted of an aggravated assault upon her, or of assault upon her, coupled with a fine of £5, or imprisonment for more than two months, or has deserted her or been guilty of persistent cruelty, causing her to leave and live separate from him, or of wilful neglect to provide reasonable maintenance for her or her infant children, whom he was bound to maintain, causing her to leave and live separately from him, may apply for and obtain by summary proceedings (a) a judicial separation; (b) the legal custody of the children under sixteen; (c) an order for payment by the husband of a weekly sum not exceeding £2 (*d*). Adultery by the wife, unless condoned or connived at by the husband, or conduced to by his wilful neglect or misconduct (*e*), is a bar to any remedy in favour of the wife (*f*). An order, when made, may be varied or discharged on "fresh evidence" (*g*), a term meaning evidence which had not come to the knowledge of the party desiring to call it at the time of the hearing, or evidence of some thing which had occurred since the hearing (*h*). The terms "desertion" and "cruelty" have practically the same meanings as in the law of divorce (*i*).

A separation order granted under the Summary Jurisdiction (Married Women) Act, 1895 (*c*), has the effect of preventing the continuance of desertion commenced prior to the granting of the order. Therefore, a deserted wife who obtains such an order within two years of the first desertion cannot subsequently obtain a divorce on the grounds of desertion and adultery (*k*).

In cases of judicial separation, permanent alimony, analogous to the maintenance which may be granted to a wife in cases of divorce (*l*), may be allowed to the wife (*m*). In cases alike of divorce and of judicial separation, alimony *pendente lite* may be granted to the wife.

(*c*) 58 & 59 Vict. c. 39, s. 4.

(*d*) *Ibid.*, s. 5.

(*e*) Cf. Burdon *v.* Burdon, [1901] P. 52.

(*f*) S. 6.

(*g*) S. 7.

(*h*) Johnson *v.* Johnson, [1900] P. 19.

(*i*) See pp. 864, 865, *ante*.

(*k*) Dodd *v.* Dodd, [1906] P. 189; Wilson *v.* Wilson (1908), 24 T. L. R. 256; Harriman *v.* Harriman (1908), 24 T. L. R. 596; [1909] P. 123.

(*l*) See pp. 870—872, *supra*.

(*m*) If the circumstances of the case require it, a settlement out of the wife's property may be made for the benefit of the husband: Matrimonial Causes Act, 1884 (47 & 48 Vict. c. 68), s. 3; Swift *v.* Swift, [1891] P. 129.

Law of Ireland.—During the seventeenth and eighteenth centuries (*n*) divorce *à vinculo* was not recognised in Ireland. It was, however, granted by the Irish Parliament, and up to the Act of Union in 1800, nine divorce bills were passed and one rejected. After the Union the Imperial Parliament succeeded to the Irish. As already mentioned, the Matrimonial Causes Act, 1857 (*o*), does not extend to Ireland; but the Imperial Parliament (*p*), in dealing with Irish divorce bills, acts on the same principle as was formerly applied to English divorce bills, namely (*q*), that the proceeding is in spirit a judicial, though in form a legislative, Act. "Whatever," said Lord Herschell, L. C., in *Westropp's Divorce Bill* (*r*), "may have been the case prior to the passing of the Divorce Act of 1857, I think that since the passing of that Act, whatever would justify a divorce and afford a legal ground for it according to the provisions of that Act, where that Act prevails, will afford sufficient ground for an application to the legislature to grant a divorce in that part of the United Kingdom where the Act does not itself operate."

The bill to dissolve the marriage must, as was the rule *mutatis mutandis* under the old practice in the case of English bills, be founded upon a divorce *a mensa et toro* obtained in Ireland (*s*).

In 1870, jurisdiction in cases of divorce *a mensa et toro* was transferred from the Ecclesiastical Courts to the Court for Matrimonial Causes and Matters (*t*), thence in 1878 (*u*) to the Probate and Matrimonial Jurisdiction of the High Court of Justice, and under the Supreme Court of Judicature (Ireland) (No. 2) Act, 1897 (*v*), to the King's Bench Division of that Court.

Isle of Man (*vv*).—Divorce *à vinculo* is only obtainable in the Isle of Man by Act of Tynwald, founded on a decree for judicial separation (*x*). The Chancery Division of the High Court has jurisdiction in "matrimonial matters" (*y*), and acts on the principles on

(*n*) See, generally, Roberts' Divorce Bills in the Imperial Parliament, pp. 9 *et seq.*; Wheeler, Practice of Private Bills, p. 210.

(*o*) 20 & 21 Vict. c. 85. See p. 863.

(*p*) There were five Divorce Acts in 1905, one in 1906, and five in 1907.

(*q*) Shaw *v.* Gould (1868), L. R. 3 E. & I. R., per Lord Westbury, at pp. 84, 85.

(*r*) (1886) 11 A. C., at p. 297.

(*s*) See Roberts, p. 17; and St. O. No. 177.

(*t*) 33 & 34 Vict. c. 110, ss. 5, 7.

(*u*) 40 & 41 Vict. c. 57, ss. 21, 34.

(*v*) 60 & 61 Vict. c. 66, s. 5.

(*vv*) This account has been revised by Mr. G. A. Ring, Attorney-General of the Isle of Man.

(*x*) See, *e.g.*, Goldsmith Divorce Act, 1887.

(*y*) Ecclesiastical Civil Judicature Transfer Act, 1884, s. 49.

which the Ecclesiastical Court theretofore acted (*z*). Decree for judicial separation is substituted for divorce *a mensa et toro* (*a*). The procedure and powers of the Court are similar to those of the Divorce Division in England dealing with such cases (*b*). The Married Women's Protection Acts, 1897 (*c*) and 1905 (*d*), proceed on the lines of Imperial legislation.

Channel Islands.—Law of Jersey.—There is no divorce in Jersey. Although Jersey is in the diocese of Winchester, the Bishop of Winchester had, under the ecclesiastical law applicable to Jersey, no original jurisdiction in matrimonial causes there. Jersey is not, therefore, to be deemed in England for the purposes of the Divorce Act, 1857 (*e*), and is exempt from the operation of that enactment (*f*).

Guernsey.—There is no divorce, but *séparations quant aux biens* by the Court are not infrequent.

Canada.—Divorce is one of the "enumerated subjects" within the exclusive legislative authority of the Federal Parliament of the Dominion of Canada (*g*), but no general law has been passed. Since the Confederation of 1867, accordingly, the Provinces of Canada have had no jurisdiction to create a Divorce Court or to legislate in any way concerning the subject of divorce. By the British North America Act (*h*), however, all laws in force in Canada, Nova Scotia, or New Brunswick at the Union shall continue as if the Union had not been made, subject, nevertheless, to be repealed, abolished, or altered by the Parliament of Canada or by the legislature of the respective Provinces according to the authority of Parliament or of that legislature under the Act. The power of the Dominion Parliament in the matter is, moreover, cut down by the exclusive power of each Province to legislate as to the solemnisation of marriage within its territory (*i*).

The statutes in force in respect to divorce in Nova Scotia, New Brunswick, Prince Edward Island, and British Columbia at the time of their incorporation into the Dominion have not been repealed and are still material by virtue of the provision above referred to.

No Divorce Court has been created by the Federal Parliament, and, save as hereinafter mentioned in some of the Provinces, no

(*z*) S. 50.
(*a*) *Ibid.*
(*b*) Ss. 52 *et seq.*
(*c*) 60 Vict., 1897.
(*d*) 5 Edw. VII., 1905.
(*e*) 20 & 21 Vict. c. 85.
(*f*) Per Sir R. Phillimore in Le Sueur *v.* Le Sueur (1876), 1 P. D. 139, at p. 140.
(*g*) B. N. A. Act, s. 91 (26).
(*h*) *Ibid.*, s. 129.
(*i*) *Ibid.*, s. 92 (12).

divorce for cause subsequent to a marriage can be obtained in Canada except by an Act of the Dominion Parliament. The functions of the Canadian Senate with respect to divorce legislation are different from those with respect to other private bills. At every Session of Parliament a Committee of Senators is appointed, which is called the Select Committee on Divorce, to whom all petitions and bills for divorce after the prescribed advertisement and notice for six months are referred. When the bill is read a second time it is referred to this Committee, which hears the evidence and discharges the judicial functions conferred upon it by the rules of the Senate. After the bill is passed by the Senate it is sent to the House of Commons for consideration there. With a few exceptions of early date, there is no instance in which a divorce has been awarded by Parliament without proof of adultery (*k*). Parliamentary divorces are rare; from 1868 to 1909 one hundred and forty divorces have been granted. Of these a small proportion are from the Province of Quebec. Up to the present time it is believed that there has been only one case of a divorce between Roman Catholics being granted.

Ontario.—No power to dissolve marriage has ever been conferred upon the Courts of Upper Canada or Ontario by legislation. To dissolve a marriage once validly solemnised is not of judicial but of legislative competence in that Province (*l*). The Courts, however, may deal with the marriage contract as a civil contract, and if void *ab initio* by reason of fraud or duress may give a judgment of nullity (*m*).

By recent enactment, moreover, the High Court of Justice is given power to declare null marriages, though otherwise regular, in case either of the parties is under eighteen and the statutory consent has not been obtained, provided there has been no consummation. Notice of trial must be given to the Attorney-General, who may intervene at any stage (*n*).

Nova Scotia.—There is a Court of Divorce and Matrimonial Causes in Nova Scotia, which has power to dissolve a marriage for impotence, adultery, cruelty or relationship within the degrees prohibited by 32 Hen. VIII. c. 38. The Court has by statute the power of the Court for Divorce and Matrimonial Causes in England,

(*k*) Gemmill on Divorce in Canada, p. 49; and see this work generally for further information.

(*l*) Lawless *v.* Chamberlain (1889), 18 O. R. 296.

(*m*) *Ibid.*

(*n*) 1907, Ont. c. 23, s. 8; 1909, c. 62 (marriage of minors).

and the procedure is modelled as far as possible upon the procedure of that Court. The Court may pronounce such determination as it may think fit on the rights of the parties to curtesy or dower. An appeal lies from the decision of the Judge in Ordinary to the Supreme Court of Nova Scotia (*o*).

New Brunswick.—The New Brunswick Act of 1860 (23 Vict. c. 37) vested all the jurisdiction in respect of suits, controversies, and questions concerning marriage and contracts of marriage and divorce both from the bond of matrimony and separation from bed and board and alimony in a Court of Record called "The Court of Divorce and Matrimonial Causes." This jurisdiction is continued by the Consolidated Statutes (*p*). The grounds for divorce *a vinculo* are limited to impotence, adultery, and consanguinity within the degrees prohibited by 32 Hen. VIII. c. 38. A divorce on the ground of adultery does not affect the legitimacy of the issue of the marriage. Where the divorce is granted because of adultery the wife is not barred of her dower or the husband deprived of his tenancy by the curtesy unless expressly so adjudged and determined by the sentence of divorce (*q*).

Prince Edward Island.—This Province was admitted into the Confederation in 1873 on the same terms as if it had been one of the Provinces originally united (*qq*).

By statute 5 Will. IV. c. 10, the Lieutenant-Governor and Council are constituted a Court for hearing all suits concerning marriage and divorce in Prince Edward Island, with power to the Lieutenant-Governor to appoint the Chief Justice to preside in his stead. The statutory grounds are impotence, adultery, and consanguinity within the prohibited degrees.

A divorce does not illegitimise the issue, nor does it bar dower nor curtesy unless expressly so provided in the sentence of divorce. These powers, however, are dormant, and are never exercised in this Province.

British Columbia.—Under the Ordinance of 1867 introducing English law as the same existed on November 17th, 1858, into British Columbia, jurisdiction to exercise the relief and powers given by the Imperial Act of 1857 has been assumed (*r*), and is

(*o*) The governing Act is R. S. N. S., 3rd series, c. 126, reprinted in R. S. N. S. (1900), ii., p. 862.

(*p*) R. S. N. B. (1903), c. 115, s. 2.

(*q*) *Ibid.*, s. 39.

(*qq*) See Burge, vol. i. 228.

(*r*) See R. S. B. C. (1897), c. 62.

exercised by the Supreme Court of British Columbia, and this assumption of jurisdiction, though its legality was the subject of some doubts, has recently been upheld by the Privy Council (*s*).

Manitoba, Alberta, and Saskatchewan, North-West Territories.—As these Provinces have been admitted to the Confederation since 1867, there is no Provincial legislation on the subject and no Divorce Courts in these Provinces or in the North-West Territories.

Quebec.—In the Province of Quebec there is no Divorce Court.

From the foregoing summary it appears that adultery is the sole ground of divorce in the Provinces which have Divorce Courts, except Nova Scotia, where cruelty is also a ground, though this is very rare in practice, and in British Columbia, where besides adultery of the husband cruelty or desertion is also necessary for a divorce. The other grounds mentioned above are really causes for which nullity is pronounced by the Court.

Newfoundland.—There is no provision for divorce in Newfoundland and no Court in that Colony has power to grant divorce.

Australia (*t*).—The Parliament of the Commonwealth has power, but not exclusive power, to make laws with respect to "divorce and matrimonial causes; and in relation thereto, parental rights and the custody and guardianship of infants" (*a*). No such legislation has as yet been passed.

New South Wales.—Jurisdiction in matrimonial causes is conferred on the Supreme Court (*b*), and executed by a Judge of that Court appointed in that behalf (*c*). In suits (*d*) other than for dissolution of marriage the Court is to act on the principles and practice followed by the Ecclesiastical Courts in England prior to the Divorce Act, 1857 (*e*). The remedies recognised by the law of New South Wales are restitution of conjugal rights (*f*), divorce, and judicial separation.

Restitution of Conjugal Rights.—A decree for restitution of conjugal rights is not enforceable by attachment (*g*); but failure to

(*s*) Watts and Att.-Gen. for British Columbia *v.* Watts, [1908] A. C. 573.

(*t*) This account has been revised by Mr. F. Fitzgerald, of the New South Wales and English Bars.

(*a*) Commonwealth of Australia Constitution Act, 1900 (63 & 64 Vict. c. 12), s. 9, ch. i., pt. v., ss. 51 (xxii.), 52.

(*b*) No. 14 of 1899, s. 4 (1), (2).

(*c*) *Ibid.*, s. 4 (3).

(*d*) *Ibid.*, s. 5.

(*e*) 20 & 21 Vict. c. 85.

(*f*) No. 14 of 1899, s. 6.

(*g*) *Ibid.*, s. 7 (2).

comply with such a decree is equivalent to desertion without reasonable cause; and a suit for dissolution of marriage or judicial separation may be instituted in respect thereof (*h*).

Divorce.—Any husband may petition for divorce on the ground of his wife's adultery (*i*). Any husband who has been domiciled in New South Wales for three years at the time of the institution of the suit, unless such domicil has been resorted to for the purpose of instituting it, may also petition for divorce on the following grounds: (a) Desertion of him by his wife without just cause or excuse for three years; (b) her habitual drunkenness and neglect of her duties for three years; (c) that, at the time of the presentation of the petition, the wife had been imprisoned for three years, and was still in prison, under a commuted sentence of capital punishment, or of seven years' penal servitude or more; (d) that, within one year of the presentation of the petition, the wife had been convicted of the attempted murder of her husband, or of assault with intent to cause him grievous bodily harm; (e) repeated assaults on the husband by the wife within one year previously (*k*). Any wife may petition for divorce on the grounds of her husband's (a) incestuous adultery; (b) bigamy with adultery; (c) having committed rape, sodomy or bestiality; (d) adultery, coupled with such cruelty as would have entitled her to a divorce *a mensa et toro* prior to the Divorce Act, 1857 (*l*), in England (incestuous adultery and bigamy have substantially the same meaning as in English law (*m*)); (e) adultery, coupled with desertion for three years; (f) adultery, where the husband is domiciled in New South Wales at the time of the institution of the suit (*n*). Where the wife has been domiciled in New South Wales for three years at the time of the institution of the suit (unless such domicil has been acquired for the purposes of the suit), she may petition for divorce on the grounds of her husband's (a) desertion without just cause or excuse for three years (the wife's domicil is not lost because the husband has acquired a foreign domicil); (b) habitual drunkenness and either desertion or cruelty over a period of three years; (c) imprisonment as in the case of the wife; (d) frequent convictions for crime within five

(*h*) No. 14 of 1899, s. 11.
(*i*) *Ibid.*, s. 12.
(*k*) *Ibid.*, s. 13.
(*l*) 20 & 21 Vict. c. 85.
(*m*) No. 14 of 1899, s. 14.
(*n*) *Ibid.*, s. 15.

years, and imprisonment in the aggregate for three years, coupled with the fact of the husband's having left his wife habitually (while imprisoned) without means of support; (e) attempted murder of, or assault, with intent to cause grievous bodily harm, on, the wife; (f) repeated assaults on the wife as above (*o*).

There are provisions, analogous to those of the English Divorce Acts, as regards absolute (*p*) and discretionary (*q*) bars; decrees absolute (*r*) and *nisi* (*s*); re-marriage after decree (*t*); joinder of co-respondents (*u*); damages (*a*), except that a petition for damages alone is apparently not recognised, and no damages are recoverable for an act of adultery committed more than three years before the filing of the petition (*b*); grant of alimony (*c*); custody and maintenance of children (*d*); ordering (*e*) and variation (*f*) of settlements. The Court may set aside transactions (*g*) and restrain sales of real property (*h*) made with intent to defeat the exercise of its powers as to alimony and settlements.

Judicial Separation.—Any husband or wife may petition for judicial separation on the ground of adultery, or cruelty, or desertion without cause for two years or upwards (*i*). Where domiciled in New South Wales for three years at the time of the institution of the suit (such domicil not having been acquired for the purpose of the suit) the husband and wife may (*k*) respectively petition for judicial separation on the grounds recognised by ss. 13 and 16 (*l*) of the Ordinance. The petition may be dismissed if the petitioner's own conduct has induced or contributed to the wrong complained of (*m*). A decree for judicial separation may be made in all cases in which (a) a decree for divorce *a mensa et toro* could have been obtained under the practice in England prior to the Divorce Act,

(*o*) No. 14 of 1899, s. 16.
(*p*) *Ibid.*, s. 18.
(*q*) *Ibid.*, s. 19 (2).
(*r*) *Ibid.*, ss. 22, 23.
(*s*) *Ibid.*, s. 21. A notice is to be indorsed on every decree *nisi* that the petitioner or respondent, contracting marriage before the decree has been made absolute, will be guilty of bigamy: s. 27.
(*t*) *Ibid.*, s. 28.
(*u*) *Ibid.*, s. 24.
(*a*) *Ibid.*, s. 52.
(*b*) *Ibid.*, s. 54 (1).
(*c*) *Ibid.*, ss. 39—46.
(*d*) *Ibid.*, ss. 60—62.
(*e*) *Ibid.*, s. 55.
(*f*) *Ibid.*, ss. 56, 57.
(*g*) *Ibid.*, s. 58.
(*h*) *Ibid.*, s. 59.
(*i*) *Ibid.*, s. 31.
(*k*) *Ibid.*, s. 32.
(*l*) See p. 882, n. (*k*), and above, n. (*o*).
(*m*) No. 14 of 1899, s. 35 (1).

1857; or (b) the case for dissolution of the marriage has failed, but a case for judicial separation has been established (*n*). The effect of a decree of judicial separation is the same as that of a decree for divorce *a mensa et toro* in England before the Act of 1857 (*o*). The wife becomes a *feme sole* as regards her after-acquired property (*p*) and as regards contracts, torts, injuries, suing and being sued (*q*). The husband is liable for necessaries if alimony decreed is not paid (*r*). The wife may at any time, notwithstanding judicial separation, join with her husband in the exercise of joint powers (*s*).

Queensland.—The Matrimonial Causes Jurisdiction Acts, 1864 (*t*) and 1875 (*u*), are similar, but contain no provisions analogous to those of the New South Wales Act, 14 of 1899, as to the special grounds of divorce and judicial separation open to husbands and wives who have been domiciled for three years in that Colony. A petition for damages against a co-respondent may be limited to that object (*x*).

South Australia.—The Matrimonial Causes Act, 1867 (*y*) provides, on the lines of English legislation, for judicial separation (*z*), divorce *à vinculo* (*a*), and damages against a co-respondent (*b*), and also for the granting of protection orders to married women (*c*). A wife obtaining a protection order is in the same position as if she were judicially separated (*d*). No. 664 of 1896 is an enactment on the lines of the Imperial Summary Jurisdiction (Married Women) Act, 1895 (*e*).

Tasmania.—The law is generally the same as in Queensland (*f*).

Victoria.—The Marriage Act, 1890 (*g*), is similar to the other

(*n*) No. 14 of 1899, s. 33.
(*o*) *Ibid.*, s. 37 (1).
(*p*) *Ibid.*, s. 37 (2), (5).
(*q*) *Ibid.*, s. 38 (1), (2).
(*r*) *Ibid.*, s. 38 (3).
(*s*) *Ibid.*, s. 38 (4).
(*t*) 28 Vict. No. 29.
(*u*) 39 Vict. No. 13.
(*x*) Act of 1864, s. 28.
(*y*) No. 3 of 1867.
(*z*) Ss. 11—23.
(*a*) Ss. 24—40.
(*b*) Ss. 41—44.
(*c*) *Ibid.*, s. 6.
(*d*) *Ibid.*, s. 9.
(*e*) 58 & 59 Vict. c. 39.
(*f*) Matrimonial Causes Acts, 1860 (24 Vict. No. 1); 1864 (28 Vict. No. 4); 1865 (29 Vict. No. 19); 1874 (38 Vict. No. 13); and see 1873 (37 Vict. No. 13), and 1907 (7 Edw. VII., No. 22).
(*g*) No. 1166 of 1890, amended as to procedure on making decree absolute by the Marriage Act, 1906 (No. 2062 of 1906).

Australian Acts as to the grounds and effect of judicial separation (*h*) and (to some extent) to the law of New South Wales as to the grounds of divorce (*i*) and damages (*k*). Thus the grounds for a divorce, which is available to any married person who at the time of the institution of the suit or other proceeding has been domiciled in Victoria for two years and upwards, are: (1) desertion during three years without just cause or excuse; (2) habitual drunkenness, with cruelty, in the case of a husband, or neglect of domestic duties in the case of a wife; (3) imprisonment for three years or being in prison under a commuted sentence for a capital crime, or under sentence of penal servitude for seven years or upwards, or in the case of a husband within five years frequent convictions for crime and an aggregate term of imprisonment for three years or upwards, or leaving his wife habitually without support; (4) violent assault, &c., within a year previously; (5) adultery of the husband in the conjugal residence, or with circumstances of aggravation, or repeated adultery.

If the petitioner's habits or conduct induced or contributed to the wrong complained of, the petition may be dismissed. The term "domiciled person" includes a deserted wife who was domiciled in Victoria at the time of desertion, and such a wife retains her Victorian domicil although the husband has since acquired a foreign domicil; but a person cannot petition who has resorted to Victoria for that purpose only (*l*).

The Act makes provision for the grant of protection orders to married women (*m*). If a husband is convicted of an aggravated assault on his wife, the Court may make an order that the wife is not bound to cohabit with her husband. Such an order has the force and effect of a decree of judicial separation. The order may provide for weekly payments by the husband to the wife and give her the custody of children under sixteen, but the making and the continuance of the order are dependent on the wife's conduct (*n*).

Western Australia.—The law is similar to that of Queensland (*o*). 34 Vict. No. 7 (1871) provides for the settlement of property, and monthly or weekly payments by way of maintenance, in favour of

(*h*) No. 1166 of 1890, ss. 61—73.
(*i*) Ss. 74—91.
(*k*) Ss. 93, 94.
(*l*) P. P. 1894, 144, 145, p. 19.
(*m*) No. 1166 of 1890, ss. 55—59.
(*n*) S. 60.
(*o*) 1863 (27 Vict. No. 19).

the wife. 43 Vict. No. 9 (1879) gives the Court power to settle property on the wife, though there are no children of the marriage (*p*). No. 10 of 1896 corresponds to the Imperial Summary Jurisdiction (Married Women) Act, 1895 (*q*).

New Zealand.—Act No. 18 of 1904 is substantially the same as the New South Wales Act, No. 14 of 1899, the provisions of which have been summarised above (*r*). No. 78 of 1907 adds, as grounds of divorce in the case of domiciled persons—conviction of the respondent of an attempt to take the life of any child of the petitioner or respondent (*s*) or of the murder of such a child, or that the respondent is a lunatic or person of unsound mind, and confined as such under the lunacy law for a period or periods not less in the aggregate than ten years, within twelve years immediately preceding the filing of the petition and unlikely to recover (*t*). If the ground of a petition is lunacy or unsoundness of mind, it is the duty of the Solicitor-General to protect the interests of the respondent (*u*). Ordinance 15 of 1896 gives the husband as well as the wife the right to obtain a protection order.

West Indies.—There is considerable diversity between the different legislations, some admitting divorce on similar terms to the law of England, while others do not recognise it.

In **Jamaica** the law is similar to the statute law of England (*a*). The divorce jurisdiction is vested in the Supreme Court (*b*). Ordinance 27 of 1881 extends the law of Jamaica to **Turks** and **Caicos Islands** and to the **Cayman Islands**. Ordinance 22 of 1896, as amended by No. 13 of 1897, deals with the divorce of Indian immigrants.

Bahama Islands.—The Supreme Court has the jurisdiction of the Divorce Court in England (*c*). The Chief Justice is Judge Ordinary, and the law and practice in England for the time being, so far as applicable, are to be followed (*d*).

Leeward Islands.—Ordinance 2 of 1880 (*e*) confers on the Supreme Court the jurisdiction of the Divorce Court in England; and

(*p*) S. 2.
(*q*) 58 & 59 Vict. c. 39.
(*r*) *Supra*, pp. 881—884.
(*s*) S. 3 (1).
(*t*) S. 3 (2).
(*u*) S. 4.
(*a*) See No. 14 of 1879.
(*b*) No. 24 of 1879, s. 20.
(*c*) Supreme Court Act, 1896 (59 Vict. c. 26), s. 32.
(*d*) S. 35; and see Matrimonial Causes Act, 1879 (42 Vict. c. 6).
(*e*) S. 35.

Ordinance 7 of 1906 (*f*) provides that this jurisdiction is to be exercised in accordance with the law and practice for the time being in force in England.

In **British Honduras**, though the Supreme Court has jurisdiction "over matrimonial and divorce cases under any laws made, or to be made, in such matters" (*g*), there does not appear to be any such legislation (*h*). No. 6 of 1897 corresponds to the Imperial Summary Jurisdiction (Married Women) Act, 1895 (*i*).

In **Trinidad** and **Tobago** (*k*) the jurisdiction of the High Court of Justice in England as a Court for divorce and matrimonial causes is expressly withheld from the Supreme Court.

On the other hand, in **Barbados** and **Bermuda** (*l*), **Grenada** (*m*) and **St. Vincent** (*n*), divorce *à vinculo* is not recognised. In Barbados, Act 13 of 1900 provides for the protection of the property of, and the grant of alimony to, deserted wives. In Bermuda, Ordinance 4 of 1886 (*o*), "in the absence of any divorce jurisdiction," gives the Court of Chancery jurisdiction over claims for alimony, &c., on behalf of married women deserted by, or compelled by cruelty or otherwise to leave, their husbands. This jurisdiction is to be exercised in accordance with the principles followed by the English Ecclesiastical Courts (*p*). No. 9 of 1894 enables a married woman, in the case of aggravated assault upon, or habitual cruelty towards, her to obtain a separation order against her husband, with alimony and the custody of children under ten years of age (*q*).

The law of **St. Lucia** on this subject is contained in its Civil Code.

Marriage is indissoluble during the lifetime of the spouses, but separation from bed and board is recognised. This cannot be obtained by mutual consent, but only for (1) adultery by either spouse; (2) outrage, ill-usage, or grievous insult, the sufficiency of which is determined by the Court, taking into consideration the

(*f*) S. 3.

(*g*) Consolidated Laws, pt. v., c. 8, s. 30.

(*h*) S. 29 expressly confers on the Supreme Court the jurisdiction of the English Court of Probate only.

(*i*) 58 & 59 Vict. c. 39.

(*k*) Laws of Trinidad, i., 364, No. 34, s. 16 (Ordinance 28 of 1879).

(*l*) Ordinance 4 of 1905, defining the jurisdiction of the Supreme Court, confers on it no jurisdiction in divorce *à vinculo*.

(*m*) No. 28 of 1896, s. 6.

(*n*) No. 14 of 1880, cl. ix.

(*o*) Continued in force indefinitely by No. 14 of 1889.

(*p*) No. 4 of 1886, s. 5.

(*q*) S. 10.

circumstances of the parties and their condition in life; but the Court may in this case, although the cause of action is established, refuse to grant immediate separation and may suspend judgment till a further day, in order to enable the parties to come to an understanding or reconciliation; (3) for refusal by the husband to receive his wife or to furnish her with the necessaries of life according to his rank, means, and condition. The action for separation is brought, tried, and decided like any other civil action, except that the allegations cannot be admitted, but must be proved before the Court. It may be extinguished by reconciliation, when the suit is dismissed. Upon dismissal the common life must be resumed within the time fixed by the Court.

During the action for separation provisional measures are available for the care of the children and alimony of the wife; and alimony may be accorded by the Court to either of the separated parties who has not sufficient means of subsistence, payable by the other according to their condition and circumstances. The effect of separation is to relieve the parties from common life and carries with it separation of property and dissolution of the community of property (*r*).

No. 3 of 1902 is analogous to the Imperial Summary Jurisdiction (Married Women) Act, 1895 (*s*).

Falkland Islands.—The Supreme Court has the jurisdiction of the Divorce Division in England, subject to the Order in Council of November 28th, 1899 (*a*). No. 4 of 1886 extends to the Colony the Imperial Matrimonial Causes Act, 1878 (*b*). No. 8 of 1886 provides for the grant of protection orders as in England.

In **St. Helena** the Governor, as Chief Justice, has the jurisdiction of the Divorce Court in England (*c*).

In **Fiji** the Supreme Court has the jurisdiction of the Divorce Division in England (*d*). Ordinance 3 of 1899 applied the Matrimonial Causes Act, 1884 (*e*), *mutatis mutandis*, to the Colony. Ordinance 3 of 1883 deals with suits for the dissolution of marriage where the parties are natives or half-castes (*f*).

(*r*) See arts. 156—185.

(*s*) 58 & 59 Vict. c. 39.

(*a*) No. 4 of 1901, s. 9 (5); No. 9 of 1908, s. 7, extends the jurisdiction of the Supreme Court to the dependencies.

(*b*) 41 & 42 Vict. c. 19.

(*c*) Order in Council of May 1st 1890; Rules and Regulations of July 14th, 1891.

(*d*) No. 7 of 1875, s. 23.

(*e*) 47 & 48 Vict. c. 68.

(*f*) See Burge, vol. i., p. 298.

Mediterranean.—In **Gibraltar** the Supreme Court has the divorce jurisdiction of the High Court in England (*g*). Ordinance 3 of 1908 introduces the Imperial Matrimonial Causes Act, 1907 (*h*); No. 11 of 1896 corresponds to the Imperial Summary Jurisdiction (Married Women) Act, 1895 (*i*).

Malta.—Under the law of Malta, as under the law of France, "eccessi" (*excès*), "sevizie" (*sévices*), and "ingiurie gravi" (*injures graves*) are grounds of judicial separation, although the law of Malta does not permit divorce *à vinculo*. But an important addition has been made in the Maltese Ordinance (*k*) to the provisions of the French and Italian laws by placing wrongs done to the children of the complainant on the same footing as those inflicted on the complainant herself or himself (*k*). The term "ingiurie gravi" in the Maltese law includes not only acts but words designed to wound the feelings of the complainant (*k*). A wide discretion is left to the tribunal having to judge of the facts; the position of the parties and the habits and usages of the society in which they live will be regarded (*k*).

In **Cyprus** the jurisdiction of the High Court is defined by the Courts of Justice Order, 1883 (*l*). Under Ordinance 1 of 1878 (*m*) the High Court has the jurisdiction of the High Court in England as to dissolution or nullity or jactitation of marriage.

Eastern Possessions.—**Hong-Kong.**—No jurisdiction in divorce or matrimonial causes is conferred on the Supreme Court by Ordinance 3 of 1873 (*n*). Ordinance No. 10 of 1905 corresponds to the Imperial Summary Jurisdiction (Married Women) Act, 1895 (*o*). For the purposes of the Ordinance the expression "married woman" includes the first wife ("kit fat") or second wife ("tin fong") of any Chinese man, married to him in accordance with the laws and customs of China, and any woman married to a man of Asiatic race (not being Chinese), in accordance with the rites and ceremonies of his religion (*p*).

The Supreme Court of the **Straits Settlements** possesses only the

(*g*) Supreme Court Consolidation Order, 1888, s. 22.

(*h*) 7 Edw. VII. c. 12.

(*i*) 58 & 59 Vict. c. 39.

(*k*) Sant *v.* Sant (1874), L. R. 5 P. C. 542; Ordinance No. 5 of 1867, art. 46.

(*l*) Stats. R. & O. Rev., 1903, Foreign Jurisdiction, v., 412.

(*m*) S. 71.

(*n*) See ss. 5—8.

(*o*) 58 & 59 Vict. c. 39.

(*p*) No. 10 of 1905, s. 2.

old jurisdiction of the English Ecclesiastical Courts of Justice in matrimonial causes (*q*).

Mauritius.—In Mauritius divorce is now regulated by local Ordinances (*a*). The grounds of divorce, which are the same for both husband and wife, are these: (a) Bigamy, incest, and adultery (*b*): (b) wilful desertion for five years (*c*); (c) continued absence of either spouse for ten consecutive years, without news or information whether he or she be alive or dead (*d*); (d) acts of cruelty or brutality, *sævitiæ*, or outrage of a serious nature (*injures graves*) (*e*); (e) sodomy or bestiality (*f*); (f) condemnation of either party to penal servitude or imprisonment with or without hard labour for a period of not less than five years (*f*). Divorce by mutual consent is not recognised (*g*). The procedure resembles that under English legislation, except that, before leave to sue is given, a reconciliation of the parties is attempted to be brought about by the Judge in Chambers (*h*). Reconciliations are seldom effected, but there have been cases in which the Judge has insisted on a postponement of the proceedings in order to give the parties time for reflection. The Court is not bound to pronounce a divorce if there has been, on the part of the petitioner, connivance or collusion, or unreasonable delay in instituting or prosecuting the suit, or adultery, cruelty, or desertion, or behaviour conducing to the offence complained of (*i*). It will be observed that the distinction, recognised by English law, between absolute and discretionary bars to divorce does not exist in Mauritius. Every judgment for divorce is in the first instance a decree *nisi*: and an interval of three months must elapse before it can be converted into a decree absolute (*k*). At any time during the progress of the suit, or before the decree absolute, the Procureur-General, who fulfils in this respect the functions of the King's Proctor in England, may intervene, and show cause against the divorce (*k*). Any person having been a party to any judicial

(*q*) No. 30 of 1907, s. 9 (5); and Scully *v.* Scully (1890), 4 Kyshe, 602; and see Burge, vol. i., p. 196, and pp. 194 (as to Labuan), 195 (special laws applicable to particular races and creeds); also No. 25 of 1908, as to registration of Muhammadan divorces.

(*a*) Nos. 14 of 1872; 37 of 1882; 31 of 1892; and 14 of 1899.

(*b*) No. 14 of 1872, s. 1.

(*c*) S. 2.

(*d*) S. 3.

(*e*) S. 4.

(*f*) S. 5.

(*g*) S. 6.

(*h*) S. 11.

(*i*) No. 37 of 1882, s. 11.

(*k*) S. 12.

proceedings for divorce may contract marriage with the other party, notwithstanding any prohibition contained in art. 295 of the Civil Code (*l*); but it shall not be lawful for the parties so re-marrying to adopt any marriage settlement (*régime matrimonial*) other than the one adopted by them at the time of the first marriage (*m*).

Either husband or wife may obtain a judicial separation (*séparation de corps*) on the ground of desertion without cause for more than two years (*n*). A wife who is deserted may obtain an order for the protection of her earnings against her husband or his creditors (*o*); suits for judicial separation are instituted and tried in the same way as suits for divorce (*p*). No action for damages for adultery is maintainable (*q*). Damages may be claimed against a co-respondent in the petition either for divorce or for judicial separation, and a co-respondent may, in addition be ordered to pay, in whole or in part, the costs of the proceedings (*r*). If the respondent is absent from the Colony the proceedings in reconciliation may be dispensed with (*s*).

Seychelles.—The Mauritius Ordinances 14 of 1872 and 37 of 1882 apply to Seychelles. The Seychelles Ordinances 7 of 1893 and 9 of 1900 reproduce respectively the Mauritius Ordinances 31 of 1892 and 44 of 1899 (*t*).

West Africa.—In **Gambia** the Chief Magistrate has the jurisdiction of the High Court of Justice in England (*a*). Ordinance 10 of 1905 establishes a Muhammadan Court at Bathurst under a Cadi appointed by the Governor for determining all disputes between Muhammadans *inter alia* as to marriage (*b*). In the procedure and practice of the Court, Muhammadan law is to be followed (*c*). An appeal lies to the Supreme Court, assisted by a "Tamsir," or person learned in Muhammadan law.

In **Sierra Leone** (*d*) and in the **Gold Coast Colony** (*e*), respectively,

(*l*) No. 31 of 1892, s. 1.
(*m*) S. 1 (3).
(*n*) No. 37 of 1882, s. 5.
(*o*) Ss. 6, 7.
(*p*) No. 44 of 1899, s. 1.
(*q*) S. 2.
(*r*) S. 3.
(*s*) S. 4 (1).
(*t*) *Vide supra.*
(*a*) No. 4 of 1889, s. 16.
(*b*) S. 4.
(*c*) S. 5.
(*d*) No. 14 of 1904, s. 7. No. 7 of 1858 enacted a divorce law similar to English statute law; No. 7 of 1888 deals with desertion; No. 20 of 1905, s. 5, provides for the registration of Muhammadan divorces.
(*e*) No. 4 of 1876, s. 11; and see No. 2 of 1909 (marriage).

the Supreme Court has the divorce jurisdiction of the High Court in England.

In **Northern Nigeria**, jurisdiction in divorce is conferred on the Supreme Court, and is to be exercised in accordance with the law and practice for the time being in force in England (*f*).

In **Southern Nigeria**, the Supreme Court has the jurisdiction of the High Court of Justice in England. This jurisdiction may, subject to the Ordinance and Rules of Court, be exercised in conformity with the law and practice for the time being in force in England (*g*).

In **East Africa** jurisdiction in divorce is confined to the High Court (*h*). The petitioner must either be a professing Christian or have been married under the marriage laws of East Africa, Uganda, or British Central Africa, and must be resident in the Protectorate at the time of presenting the petition. Divorce can be granted only where the marriage has been solemnised in "Africa," which includes only the said three Protectorates, Zanzibar, Somaliland, and the German, Italian, and Portuguese possessions on the East Coast, or where the adultery or other offence has been committed in "Africa," or where the husband has, since the marriage, adopted some form of religion other than Christianity. The Ordinance is drawn on the model of the English Divorce Acts, adapted to circumstances. Similar Ordinances have been enacted for **Uganda** (*i*) and **British Central Africa** (*k*).

Exterritorial Jurisdiction.—The position, in regard to matrimonial causes of the various Courts respectively erected in the exercise of the exterritorial jurisdiction of the Crown, is described in the first volume of Burge's Commentaries (*l*). Such Courts have in general the matrimonial jurisdiction of the High Court of Justice in England, except as regards suits for dissolution (and jactitation) of marriage.

United States (*m*).—In the United States of America the law of divorce is dealt with exclusively by the different State legislatures, the Congress of the United States not being authorised to deal therewith; and each, therefore, of the several States, Territories,

(*f*) Supreme Court Proclamation, ss. 11, 14; Laws of N. Nig. (1905, by H. C. Gollan), p. 183.

(*g*) Supreme Court Ordinance, Laws of S. Nig. (1908, by E. A. Speed), c. 3, s. 16. See also Native Courts Ordinance Laws, c. 123.

(*h*) No. 12 of 1904.

(*i*) No. 15 of 1904.

(*k*) No. 5 of 1905.

(*l*) Vol. i., ch. x., p. 321.

(*m*) This account has been revised by Mr. J. Arthur Barratt, of the New York and English Bars.

and the District of Columbia have separate and independent laws upon the subject.

A divorce *à vinculo* and a divorce *a mensa et toro* can be obtained in Alabama (*n*), Alaska (*o*), Arizona (*p*), Delaware (*q*), District of Columbia (*r*), Georgia (*s*), Idaho (*t*), Indiana (*u*), Kentucky (*v*), Louisiana (*w*), Maryland (*x*), Michigan (*y*), Minnesota (*z*), Montana, New Jersey (*a*), New York (*b*), North Carolina (*c*), Pennsylvania (*d*), Rhode Island (*e*), Tennessee (*f*), Vermont (*g*), Virginia (*h*), West Virginia (*i*), Wisconsin (*j*).

Divorce *à vinculo* only is recognised in Arkansas (*k*), California, Colorado (*l*), Connecticut (*m*), Florida (*aa*), Illinois (*bb*), Indian Territory (*cc*), Iowa, Kansas, Maine, Massachusetts (*dd*), Mississippi (*ee*), Missouri, Nebraska (*ff*), Nevada (*gg*), New Hampshire (*hh*), New Mexico (*ii*), North Dakota (*jj*), Ohio (*kk*), Oklahoma Territory (*ll*), Oregon (*mm*), South Dakota (*nn*), Texas (*oo*), Utah (*pp*), Washington (*qq*), Wyoming (*rr*). Separate actions for alimony or maintenance may be brought in California, Colorado, Iowa, Kansas, Maine, Missouri, Ohio.

In South Carolina no divorce for any cause is allowed (*ss*).

Jurisdiction.—According to the different statutes of the States of the Union, jurisdiction to grant divorce can be exercised only when

(*n*) Code of Ala., ss. 1485 *et seq.*
(*o*) Code of Alaska, 1900.
(*p*) Code of Arizona.
(*q*) Laws of 1891, xix., p. 480.
(*r*) Code, s. 966.
(*s*) Code of Ga., 1895.
(*t*) Civil Code, 1901.
(*u*) Burn's R. S., ss. 1036—1061.
(*v*) Ky. Stat., c. 68, art. 11.
(*w*) Civil Code, 1870.
(*x*) Code, 1888, art. 16.
(*y*) Compiled Laws, 1897, s. 8624.
(*z*) Laws, 1895, c. 40.
(*a*) Laws, 1902, p. 502.
(*b*) Civ. Pro. Code, ss. 1756—1762.
(*c*) Laws, 1899, c. 490.
(*d*) Act, April 25th, 1905.
(*e*) Act, April 2nd, 1902.
(*f*) Code M. & V., s. 3308.
(*g*) Vermont Stat., 1904.
(*h*) Ss. 2257, 2258.
(*i*) Act 1882, c. 60.
(*j*) Ss. 2356, 2357.
(*k*) Bauman *v.* Bauman (1857), 18 Ark. 320.
(*l*) Gen. Stats. (1883), c. 32.
(*m*) Gen. Stats. 1902, s. 4551.
(*aa*) Thompson's Digest, 1881.
(*bb*) Hirsh, 705.
(*cc*) Indian Territory Statutes, 1899.
(*dd*) Revised Laws, 1902.
(*ee*) Code, 1892.
(*ff*) Compiled Stat., 1881.
(*gg*) Code, 1899.
(*hh*) P. S., c. 175.
(*ii*) Compiled Laws, N.M., 1897.
(*jj*) Civil Code, 1899.
(*kk*) R. S., 5699.
(*ll*) Oklahoma Code, 1895.
(*mm*) Code, 1902.
(*nn*) Code, 1902.
(*oo*) Rev. Stat., Texas, 1899.
(*pp*) Rev. Stat., 1898.
(*qq*) Code Civ. Proc. 5716.
(*rr*) Stat. Wyoming, 1899.
(*ss*) 16 Statutes, 719.

one of the parties is *bonâ fide* domiciled in the State in which the divorce is sought, the wife for this purpose having the right to acquire a separate domicil from her husband if his conduct furnishes grounds for divorce; in some, the particular period of required residence is defined; in others, the laws are silent on these points, but *bonâ fide* domicil by inter-State law and international law, in such case, is necessary to confer divorce jurisdiction (*a*).

It is the rule in all States of the Union, upon this point (*b*), that a wife may acquire a domicil separate from her husband in a case where he has acted towards her in a manner that would entitle her to an absolute divorce, or in a case where there has been abandonment of the wife, or the husband's conduct has been such as to compel her to leave him, or in cases where the parties live apart under a judicial separation. The reason of this exception to the general rule of the wife's domicil being that of the husband is, that the theoretic identity of person and interest between husband and wife, and the presumption arising that the home of the one is the home of the other, is destroyed when the husband's conduct has been such as to render it proper for her to seek relief from her obligations to her husband (*c*).

Grounds of Divorce or Nullity.—Duress and Fraud are grounds of divorce or nullity in all the States and Territories, but in some there are statutes conferring jurisdiction to annul marriages in specified Courts (*d*).

Impotence and Physical Incapacity are grounds of divorce or nullity in every State and Territory.

Mental Incapacity at the time of the marriage is a ground of divorce or nullity in every State and Territory, there being no real consent in such case.

Insanity arising after Marriage is a ground in Washington; "hopeless insanity" in Pennsylvania (*e*); and in Utah where judicially declared insane five years prior to action.

(*a*) See Burge, 1st ed., i., p. 691.

(*b*) See Burge, vol. ii., 54, 55.

(*c*) Hunt *v.* Hunt (1878), 72 N. Y. 217. This practice of the American Courts has been (Armytage *v.* Att.-Gen., [1906] P. 135) recognised in England.

(*d*) See generally, for a full statement, Hirsh's Tabulated Digest of the Divorce Laws of the United States. The instances given above are illustrative, not exhaustive. A law was enacted in Pennsylvania in 1906 authorising the Governor to appoint Commissioners to codify the divorce laws, and to co-operate with other States in securing uniformity of divorce legislation in the United States: Jour. Comp. Leg., viii., p. 276.

(*e*) Jour. Comp. Leg., viii., p. 276.

Adultery and Bigamy are causes for divorce *à vinculo* in every State and Territory where divorce is allowed; so also are conviction of crime and cruelty, except in District of Columbia, Maryland, New Jersey, New York, North Carolina. In Virginia and West Virginia felony is a cause.

Desertion or Abandonment are causes for divorce *à vinculo* when they have existed for varying periods—in some States fixed by statute and in others not—from one to five years in every State and Territory except New York and North Carolina, and in the District of Columbia.

Vicious Conduct is a ground for a divorce *a mensa et toro* in Maryland.

Gross misbehaviour, neglect of duty, and wickedness are grounds in Kansas; in Ohio if continued for three years; in Rhode Island "if repugnant to and in violation of the marriage covenant."

Habitual Drunkenness is a ground in nearly all the States, unless contracted before marriage; not, however, in Arizona, Maryland, New Jersey, New York, Pennsylvania, or Vermont (*f*). In Maine, Massachusetts, and some other States, gross and confirmed use of opium or other drug is a cause.

Non-support of Wife is a ground in Arizona (*f*), California, Colorado, Vermont, Maine, Massachusetts, New Hampshire, Rhode Island.

Personal Indignities rendering condition intolerable or life burdensome constitute a ground of divorce *à vinculo* in favour of the wife in Pennsylvania, and in favour of either spouse in Arkansas, Louisiana, Missouri, Oregon, Vermont, Wyoming.

Turning a wife out of doors is a ground of divorce *a mensa et toro* in Pennsylvania. So is "extreme cruelty," defined as "the infliction of grievous bodily injury or grievous mental suffering" (*g*).

The vagrancy of the husband is a ground in Missouri; violent and ungovernable temper in Florida (*h*). There is no divorce for "incompatibility of temper" as is frequently stated in public prints.

Public Defamation is a ground in Louisiana.

Joining a religious sect holding a belief inconsistent with marriage is a ground in New Hampshire, Kentucky, Massachusetts.

Ante-nuptial Pregnancy unknown to husband (*f*) is a specific ground of divorce in Alabama, Arizona, Georgia, Iowa, Kansas, Kentucky, Wyoming, Oklahoma, Tennessee.

(*f*) Hirsh, *ubi supra*.
(*g*) *Ibid*.
(*h*) 14 Cyclopædia of Law and Procedure, 611—627.

Nonage (*i*) is a ground of divorce in Alabama, Alaska, Arkansas, Delaware, Georgia, New York, and most other States, except Florida, Oregon, Pennsylvania.

Alimony may be granted in all States.

The **defences** of connivance, collusion, condonation, and recrimination, delay, and insincerity are generally in force (*k*).

Inter-State Recognition of Divorce Decree.—A decree of divorce rendered in accordance with the law of the *forum* of one State by a Court having jurisdiction over the subject-matter and the parties is valid in all other States (*l*), but in cases where service on a defendant is made personally outside the jurisdiction or by substituted service, there is not uniformity in admission by the several States of the validity of divorce of their own citizens by the Courts of another State (*a*).

Re-marriage (*i*).—In most cases the re-marriage of divorced parties is permitted. In Delaware, Louisiana, and Pennsylvania, a party found guilty of adultery may not marry the co-respondent. In South Dakota, and the District of Columbia, the guilty party may only re-marry with the petitioner. In Tennessee, the respondent guilty of adultery may not marry the co-respondent during the petitioner's life; in Michigan, the Court may order that the guilty party may not re-marry within two years from decree, and disobedience is bigamy; in Vermont, within three years under penalty of imprisonment.

But a regular marriage outside the State granting such decree is held valid by other States, as such prohibitory statutes are deemed penal and without extraterritorial effect.

SECTION V.

Laws of India, Burmah, China, Japan, and Siam.

British India.—Hindu Law.—Divorce is unknown to the general Hindu law (*b*), but is allowed by custom in certain localities, and among certain low castes (*c*). Apostasy does not dissolve a

(*i*) Hirsh, *ubi supra*.

(*k*) Bishop, Marr. and Divorce, vol. ii., book ix.

(*l*) 14 Cyclopædia of Pleading and Practice, 814.

(*a*) Rep. Int. Law Assoc., at Portland, Maine (1907), p. 79, paper by Mr. J. A. Barratt, of London, on "Divorce Jurisdiction"; Haddock *v.* Haddock, 201 U. S. Rep. 562 (1906).

(*b*) Kudomee Dossee *v.* Joteeram Kolita (1877), I. L. R. 3 Calc. 305.

(*c*) See Steele's Law and Custom of

marriage (*d*), but in a case of conversion to Christianity the unconverted spouse may withdraw from cohabitation, and then the convert may obtain a dissolution of the marriage under Indian Act XXI. of 1866. Except under that Act, a Court has no power to decree a divorce between Hindus.

A husband is entitled to put away an unfaithful wife (*e*). The marriage bond is not thereby dissolved, but the wife loses all rights of inheritance to her husband (*f*), and on returning to a moral life is entitled only, at the most, to a bare subsistence (*g*).

Muhammadan Law.—In Muhammadan law, three forms of divorce are recognised (*h*). *Talak*, a divorce proceeding from the husband or from the wife or some third person by the husband's authority. *Talak* signifies severance, and this as between spouses may be consensual: *Khula*, or *Mubarat*, divorce by mutual consent; and judicial divorce, on various grounds, which will be indicated immediately (*i*).

Talak.—*Talak* divorce is effected by a declaration by the husband to the wife, either verbally or in writing (*j*), of a clearly expressed intention to terminate the union. This declaration may be made: (a) Once, in which case the divorce is revocable, but becomes irrevocable on abstinence from conjugal relations for three months; (b) three times during successive intervals of purity, there being no intercourse between the spouses during any of such intervals—this is irrevocable; or (c) three times at shorter intervals or even in immediate succession—this is irrevocable.

Among the pre-Islamic Arabs abstinence by the husband from cohabitation for four months, in pursuance of a vow (*ila*), creates a

Hindu Castes, pp. 168, 169; Risley's Tribes and Castes of Bengal; Crooke's Tribes and Castes of the North Western Provinces and Oudh; Banerjee's Hindu Law of Marriage, 2nd ed., pp. 179—180, 237, 238, 246.

(*d*) Thapita Peter *v.* Thapita Lakshmi (1894), I. L. R. 17 Mad., at p. 239.

(*e*) Colebrooke's Digest, ii., p. 415.

(*f*) Kery Kolitany *v.* Moneeram Kolita (1873), 13 Ben. L. R. 1; affirmed on appeal, Moniram Kolita *v.* Kerry Kolitany (1879), L. R. 7 I. A. 115; I. L. R. 5 Calc. 776.

(*g*) See Honamma *v.* Timannabhat (1877), I. L. R. 1 Bom. 559; *contra*, Valu *v.* Ganga (1882), I. L. R. 7 Bom. 84; Nagamma *v.* Virabhadra (1894), I. L. R. 17 Mad. 392. See Roma Nath *v.* Rajonimoni Dasi (1890), I. L. R. 17 Calc., at p. 679.

(*h*) See Wilson, Dig., ss. 60 *et seq.*

(*i*) See Moonshee Buzul-ul-Raheem *v.* Luteefutoon-Nissa (1861), 8 Moo. Ind. App. 379.

(*j*) Gouhur Ali Khan *v.* Ahmed Khan (1873), 20 Calc. W. R. 214.

valid divorce, and it was allowed by the Prophet; but this form of divorce is now obsolete (*k*). Neither duress nor intoxication will prevent a divorce from being effectual, but divorce by a lunatic or a minor is void. The remedy of *talak* divorce is not open to the wife unless by ante-nuptial or post-nuptial agreement with her husband (*l*).

The power of pronouncing a *talak* divorce may also be delegated by the husband to a third person or to the wife herself.

The rules above stated are those of the Hanifite School. Under the Shafeite system (*m*), an inchoate divorce cannot be set aside by renewed cohabitation; an express declaration is necessary. A divorce pronounced under duress is null, and the husband's abstinence from cohabitation under an *ila* entitles the wife to demand a judicial divorce. Under the Shia system (*n*), intoxication (as well as duress) renders a divorce null; the divorce must be effected orally in the presence of two competent witnesses, unless the husband is physically incapable of making it; and a marriage cannot be dissolved by three utterances of the words of repudiation in immediate succession.

Khula Divorce.—In the Khula divorce the wife secures her freedom by a consideration such as the surrender, in whole or in part, of her dower or other pecuniary claims on her husband. If there is no consideration for the release of her husband's rights, this form of divorce is termed *Mubarat*. Where there is a failure of the agreed consideration, the divorce is not invalidated (*o*), and the husband cannot sue for restitution of conjugal rights, but may plead the divorce as a defence to the wife's claim for dower.

Judicial Divorce.—Either spouse may sue for divorce where there is what is known as an "option of puberty," *i.e.*, where the marriage was contracted by a guardian other than a father or grandfather. The wife may obtain a divorce on the ground of her husband's impotence at the time of the marriage if unknown to her then;

(*k*) Ameer Ali's Mahomedan Law, 2nd ed., vol. ii., 457.

(*l*) *E.g.*, a stipulation that the wife should be entitled to divorce on the husband marrying a second wife is valid: Badarunnissa Bibi *v.* Mafiattala (1871), 7 Ben. L. R. 442; and see also Hamidoolla *v.* Faizunnissa (1882), I. L. R. 8 Calc. 327; Ashruf Ali *v.* Ashad Ali (1871), 16 W. R. 260; Ibrahim Mulla *v.* Enayetur Ruhman (1869), 4 Ben. L. R. (A. C.) 13; 12 Calc. W. R. 460.

(*m*) Wilson, ss. 398, 399.

(*n*) *Ibid.*, ss. 434—436.

(*o*) See Moonshee Buzul-ul-Raheem *v.* Luteefutoon-Nissa (1861), 8 Moo. Ind. App. 378.

and (possibly) (*p*) on the ground that he has charged her, whether truly or falsely, with adultery. Actual physical cruelty on the part of the husband to the wife, if of such a character as to endanger her health or safety, will justify a wife in leaving her husband, and will afford a defence to an action by him for restitution of conjugal rights (*q*). If the husband refuses to divorce a wife whom he treats in such a manner as to justify her in leaving him, he may be ordered to allow her monthly maintenance, unless he can prove that she is living in adultery. The wife retains her claims for unpaid dower and her rights of inheritance as against him (*r*). The husband cannot obtain a judicial divorce from his wife on the ground of incapacity for intercourse; in such a case he can, of course, exercise his ordinary right of divorce. Under the Shafei system the husband can obtain a divorce on the ground of his wife's impotence (*s*), and either spouse can obtain a divorce on the ground of the madness or leprosy of the other (*s*).

The Effects of Divorce (*t*).—Further cohabitation between the parties is unlawful; and if the wife has been divorced by words of repudiation thrice pronounced, the husband cannot re-marry her until she has been first married to another husband, and the marriage has been dissolved after consummation. For this purpose the fact of consummation cannot be proved by mere presumption from the circumstances (*u*). Among the Shias, re-marriage in this way cannot be legalised after the triple repudiation (*x*). Immediately on the completion of her *iddat*, or at once, if the marriage was not consummated, the wife may marry again; the husband is also free to take another wife, in place of the divorced one, on the completion of her *iddat*. If the marriage was consummated before its dissolution, the wife is entitled at once to her unpaid dower, unless the divorce was by the wish of the wife herself or due to her fault. If the marriage had not been consummated at the time of the divorce the husband is liable for half the dower, if specified. If no dower was specified, the wife is entitled

(*p*) Baillie, vol. i., pp. 333—336. But see Jaun Beebee *v.* Beparee (1865), 3 W. R. 93.

(*q*) As to the meaning of legal cruelty, see Moonshee Buzloor Ruheem *v.* Shumsoonnissa Begum (1867), 11 Moo. Ind. App. 551, and p. 355, *ante*.

(*r*) Wilson, s. 77.

(*s*) *Ibid.*, s. 401.

(*t*) *Ibid.*, s. 78.

(*u*) Baillie, Dig. 290.

(*x*) Wilson, s. 432.

to a present (*matat*). During her *iddat* after a revocable divorce the wife has a right to maintenance, and preserves her rights of inheritance as regards her husband. On the completion of the *iddat* all such rights cease (*a*). Under the Shafei law (*b*) the wife has no right to maintenance during her *iddat*.

The facility for divorce amongst Muhammadans is consistently controlled by the fact that deferred dower is payable on divorce (*c*), and that it is not unusual at the time of marriage to fix an amount the payment of which will cause the husband considerable inconvenience.

Other Communities in British India.—Christians.—The Indian Divorce Act (*d*), which is in terms similar to the law administered in England, provides for divorce where the petitioner professes the Christian religion, and resides in India at the time of presenting the petition.

By the Act a husband is entitled to a decree of divorce on the ground of his wife's adultery. The wife is entitled to a divorce: (a) when the husband has, since the marriage, exchanged his profession of Christianity for that of another religion and gone through a form of marriage with another woman; (b) or has been guilty of incestuous adultery; (c) or of bigamy with adultery; (d) or of marriage with another woman with adultery; (e) or of rape, sodomy, or bestiality; (f) or adultery coupled with such cruelty as without adultery would have entitled her to a divorce *a mensa et toro*; or (g) adultery coupled with desertion without reasonable excuse for two years or upwards (*e*). Either party is entitled to a decree of judicial separation on the ground of adultery, or cruelty, or desertion without reasonable cause for two years or upwards (*f*).

Parsees.—The dissolution of the marriage of Parsees is dealt with by Indian Act XV. of 1865, which provided for the judicial dissolution of the marriages of Parsees.

A marriage may be declared void in case of unsoundness of mind

(*a*) The divorce is final if the husband does not take the wife back before the completion of the "Iddat": Ibrahim *v.* Syed Bibi (1888), I. L. R. 12 Mad. 63; Mozuffur Ali *v.* Kumurunissa Bibi (1864), Calc. W. R. 32.

(*b*) Wilson, s. 402.

(*c*) P. 757, *ante*.

(*d*) Indian Act IV. of 1869.

(*e*) *Ibid.*, s. 10.

(*f*) S. 22.

existing at the time of marriage and since continuing, and impotence. It may be dissolved in case of continued absence, without having been heard of by the other spouse for seven years, in case of the wife's adultery, and in case of the husband's adultery with a married woman, or fornication with an unmarried woman not being a prostitute, or of bigamy coupled with adultery, or adultery coupled with cruelty, or of adultery coupled with wilful desertion for two years or upwards, or of rape, or of an unnatural offence (*g*). There are also provisions for judicial separation and for restitution of conjugal rights (*h*).

Under this Act, which otherwise is similar to the Indian Divorce Act, adultery with a prostitute is not a ground for divorce, and is only a ground for judicial separation when the prostitute is openly brought into or allowed to remain in the place of abode of a wife by her own husband (*i*).

Burmah.—Buddhist Law.—Desertion is one of the grounds for divorce. In the case of the husband it must be proved that a period of three years has elapsed during which time he has failed to support his wife in any way. With the wife the period is one year, during which interval no support must have been given by the husband. The intention to desert may always be inferred. The fact that a husband has joined the priesthood would afford a ground for the dissolution of marriage. Neglect may not amount to desertion. The *Dhamathats* enumerate different periods which must elapse before a wife can re-marry when the husband has in the first instance left her for some definite purpose. As an instance, if the husband goes away to trade or in search of knowledge, the wife must wait for eight years before she has the right to re-marry. But if during his absence he marries and fails to maintain his wife, the usual period of three years need only pass to entitle the latter to marry again. Repeated ill-treatment towards a wife will entitle her to a divorce. Matricide, patricide, killing, stealing, shedding the blood of a Buddha or Rahan, heresy, and adultery are amongst the deeds which entitle a Burmese Buddhist to sever the marriage tie.

Marriage may always be dissolved by the consent of the parties. When there is no such consent the intervention of the Court is

(*g*) See Indian Act IV. of 1869, ss. 27—30.

(*h*) Ss. 31, 36.

(*i*) Indian Act XV. of 1865, ss. 30, 31.

necessary, and in that case one of the recognised grounds must be established by the party seeking the divorce.

The modes of division of property belonging to the parties on a divorce vary according to circumstances. In some instances the party not at fault may receive the whole of the property possessed by both. Condonation is recognised by the Buddhist law.

On a dissolution of marriage by mutual consent, the ordinary rule is that the father is given the sons and the mother the daughters. In the case of extreme youth the son remains with the mother. When the divorce is granted by the Court it has the power to decide as to the care of the children.

Though a suit for restitution of conjugal rights can be maintained, none lies for judicial separation.

China.—Marriage is dissolved by death or divorce. A divorce must take place if any of the above-named impediments to marriage is discovered, or if the wife commits adultery. A divorce may also take place: (1) by consent of both parties, *e.g.*, for incompatibility of temperament; (2) if the wife leave her husband's house without his consent; (3) if the wife beats the husband; (4) if the marriage contract contained false statements; (5) if the wife has one of the following seven faults, viz., barrenness, sensuality, want of filial piety towards the husband's parents, loquacity, thievishness, jealousy, or an incurable disease. The husband must, however, keep her, even with any of the above-mentioned seven faults, if she has mourned for three years after the death of his parents; if his family have passed from poverty to wealth since the marriage; or if she has no relations to whom she may return after divorce (*j*).

Japan.—There are two kinds of divorce: (a) by arrangement between the parties; and (b) judicial.

In the former case this is effected by notice to the registrar with the same formalities and under the same conditions as in the case of marriage. If the notice is accepted and the head of the family agrees, the person leaving the other's family is registered in the register of his or her former family; otherwise he or she is registered as head of a new family; or if he or she had upon marriage abolished their original family, that family is resuscitated.

(*j*) This account is contributed by Mr. J. Bromley Eames, Barrister-at-law.

Persons under twenty-five must have the consent of the persons whose consent was required on their marriage.

In the latter case, divorce is granted for the following causes: (1) if the spouse contracts another marriage; (2) adultery of the wife; (3) criminal sentence passed on husband for immorality; (4) criminal sentence passed on a spouse for specified offences; (5) cruelty or grave insult by the other spouse rendering common life intolerable; (6) desertion with evil intention; (7) cruelty or grave insult by a lineal descendant of the spouse; (8) cruelty or grave insult to a lineal ascendant by the spouse; (9) uncertainty during a period of three years whether the other spouse is alive; and (10) the dissolution or annulment of adoption in cases where the adopted person is connected with the adopted family both by marriage and adoption.

In cases (1) to (4) consent, and (1) and (7) condonation, by one of the spouses to the act in question bars divorce; and a spouse who has received a sentence specified under (4) cannot petition for divorce on the ground that the other spouse has received a criminal sentence. An action cannot be brought after a year from the party becoming aware of the fact or ten years after it took place on any ground mentioned in (1) to (8); nor can it under (9) after the fact has been ascertained; nor under (10) after three months from becoming aware of the dissolution or annulment of the adoption, or if the right to apply for a divorce has been given up.

Under both kinds of divorce, in the absence of any contrary arrangement, the custody of the children belongs to the father, or to the mother if the father by the divorce leaves the family; but in the case of judicial divorce the Court can order a different course to be followed (*k*).

Law of Siam.—The grounds for divorce may, generally speaking, be said to be any breach of the marriage covenants, even though these may include one on the part of the husband not to have a second wife (*l*). Ill-treatment, failure to maintain a wife in the position she ought to occupy, desertion for a statutory period,

(*k*) C. C., arts. 808—819; Gubbins's Civil Code of Japan, Introd., 40, 41. Nullity of marriage by judicial decree is also provided for in the Code, 778—787.

(*l*) Kreung *v.* Phra Sakorn, Tachin, 68—128.

adultery on the part of the wife, serious crimes committed by a husband and probably by a wife, assault on and serious abuse of a wife's parents, or the husband becoming a priest, all form grounds for the interference of the Courts (*m*). Judicial separation is unknown, though separation by mutual consent of the parties is a good and valid one (*n*).

(*m*) Laksana Phua Mia.

(*n*) This account is contributed by H.R.H. Prince Rajburi Direkriddi, Minister of Justice, Bangkok.

CHAPTER XVII.

DIVORCE—PRIVATE INTERNATIONAL LAW.

Governing Law.—It will have been seen that the dissolubility of marriage and the causes for which it may be either entirely dissolved, or its obligations only suspended by the separation of the parties *a mensa et toro*, are subjects on which conflicting doctrines are maintained by several systems of jurisprudence.

When the law of the country in which the parties were married differs from that of their domicil or nationality, or from that of the country in which the suit for the divorce or separation is instituted, it becomes necessary to ascertain which of these conflicting laws ought to be selected in deciding whether such divorce or separation can be granted.

The subject is here treated under the following heads:—

I. Jurisdiction in divorce and the competent *forum*.

II. Choice of the proper governing law, which is now generally taken to be the personal law, subject to certain limitations.

III. Conflicts (a) as to dissolubility of marriage; (b) as to grounds of divorce between personal law and *lex fori*; (c) as to forms of relief; (d) as to effects of divorce.

IV. Divorce *in fraudem legis*.

V. Judicial separation.

VI. Conversion of separation into divorce.

VII. Recognition of foreign decree of divorce or separation.

VIII. Nullity of marriage.

I. Jurisdiction in Divorce and the Competent Forum.—On the first question, what Court has jurisdiction in divorce, in the former edition of Burge's Commentaries attention was chiefly drawn to the principle, which then seemed to have been adopted by the Scottish Courts, that neither the place in which the marriage was celebrated nor that of the place in which the parties were permanently domiciled need be regarded, but jurisdiction could be exercised over all foreigners present in Scotland with regard to the relation of husband and wife on the same conditions as with regard to other matters. It

seems no longer necessary to refer to the Scottish decisions, cited on this point by Burge in the former edition, other than that of the Court of Session, reviewing the decisions of the Consistory Court, in four cases which illustrate the different contingencies possible in this connection.

Former View.—Scotch Decisions Favoured Law of Parties' Residence—In the first case, the parties were English, regularly married in England, where they continued to cohabit until 1810, and the adultery had been committed in Scotland (*a*).

In the next case, the parties were Scotch, and the adultery had been committed in Scotland, but they had been married in England (*b*).

In the third case, both the parties were Irish. Their marriage took place at Gretna Green in Scotland, and immediately after it, they returned to their native country, where they resided during the whole period of their cohabitation, and the adultery was committed in Scotland (*c*).

In the fourth case, the parties were citizens of London, where they had been married. The husband visited Scotland for a temporary purpose, and there committed adultery (*d*).

In the first two cases, the interlocutors of the Consistory Court dismissed the actions, on the ground that neither the temporary domicil in the one, nor in the other, even the real domicil of the parties in Scotland, nor the adultery there by the defender, could have the effect of altering the condition of the contract between the parties as indissoluble *secundum legem loci contractus*, so as to authorise the Court to pronounce sentence of divorce *à vinculo matrimonii*.

In the third case, the interlocutor dismissed the action, on the ground that the real domicil of the parties was in Ireland.

In the fourth case, the interlocutor dismissed the action, because the marriage of the parties was indissoluble by judicial sentence according to the law of England, which was both the *locus contractus* and the country in which the parties always had their domicil.

This question, having been brought under the review of the

(*a*) Levett *v.* Levett, December 21st, 1816, Ferguss. Rep. 68.

(*b*) Edmonstone *v.* Edmonstone, December 9th, 1814, *ibid.*, 168.

(*c*) Forbes *v.* Forbes, March 7th, 1817, *ibid.*, 209.

(*d*) Rowland *v.* Rowland, April 7th, 1817, *ibid.*, 226.

whole Court of Session by these four cases, received the most full discussion and consideration.

Certain questions were submitted to ten of the judges of the Second Division. In answer to them, they stated their unanimous opinion, "That it is not a valid defence against an action of divorce in Scotland for adultery committed there, that the marriage had been celebrated in England.

"Nor that the parties had been domiciled there, when the marriage had been celebrated in Scotland.

"And lastly, that where the parties are Scots persons, happening to be in England when their marriage was celebrated, but who thereafter returned to Scotland, and cohabited and continued domiciled there, these circumstances can never aid the defence against an action of divorce in Scotland for adultery committed there, on the ground that the marriage had been celebrated in England. On the contrary, the judges are of opinion that these circumstances will materially support the plea of the pursuer of the divorce."

In giving this opinion, the judges added "that they take it for granted that there is no objection to the jurisdiction of the Court, from the want of that residence or domicil in the parties, which is necessary to found civil jurisdiction. And also that there is no proof of collusion between the parties either by direct evidence, or necessarily arising out of the circumstances of the case, as they mean to give their opinion only on the abstract question put to them, and to say, that the mere fact of the marriage having been celebrated in England, whether between English or Scotch parties, is not *per se* a defence against an action of divorce for adultery committed here" (*e*).

The several interlocutors in the cases above mentioned were reversed. It was decided with the concurrence of all the judges, except Lords Glenlee, Bannatyne, and Robertson, that if there had been sufficient domicil to found jurisdiction, the law of Scotland ought to prevail and the marriage be dissolved (*f*).

The jurisprudence of Scotland had thus adopted the law of the country in which there had been a residence for a sufficient length

(*e*) Ferguss. Rep., p. 115.

(*f*) Fac. Coll., June 1st, 1816, December 21st, 1816.

of time, to give the Court jurisdiction, although it should not be the actual domicil of the parties.

Modern View.—Law of Matrimonial Domicil not Favoured.—This theory of the sufficiency of a domicil of less completeness for founding jurisdiction in divorce than what is required for other purposes, *e.g.*, succession, was maintained by the Scottish Courts till quite recent times (*g*); but it may now be taken to be abandoned, as it was not argued before the House of Lords in 1864 (*h*), and the Scottish Courts have since expressed disapproval of it (*i*); and since the decision of the Privy Council in *Le Mesurier* v. *Le Mesurier* only complete domicil would seem sufficient for this purpose (*k*). Other Scottish theories, such as that referred to in the text that jurisdiction in divorce can be founded on a residence by the defender of forty days there, coupled with citation there, and in other cases by a personal citation in Scotland and the commission of the adultery there, have similarly been declared unfounded (*l*).

In England the theory of the matrimonial domicil as giving jurisdiction in divorce has now been definitively abandoned (*m*). In India, however, jurisdiction in divorce depends on residence (*n*). In foreign countries, as will be seen later, domicil which is less complete than ours and which is less in degree than the general personal law is now often accepted as the basis of jurisdiction, at least with the consent of the parties, and certainly if that domicil is authorised by the official authorities (*o*).

Personal Law is to be Applied.—In England, Scotland, and the United States the law of the actual domicil of the parties at the time of the petition is the exclusive governing law (*p*). An English

(*g*) Jack *v.* Jack (1862), 24 Sess. Cas., 2nd ser., 467; Stavert *v.* Stavert (1882), 9 Sess. Cas., 4th ser., 519.

(*h*) Pitt *v.* Pitt (1864), 4 Macq. 627.

(*i*) Stavert *v.* Stavert, *ante;* Low *v.* Low (1891), 19 Sess. Cas., 4th ser., 115.

(*k*) Le Mesurier *v.* Le Mesurier, [1895] A. C. 517.

(*l*) Stavert *v.* Stavert, Gillespie, Bar, 401, 402.

(*m*) Le Mesurier *v.* Le Mesurier, overruling in principle Niboyet *v.* Niboyet (1878), 4 P. D. 1; D'Etchegoyen *v.* D'Etchegoyen (1888), 13 P. D. 132; Westlake, 85; Dicey, 257.

(*n*) Indian Divorce Act, No. IV. of 1869, s. 2; Warter *v.* Warter (1890), 59 L. J. P. D. & A. 87; Foote, 124.

(*o*) Gillespie, Bar, 403, and see *post.*

(*p*) Ratcliff *v.* Ratcliff (1859), 29 L. J. P. & M. 171; Wilson *v.* Wilson (1872), L. R. 2 P. & D. 435; Le Mesurier *v.* Le Mesurier, [1895] A. C. 517; Armytage *v.* Armytage, [1898] P. 178, 185. It seems that residence is not necessary to make the jurisdiction attach: Gillis *v.* Gillis (1874), 8 Ir. R. Eq. 597; Duggan *v.* Duggan,

Court can therefore pronounce a divorce between two foreigners domiciled in England (*q*), and correlatively it should have no jurisdiction to divorce English parties domiciled abroad (*r*). A doubtful exception has, however, been made to the latter rule in the case of an English marriage between British persons where the husband has changed his domicil (*s*). An English Court has heard a divorce suit between parties not then domiciled in England where the respondent appeared unconditionally (*t*), but this has been disapproved (*tt*), and now the fact of an English domicil must be alleged in the petition. As said above, matrimonial domicil will not give jurisdiction to an English Court or support a foreign decree for divorce (*u*).

The standard of domicil is also accepted in foreign countries like France (*x*), Austria (*y*), Belgium (*z*), and others which adopt nationality as the governing law for all questions of status. In France formerly all such jurisdiction was refused (*a*), but the Courts have lately laid down the general rule that they have a facultative jurisdiction over foreigners in divorce, and the Courts will now generally assume jurisdiction in matters of divorce and judicial separation unless the respondent is able to establish that he possesses a real domicil in another country where the action can be raised (*b*). This jurisdiction has been exercised over foreigners who

Melbourne S. C., L. T. 64, 152, December 29th, 1877, Foote, 118; Wharton, 209; Dicey, 256, and 1st ed., American Notes, 283, citing cases. So Savigny, s. 379, Guthrie, 299.

(*q*) Ratcliff *v.* Ratcliff, Indian marriage; Wilson *v.* Wilson, *ante*, Scotch parties; Foote, 116: as to Canada, see Parl. Papers, 1894, 323, 324, at pp. 50 *et seq.*

(*r*) Yelverton *v.* Yelverton (1859), 1 S. & T. 574; 29 L. J. P. & M. 34, restitution of conjugal rights; Le Sueur *v.* Le Sueur (1876), 1 P. D. 139, where Sir R. Phillimore reviews all previous cases.

(*s*) Deck *v.* Deck (1860), 2 S. & T. 90; 29 L. J. P. & M. 129; Bond *v.* Bond, (1860), 2 S. & T. 93. Foote disapproves of them, 121.

(*t*) Callwell *v.* Callwell (1860), 3 S. & T. 259; Zyclinski *v.* Zyclinski (1862), 2 S. & T. 420. In the United States appearance will not give jurisdiction when it is otherwise wanting: Kinnier *v.* Kinnier, 45 N. Y. 535.

(*tt*) Armitage *v.* A.-G., [1906] P. 135, 140; Gorell Barnes, P.; Dicey, 261.

(*u*) The decision in Santo Teodoro *v.* Santo Teodoro (1876), 5 P. D. 79, is probably referable to the matrimonial domicil being stipulated for in the marriage contract.

(*x*) 1893, J. 152, C. A., Paris.

(*y*) 1893, J. 212, Vienna, S. C., where the parties also submitted to the Court, and had their last common domicil there.

(*z*) 1887, J. 215; 1889, J. 712; 1891, J. 1011, Ghent.

(*a*) 1885, J. 383, 385, Clunet.

(*b*) Trib. Seine, May 24th, 1897, Zacchire, Journal du droit int. pr., 1898, p. 111; Trib. Seine, January 21st, 1897, Keller, *ibid.*, p. 115; Trib.

were married and are domiciled in France, certainly if domiciled with the sanction of the authorities (*c*), and also even without it if the parties accept their jurisdiction (*d*) or appear unconditionally (*e*); where the domicil of the parties is uncertain and it cannot be shown that any other Court could do the parties justice (*f*); and where both parties do not consent, it has been held that it is incumbent on the defendant to show not only his foreign nationality, but also that he has a real domicil abroad which is the proper *forum* in the matter (*f*). Whether the Court must take the objection itself (*d'office*) or whether the objection only lies *ratione personæ* is not yet definitely decided, but the current of later decisions supports the latter view (*g*). But the tribunals will decide the case on the grounds admitted by the national law (*h*), and if the parties' personal law does not allow divorce French Courts will not grant it (*i*). Where such law refers to the law of the domicil some writers (*k*) consider that the French Courts, if the domicil *de facto* is in France, ought to act on the grounds which are sufficient in purely French cases, and the Belgian Court of Cassation has expressly so decided (*l*), but the contrary has since been held by the Civil Tribunal of Dieppe (*m*). Finally, recent case law permits

Seine, May 10th, 1897, Lacombe, *ibid.*, 115.

(*c*) 1897, J. 335, Vesoul; 1889, J. 814, 623; 1898, J. 895, Amiens; 1892, J. 439, Seine, not if foreigner's marriage and domicil are foreign.

(*d*) 1890, J. 878, 883.

(*e*) 1898, J. 352, Algiers; 1904, J. 382, Aix, C. A.; 1891, J. 1189; 1886, J. 584; 1890, J. 884.

(*f*) 1893, J. 370, C. A., Paris, 373, *ibid.*, 1166, Seine; 1898, J. 111, Seine; 1894, J. 123, C. A., Paris; 1894, J. 823, Orleans; 1895, J. 97, C. A., Paris; 1896, J. 602, Seine, persons established in France, offence committed there, and wife formerly French; 1896, J. 149, C. A., Paris; 1897, J. 533, Seine; *ibid.*, 331; 1888, J. 87, Dijon; 1887, J. 609; 1898, J. 927. The French Courts went on the same principle in granting *séparation de corps* when divorce was not allowed in France.

(*g*) 1891, J. 1193, Seine; 1885, J. 318; 1890, J. 874, 875, 887, 479, 483; 1893, J. 151, 374.

(*h*) Cass., February 12th, 1895, Lenthe, Gaz. des Trib., February 13th, 1895; Trib. Seine, December 11th, 1889, Emmanuel, Le Droit, December 23rd, 1889; 1895, J. 834.

(*i*) *E.g.*, Spanish, 1892, J. 662, Algiers; 1896, J. 151, Bar-sur-Aube; and see *post*; 1900, J. 955, Montpellier; or Portuguese, 1890, J. 107, Seine; perhaps Italians, see *post*; 1891, J. 505.

(*k*) See Vincent and Penaud, Dict., tit. Sép. de Corps, No. 70.

(*l*) Cass. Belge, March 9th, 1882, Bigwood; Sirey, 82, iv., 17.

(*m*) Trib. Civ., Dieppe, April 2nd, 1896, Eastabrook *v.* Eastabrook, 1899, J. 360. See on this subject and on the theory of *renvoi* generally, Notes on the doctrine of *renvoi* in Private International Law, by John Pawley Bate (Stevens, 1901).

a foreigner who has become naturalized in France to obtain the benefit of the French law in the matter of divorce although he may have applied for naturalization for that very purpose (*n*).

In Germany, until the Code of 1900, domicil was the basis of jurisdiction in divorce, but its place has now been taken by nationality (*o*). The Court of the district in which the husband is domiciled is, as a rule, exclusively competent to try a petition for divorce or judicial separation; if the husband is of German nationality without being domiciled in Germany the German Court in the district of which he had his last domicil is also competent to try the petition. If neither of the spouses is of German nationality a German Court is not competent to try the petition unless such Court has jurisdiction under the law of the State of which the husband is a subject (*p*). This principle is recognised by the Hungarian law (*q*). In Switzerland foreigners domiciled there can sue in the Courts for divorce if they can show that the decree will be recognised in the country to which they belong (*r*). In Italy, where the municipal law does not allow divorce, there is some difference of opinion as to the competence of the Italian Courts to entertain petitions for divorce by foreigners, or to sanction the execution of such decrees pronounced by competent foreign Courts. With few exceptions (*s*) the Italian Courts have held that they have no original jurisdiction in this matter. In Denmark the Court of the domicil is regarded as the only competent Court for this purpose (*t*).

The Hague Convention assigns jurisdiction in divorce to the tribunal of the parties' domicil as well as to their national tribunal to the extent that the latter Court has not jurisdiction reserved to

(*n*) Court of Appeal, Paris, May 12th, 1893, Menabrea; Le Droit, May 18th, 1893.

(*o*) 1884, J. 316, Reichsgericht.

(*p*) Civil Procedure Code, s. 606.

(*q*) Marriage law of 1894, art. 116.

(*r*) Federal Law of Marriage and Civil Status, 1874, art. 56; Barrilliet, 1880, J. 347, 348; 1884, J. 643; 1888, J. 153; 1890, J. 512. When the Federal Code comes into force it will be necessary to show that the country of nationality will recognise the jurisdiction of the Swiss Court and the cause of divorce which is in question; see art. 7h, added to the Federal Law of June 25, 1891, by art. 61 of the Final Title to the Civil Code.

(*s*) Ancona, C. A., March 12th, 1884, Foro Ital. 1884, i. 574; Genoa, Trib. June 7th, 1894, Giur., Ital. 1894, 554; Milan Trib., June 2nd, 1897, Monitore, 1897, 514.

(*t*) 1895, J. 191, Sweden; 1904, J. 205, Copenhagen, Court of Appeal.

it exclusively by its law (*u*), though the cause of divorce must satisfy the national law and the *lex fori* (*v*).

The general rule, however, in the modern Codes, as with the modern jurists, is to make the law of the nationality the governing law in divorce (*x*); and the Hague Convention makes compliance with that law a necessary condition of the petition, while it gives exclusive jurisdiction in divorce to the Court competent by the national law for all cases in which that Court has exclusive jurisdiction by its own law, *e.g.*, for religious marriages (*y*). In many countries the Courts will not entertain suits for divorce by foreigners, *e.g.*, Russia (*z*) and Greece (*a*).

A former personal law has no effect for this purpose (*b*), unless in the case of a wife whose husband changes his domicil or nationality after marriage, and therefore hers constructively.

Where Parties have Different Personal Laws.—Position of Wife.—The question what law is to govern the question of jurisdiction in divorce where the spouses have different personal laws has not received the same answer in all legislations and text-books. The general rule is that the wife takes the husband's personal law on marriage, and where that is the law of the domicil she follows his changes of domicil (*c*).

On the Continent, especially in countries in which naturalization of the husband does not carry with it that of the wife, the husband's change of nationality, even (in some systems) though *bonâ fide* (*d*), does not deprive the wife of the right of bringing divorce proceedings in the last common *forum* of the spouses (*e*).

(*u*) Art. 5 (b), Clunet, 1901, J. 231 *et seq.*

(*v*) Art. 2.

(*x*) German Code, Introd. Stat., art. 17; Swiss Code, art. 61; Bar, s. 177; Gillespie, 392; Weiss, iii., 586 *et seq.*; Wharton, s. 209.

(*y*) Art. 1; Art. 5 (b). The Convention is translated into English in Appendix to Kuhn's Meili (1905), pp. 532—534.

(*z*) Russia, 1902, J. 486, Mandelstam.

(*a*) Greece, 1898, J. 962.

(*b*) Bar, Gillespie, 384; Savigny, s. 379, Guthrie, 299; 1902, J. 195; Story, s. 222; Laurent, iii., D. C. I. 302.

(*c*) Burge, vol. ii., p. 52.

(*d*) See *post.*

(*e*) For opinions in favour of husband's actual personal law being decisive, see Belgium, 1878, J. 513; 1896, J. 842, Seine; 1893, J. 847, C. A., Paris; 1896, J. 606, Seine; or in favour of allowing wife to sue in the Court of her residence under such circumstances, see 1882, J. 544, Seine; 1878, J. 164, Chambery; and Clunet thinks this is tendency of French Courts; Italy, 1879, J. 301; Bar, Gillespie, 385 *et seq.*: Weiss, iii., 588, citing 1883, J. 531, Geneva; 1885, J. 177, Seine; 1890, J. 876, *ibid.*: see 1900, J. 955, 958, where Clunet gives authorities *pro* and *contrà* and 1891, J. 505, Italians;

This principle is recognised by the Hungarian law (*f*) in favour of a Hungarian wife. This is the view adopted in the Hague Convention on Divorce, and which prevails in the French jurisprudence (*g*), though the contrary opinion has much support (*h*). This question overlaps with that of divorce *in fraudem legis*, which is afterwards considered. The Convention gives jurisdiction in divorce to the Courts competent by either the national law or the law of the parties' domicil. If according to their national law the spouses have not the same domicil, the competent Court is that of the defendant's domicil. In case of abandonment or change of domicil made after the cause for divorce has arisen, the Court of the last common domicil is also competent (*i*).

In England and Scotland it is settled that a wife cannot have a different domicil from that of her husband, except perhaps if she has been judicially separated from him (*k*); but this has been qualified by the consideration that this must not be allowed to work injustice to the wife and place her entirely in the hands of her husband who could then take advantage of his own wrong (*l*).

1897, J. 333, Nice; 1903, J. 163, Seine. Where spouses of different nationalities marry, law of common domicil governs divorce: 1893, J. 1167, Seine. The personal law of both spouses decides if divorce is admissible: 1895, J. 834, Cassation. In France, since 1893, a French woman married to a foreigner and separated, can naturalize herself abroad without consent of husband, 1895, J. 607, Seine; compare the Bauffremont case, *post*, 1878, J. 505, and 1895, J. 607; and see Transylvanian marriages, *post*. As to Germany, see Introd. Stat. C. C., art. 17.

(*f*) Thus a Hungarian woman who marries a foreigner may sue in Hungary to have the marriage set aside, if she has not followed her husband abroad; and on the like condition if the husband was Hungarian and has changed nationality after giving cause for divorce, she may sue for divorce before a Hungarian Court: Law of 1897, art. 117.

(*g*) See note (*e*), *ante*.

(*h*) See note (*e*), *ante*. See Holland, 1899, J. 869, Cassation; Brazil, 1895, J. 1065, Tunis.

(*i*) Art. 5 (b). In England, in cases where an English woman married a foreigner, with a covenant in the marriage settlement that the matrimonial home should be in England, the Courts have declined to recognise a foreign divorce; and they have granted the wife who remained in England a divorce: Collis *v.* Hector, 1875, J. 445; Santo Teodoro *v.* Santo Teodoro (1876), 5 P. D. 79; see Alexander, 1881, J. 193. An English translation of the Hague Convention relating to divorce may be found in Kuhn's Meili, "International Civil and Commercial Law" (1905), p. 532.

(*k*) Le Sueur *v.* Le Sueur (1876), 1 P. D. 139; 1876, J. 191; Dolphin *v.* Robins, 1859, 7 H. L. C. 390; Redding *v.* Redding, 1888, 15 Sess. Cas., 4th ser., 1102; Low *v.* Low, 1891, 19 Sess. Cas., 4th ser., 115, perhaps where judicially separated.

(*l*) *Ibid.*

It seems that in our law a wife deserted by her husband or whose husband has so conducted himself as to justify her living apart from him, and who up to such time has been domiciled in England, can sue in our Courts for divorce (*m*); but she cannot acquire a new domicil for that purpose (*n*).

In the United States, on the other hand, in view of these considerations the wife is regarded as capable of acquiring a new domicil for the purpose of obtaining a divorce from her husband in such a case (*o*). The general American rule, as stated, makes the guilt or innocence of the wife the crucial point for determining her domicil, and it has been expressly held that when the wife is defendant, in the absence of justification on her part, she is to be regarded for the purposes of the suit as domiciled with her husband (*p*). But in line with the modern tendency (already mentioned when discussing Matrimonial Status) to harmonise the rule of domicil with the statutory extension of woman's rights, a number of American jurisdictions do not under any circumstances adopt the fiction that the wife's domicil follows the husband's for the purpose of maintaining jurisdiction for a divorce. Accordingly the question of her domicil depends not upon her guilt or innocence, but upon the actual facts of the case, namely, as to her actual residence and her intention to maintain such residence (*q*).

II. Proper Governing Law.—This may be either (1) the *lex loci contractus* or place where the marriage was celebrated; (2) the *lex loci delicti* or place where the matrimonial offence was committed; (3) the law of the place where the parties are resident; (4) the personal law. This last is now generally accepted, though whether the standard of domicil or that of nationality respectively be adopted

(*m*) Armytage *v.* Armytage, [1898] P. 185; Westlake, s. 46, p. 80; Dicey, 263 *et seq.*

(*n*) Westlake, s. 51, citing Shaw *v.* A.-G. (1870), L. R. 2 P. & D. 156.

(*o*) Wharton, ss. 224—226; Fraser, 1289; Harteau *v.* Harteau, Mass. 14 Pick. 181; Burlen *v.* Shannon, 115 Mass. 438; Hood *v.* Hood, 11 Allen, 196. In Pennsylvania the injured party must resort to the defendant's *forum* unless the defendant has left the common domicil of both, when plaintiff can sue in his own domicil: Wharton, 482, citing Colvin *v.* Reed (1867), 55 Penn. St. 375; Reel *v.* Elder (1869), 62 *ibid.* 315; and see Platt's Appeal, 80 Penn. St. 501.

(*p*) Cheely *v.* Clayton (1883), 110 U. S. 701; see also Burtis *v.* Burtis (1894), 161 Mass. 508; 37 N. E. 740.

(*q*) Tracy *v.* Tracy (1902), 62 N. J. Eq. 807; 48 Atl. 533; McGrew *v.* Mutual L. Ins. Co. (1901), 132 Cal. 85; 84 Am. St. Rep. 20; and see pp. 368, 789, *ante*, and Burge, vol. ii., 54, 55.

is a question to be decided by the *lex fori*, which may also impose limitations or substitute its provisions for those of the personal law.

In Scotland, as has been already seen, the earlier view was that the law of the country where the parties were actually resident should regulate whether the marriage should be dissoluble or not.

English Decisions Favoured Lex Loci Contractus.—In England, on the other hand, the Courts had seemed to adopt the *lex loci contractus* as the governing law, certainly if that was also the law of the domicil of the parties and if that law was the law of England (*r*).

Lex Loci Delicti not Adopted.—In the jurisprudence of neither country then nor since, nor in any other system, has the dissolubility of the marriage been determined by the *lex loci delicti*, which was only referred to in the cases cited for the purpose of enforcing the adoption of one of the other three laws from which the selection is to be made. This is also the general opinion (*s*).

Burge's Reasoning in Favour of the Personal Law.—The following are the considerations, on which Burge submitted, that neither the *lex loci contractus*, nor the law of the country in which there has been only such a temporary residence as enables a party to sustain a suit, ought to be adopted, but that the appropriate law by which the dissolubility of the marriage is to be determined, is that of the actual domicil; and this conclusion has been approved not only in English and Scottish law, but generally in all jurisprudences.

Lex Loci Contractus Rejected.—The *lex loci contractus* is, and ought to be, invoked only for the purpose of ascertaining whether that which is represented to be a marriage, is so in law, or in other words, whether the relation or status of husband and wife has been legally constituted. When that purpose is answered, and it has been ascertained that according to that law a valid marriage has been contracted, as the connection of the parties with the country in which that law exists, and consequently their subjection to that

(*r*) Lolley's Case (1812), Russ. & Ryan, 237; 2 Cl. & F. 567, n.; McCarthy *v.* De Caix (1831), 2 Russ. & Myl. 614, n.; 3 Hagg. E. R. 642; Conway *v.* Beazley (1831), 3 Hagg. E. R. 642.

(*s*) Lord Lyndhurst, Warrender *v.* Warrender (1835), 2 Cl. & F. 481, at p. 562; Story, C. L., s. 230 a; Foote, 115; Wharton, 232; Bar, Gillespie, 385, 401, and Scottish Courts; Dicey, 256, 1st ed., and American Notes, 283; Germany, 1897, J. 179, Jena. See Gorell Barnes, J., Armytage *v.* Armytage, [1898] P. 178, 194.

law, ceases, so the law itself ceases to be the rule or authority, which governs their conduct or regulates their rights and obligations.

Question of Status, not Contract.—The contract or consent on which the status of husband and wife is founded, should be considered as perfectly distinct from the status itself. The latter is *juris gentium*, and its relations extend so far beyond the parties themselves that, unlike a contract, it is not in their power to prescribe for themselves the rights which it shall confer, or the obligations which it shall impose on them.

It cannot, like an ordinary contract, be dissolved by their mutual consent. Although incurable insanity or any other impediment should intervene, rendering the one party incompetent to perform his part of the contract, and therefore defeating the end and object of the marriage, still the status will subsist. "Solvitur matrimonium partium consensu nullo modo, quia non, ut reliqui contractus merè consensuales, status prior conjugum potest redintegrari" (*t*).

The municipal law of every country takes upon itself to define and declare the rights, duties, and obligations, which shall be incident to the status of marriage, whether that status has been originally constituted under its own law, or under that of any other country.

It would be deprived of its legitimate power, if persons by importing the regulations prescribed by the law of some other country for their exclusive government, could withdraw themselves from those which the municipal law of the country in which they reside had prescribed for all its inhabitants.

It is not, therefore, to the law by which the status is originally constituted, but to the law which, after it has been constituted, defines its rights, conditions, duties, and obligations, that resort must be had, in ascertaining what those conditions, rights, duties, and obligations are.

They are questions not of contract, but of status, and ought to be determined by that law which would be applied to the decision of other questions of status.

The selection of the law, by which not only the rights of

(*t*) U. Huber, de Fam. et Matrim. lib 2. c. 1, s. 9, p. 388; Burge, 1st ed., i. 681. This is now a cause of dissolution in some legislations. See *ante*, *e.g.*, p. 844, Germany.

property, but the personal capacities and powers of the husband and wife are decided, is made on principles, which are equally applicable to, and ought to determine the selection of the law by which the dissolubility or indissolubility of the marriage is decided.

Analogy to Personal Capacity.—Those capacities and powers are decided, not by the *lex loci contractus*, but by the law of the country in which the husband is actually, or in which he intends to be domiciled.

The latter is adopted, because it is that to which it is presumed the parties intend to subject themselves, since it is under that law they are about to enjoy their status. The *lex loci contractus* is rejected because, as the parties quit the place of their marriage, there is no ground for presuming that they intend to conform, nor would it be reasonable that they should be required to conform to a law to which they then are, and may ever after continue strangers.

It is not a very reasonable presumption, that the possibility of dissolving their marriage was in the contemplation of the parties at the time they contracted it. But if it were, it is more reasonable that they should leave it to be decided by the law of the country in which they were about to reside, than by that of the country, with which their connection would cease, when the marriage ceremony was terminated.

Again, if not only the origin, but the continuance of the relationship of husband and wife is to be treated as if it were a matter of ordinary contract, the *lex loci contractus* would not, according to the principles on which this rule is applied to ordinary contracts, be admissible. In the words of Lord Mansfield, which express the principles adopted by all jurists: "The law of the place can never be the rule, where the transaction is entered into with an express view to the law of another country, as the rule by which it is to be governed" (*u*).

The country in which the marriage contract has been celebrated, when it is not that of the actual or intended domicil of the parties, is not the place in which the status is to be enjoyed, or in other words, the contract to be performed.

It has been assumed, that the dissolubility or indissolubility of

(*u*) Burge, 1st ed., i. 684, citing Robinson *v.* Bland (1760), 2 Burr. Rep. 1077. Huber, Prælect., lib. 1, tit. 3, p. 34.

the marriage is an essential part of the contract itself. There seems to be a striking fallacy in this assumption. It confounds the municipal regulations which prescribe the form in which the marriage is contracted, and authorise or disallow its dissolution, and which are limited in their operation to the country in which they are established, with those qualities which are paramount to all municipal law, and are of universal obligation. The only qualities which can be called essential, because they are required as indispensable in the constitution of the conjugal relation in every country, where Christianity and the law of nations are recognised, are the consent and capacity of the parties, and no such propinquity between them as is within the prohibited degrees.

Dissolubility not Essential Quality of Marriage.—The diversity in the laws of different countries, and at different periods in the same country, as to the manner of contracting marriage, abundantly establishes the distinction as it regards the constitution of the status. It also establishes that its dissolubility or indissolubility is not an essential quality of the marriage. It has been forcibly observed, that the qualities of marriages celebrated before *Foljambe's Case*, when the law of England admitted their dissolubility, cannot be distinguished from those which belong to marriages celebrated since that period, when their dissolubility was denied.

The assumption that the indissolubility was an essential quality of a marriage contracted in England, was also inconsistent with the fact, that it might be, and was dissolved by an Act of Parliament.

There was an incorrectness in the expression that an English marriage was indissoluble. It was indissoluble only *sub modo*. It was dissoluble, if the party sought its dissolution by an Act of Parliament, instead of instituting a suit before a judicial tribunal.

In truth, by the law of England a divorce *à vinculo* could only be obtained by a particular proceeding. The necessity of resorting to that proceeding was the local municipal regulation, to which the law of England subjected the status of marriage (*x*).

Merlin considers the effect which the law of France of 1792, granting divorces, and that of the law of 1816, abolishing divorces

(*x*) This reasoning is still applicable to legislations such as that of Quebec, where marriage is still judicially indissoluble; see Note on Parliamentary Divorce in Canada, Parl. Pap. 1894, 323, 324, p. 50 *et seq.*

à vinculo, would have on marriages contracted before the promulgation of those laws. If the dissolubility or indissolubility of the marriage was an essential quality, or in his language, if it were *comme l'état d'époux, l'effet immédiat et la simple conséquence* of the marriage, there could be no doubt that as the status was constituted by the law as it existed at the time of the marriage, the parties would be justified, in the one case, in insisting that their contract was, that their union should be indissoluble, and in the other, that it should be dissoluble in certain cases: "et que, dans l'un comme dans l'autre, ce serait à la loi du temps du contrat qu'il faudrait s'en rapporter sur la force du lien que les parties contractantes auraient formé." But he denies that it is. "Mais ce n'est ni par conséquence ni par interprétation de l'intention dans laquelle a été contracté le mariage, que le divorce est permis ou prohibé. En le permettant, comme en le prohibant, le législateur ne s'arrête ni ne doit s'arrêter a ce que les époux ont ou sont censés avoir voulu au moment où ils se sont unis; il ne s'arrête et il ne doit s'arrêter qu'aux considérations d'ordre public qui lui paraissent en commander impérieusement la faculté ou la prohibition d'après la conduite respective des époux. Et cela est si vrai que vainement deux époux qui se marieraient sous l'empire d'une loi prohibitive du divorce, se réserveraient-ils la faculté de divorcer, comme ce serait en vain que, se mariant sous une loi qui permettrait le divorce, ils renonceraient d'avance à cette faculté, parce qu'à l'une et à l'autre hypothèse s'appliquerait nécessairement la grande maxime consacrée par l'art. 6 du Code Civil, qu'on ne peut déroger par des conventions particulières aux lois qui intéressent l'ordre public et les bonnes mœurs" (*y*).

It has never been insisted, that the *lex loci contractus* ought to be applied in determining for what causes, and under what circumstances, it was competent to grant divorces *à mensâ et toro* (*z*).

Neither has it been assumed, that the cause for which the temporary separation of the parties might take place was an essential quality of the marriage contract. If there were any foundation for such an assumption in respect of a permanent separation dissolving the marriage, it would equally exist in respect of the temporary separation of the parties.

(*y*) Merlin, tom. 16, ss. 3, 2, art. 6, p. 232; Burge, 1st ed., i. 686.

(*z*) See p. 934, *post*.

The means by which the discharge of the duties and obligations of the status may be most effectually secured, the redress which ought to be afforded to either party when they have been violated, the manner in which the public morals and good order of society may be best promoted, are the objects of every State in the municipal regulations, by which it authorises the temporary separation of the parties, and suspends the obligations of the status.

Each State is the best and only judge of the means by which these objects may be most effectually attained, and as it is only bound, so it only professes, to consult the interests of its own subjects. It therefore applies its own law to those who are its subjects, and for whom, therefore, that law was established.

The exclusion of the *lex loci contractus*, and the adoption of that of the domicil in questions of divorce *à mensâ et toro*, afford a strong argument for the exclusion of the former, and the adoption of the latter, in questions of divorce *à vinculo*. The latter, no less than the former species of divorce, is a municipal regulation, and both originate in the same considerations, and are directed to the same objects.

The adoption of the *lex loci contractus*, when it does not allow the dissolution of a marriage, would require that it should be adopted when it does allow the dissolution. Hence, a marriage contracted in Scotland, Germany, or any other State, ought to have been deemed dissoluble in England. But as no judicial tribunal was established in England possessing jurisdiction to dissolve it, the law could not enforce its own principle.

Such a defect of jurisdiction affords an additional ground for doubting the correctness of that principle. The soundness of any principle of international jurisprudence may be reasonably doubted, when the country which adopts it does not afford the judicial means of giving it effect.

But the adoption of the law of the domicil does not involve any such inconsistency. A person who had contracted a marriage in Scotland, and applied to a judicial tribunal in England for a divorce *à vinculo*, would have failed in his application, because the law to which he had subjected himself, either by resorting to it, or by his actual domicil, did not authorise such a divorce. The rejection would be warranted by the *lex loci domicilii*.

Upon these grounds it is submitted, that the adoption of the *lex loci contractus* in questions of divorce is not warranted either by the purpose for which this rule has been established, or to which it has been accustomed to be applied, but that it is at variance with those principles of international jurisprudence which have obtained the general concurrence of jurists, and are best calculated to maintain the legitimate authority of the laws, as well as to promote the common interests of all States.

As its dissolubility or indissolubility is no part express or implied of the contract of marriage, but is an incident to the status of husband and wife, after it has been constituted by such contract, it must be determined by the law to which the status is subject. In a preceding part of this work it has been shown, on the authority of jurists, and, it is conceived, on grounds of public policy, that the law to which it is subject is that of the actual domicil (*a*).

Personal Law preferred to Law of Residence.—The same considerations which exclude the *lex loci contractus* from the decision of the question of dissolubility recommend the adoption of the law of the actual domicil, rather than that of the country in which the residence of the party has been taken up for no other purpose but that of instituting a suit.

It must be admitted that in the cases already referred to a large majority of the judges in Scotland considered that the proof of the residence of forty days was sufficient not only to give the Court jurisdiction, but to warrant its application of the law of Scotland in deciding on the dissolubility of a marriage, when England was not only the place in which it had been contracted, but that in which the parties had their real domicil. Three of the learned judges however, as well as the Consistorial Court, considered that such a residence was not sufficient, and that the law of Scotland ought to be applied only in cases where the party had acquired a real domicil in that country. There is great force in the reasoning by which those learned persons support their opinion (*b*).

Burge's View.—The incidents and qualities of the status are conferred by the law of the country in which the person acquires a residence *animo remanendi*. A state has no interest in, nor does it profess to regulate the condition of those who are to all

(*a*) Pp. 246 *et seq.*, *supra*: Burge, 1st ed., i. 688. So Wharton, s. 211.

(*b*) Gordon *v.* Pye (1815), Ferguss. Rep. 276; Burge, *ubi cit. sup.* 689.

intents and purposes foreigners, except so far as by their acts or conduct, or in respect of their property, they become the objects of its laws.

Thus, when it is said by Burgundus, Lauterbach, Hertius, and other jurists, "tota personæ conditio et status regitur à legibus loci cui ipsa sese per domicilium subjecit," they contemplate not the place of a temporary residence to which the person has paid a transient visit, but "illud domicilium, ubi quis frequentiùs ac diutiùs commorari solet rerumque ac fortunarum suarum majorem partem constituit" (*c*).

Hertius has pointedly contrasted the limited and qualified effect of the law of a place of mere temporary residence with that of the law of the real domicil: "Leges, quæ personæ qualitatem sive characterem imprimunt, comitari personam soleant, ubicumque etiam locorum versetur, tametsi in aliam civitatem migraverit . . . Quandoquidem extera illa civitas in advenam non habet potestatem, nisi ratione actuum, vel bonorum immobilium; in reliquis iste patriæ suæ manet subjectus" (*d*).

In a preceding passage he has explained in what respect, and by what means this partial and limited subjection takes place: "Ratione actuum subjiciuntur cujusque generis personæ, etiam *advenæ sive exteri*, vel transeuntes vel negotiorum suorum causâ ad tempus in civitate commorantes, quatenus nimirum ibi agunt, v. g. contrahunt vel delinquunt" (*e*).

It is perfectly reasonable, and the interests of the civilized world require, that the tribunals of every country should entertain questions of contract between persons who are only its transient visitors, but there is no reason for applying to the determination of the incidents and qualities of their status a law which never professed to regulate it, which they never contemplated, and to which they have no intention by any future residence of conforming.

The law by which the succession to movable property is governed perhaps affords, in the origin and principle of this rule, another reason for adopting the law of the real domicil.

The law of this domicil is applied from the presumption that the owner of this species of property wishes its distribution to be

(*c*) Hertius, De Coll. 1, s. 5; *ibid.*, s. 8, pp. 124, 125.

(*d*) *Ibid.*, p. 123.

(*e*) Hertius, 1, s. 4, p. 121.

made according to that law to which he had by his domicil subjected himself. But his mere casual or transient residence does not afford this presumption, and therefore the law of the country in which he died is not applied, if it be not also that of his real domicil (*ee*).

Modern View Rejects Lex Loci Contractus.—In English law the theory of the *lex loci contractus* being the governing law for divorce, if it was ever intended to apply to cases other than where the parties had an English domicil, has long been given up (*f*); and it has been held that the decree of a competent Court dissolving a marriage celebrated in England between an English woman and a person domiciled and belonging to the State where the divorce was pronounced is recognised in England, even though the grounds of the divorce would not support a divorce in England, *e.g.*, desertion only (*g*). This is the general view of writers and legislations (*h*), with the exceptions hereafter noticed in favour of Catholic marriages in Austria. In Argentina, though a Catholic marriage is similarly treated as indissoluble, and a decree of divorce pronounced at the home of both spouses is not recognised in Argentina, yet if the *lex loci contractus* of the marriage allows divorce, it will be recognised in Argentina (*i*).

Effect of lex fori.—The law of the parties' mere residence is similarly regarded as insufficient in English and foreign law; and the personal law is generally selected for determining the right to divorce, as already stated under the head of jurisdiction. But the *lex fori* has also to be considered. In certain countries, *e.g.*, England, the Courts, once they assume jurisdiction, apply their own law. In other countries, *e.g.*, France and Germany, the personal law of the parties will be given effect to, subject to certain reservations in favour

(*ee*) Burge, 1st ed., i. 690.

(*f*) Warrender *v.* Warrender (1835), 2 Cl. & F. 488, 535; Dolphin *v.* Robins (1859), 7 H. L. C. 390; Shaw *v.* A.-G. (1870), L. R. 2 P. & D. 156, 161; Shaw *v.* Gould (1868), L. R. 3 H. L. 55; Foote, 111—115; Wilson *v.* Wilson (1872), L. R. 2 P. & D. 435. But at the St. Louis Universal Legal Congress (1900), Mr. (now Lord) Justice Kennedy advocated giving exclusive jurisdiction in divorce to the Court of the *lex loci contractus*, Report, p. 55.

(*g*) Harvey *v.* Farnie (1882), 8 App. Cas. 43; Green *v.* Green, [1893] P. 89; 1893, J. 911; and see Pemberton *v.* Hughes, [1899] 1 Ch. 781.

(*h*) Bar, Gillespie, 384; Austria, 1888, J. 124; Sweden, 1883, J. 359, though Olivecrona thinks this wrong, 360; 1885, J. 153, Rittner. So in United States, Dicey, 1st ed., American Notes, 283, 284.

(*i*) Bar, Gillespie, 384; 1886, J. 293, 294; 1903, J. 798.

of their *lex fori*. Thus, as regards foreigners domiciled *de facto* in France a French Court will apply their national law; and where that is uncertain, or not pleaded or raised *d'office* by the Court, French law will govern the case (*k*).

The questions (a) what is the personal law to be applied; (b) where the parties have different personal laws, which is to govern, have similarly been already considered (*l*).

Time of Action Determines Proper Law.—The personal law of the parties at the time of the institution of the proceedings may, however, not be the same as that at the time of the matrimonial offence. In this case, although, as has been seen, the *locus* of the matrimonial offence founding the divorce is not material, the time of its occurrence may be taken in conjunction with the party's personal law, and the act might be a ground for divorce under the personal law of the party at the time of divorce proceedings, though not at the time of its occurrence. On principle it would seem that, if the act was not a ground for divorce when committed, but is a ground for it by a later personal law afterwards acquired, *e.g.*, adultery insufficient under a former personal law which required adultery and desertion, but sufficient under a later one, it should not be taken into account (*m*). This view has been adopted in the Hague Convention (*n*), and the German Introductory Law to the Civil Code (*n*). In Belgium the Courts have taken contrary views (*o*). In the converse case, where a matrimonial offence giving cause for divorce by the parties' then personal law has been committed, provision may be made that a subsequent change of personal law, *e.g.*, by the husband changing his nationality, will not deprive the innocent spouse of the right to claim a divorce for it (*p*). In Massachusetts the earlier legislation seems to have aimed at excluding circumstances happening in any

(*k*) See Labbé, 1885, J. 5; 1899, J. 360. But Clunet criticises this; *ibid.* 363, and see Bar, Gillespie, 393.

(*l*) See *ante*, pp. 908, 912.

(*m*) Bar, Gillespie, 385.

(*n*) Art. 4, explained by Lainé, 1901, J. 240; Introd. Law to German Civil Code, art. 17; 1904, J. 721. See also art. 7h added to the Federal Law of June 25th, 1891, by art. 61 of the Final Title of the Swiss Federal Code.

(*o*) Belgium, 1878, J. 514, decisions both ways as to whether grounds for divorce before naturalization in Belgium are available. Cf. 1890, J. 720; accomplice of guilty Belgian wife is not criminally liable there for adultery in France.

(*p*) So in Hungary, for a Hungarian wife; see p. 913.

foreign country, unless the parties have lived together as man and wife in Massachusetts before those circumstances happened, and one of them was then living in that State. A similar provision refused recognition to a divorce obtained in any other State for something which happened in Massachusetts while the parties were living there unless it was a ground for divorce in Massachusetts. By a later statute of the same State a decree of divorce could be pronounced for facts happening out of Massachusetts if the petitioner has lived for five years there before taking action (*q*). In Pennsylvania formerly jurisdiction depended on domicil at the time of the offence. This was abolished for offences committed in the United States, but not for those outside the country. Decisions in New Hampshire and Louisiana have countenanced this view, but it is generally rejected, and the law of the domicil at time of the suit adopted (*r*).

III. Conflicts as to Dissolubility of Marriage.—This question may be raised by parties marrying in a country which does not recognise divorce at all, or being domiciled in such a country at the time of the marriage in another, and then claiming a divorce in a country where it is allowed on certain definite grounds. It was dealt with in the former edition of Burge's work in connection with the then existing difference between the laws of England and Scotland on this point—by the English law marriage being judicially indissoluble, while by the Scottish law it was so dissoluble for adultery and wilful desertion. With the introduction of judicial divorce into English law in 1857, that difference disappeared.

In recent times this question has been chiefly raised in the case of Catholic marriages in countries which regard such marriages as indissoluble. The Austrian Courts have held that a Catholic marriage between Catholics or between a Catholic and a non-Catholic, whether celebrated in Austria or elsewhere, is indissoluble so far as Austrian subjects are concerned, and that neither a change of religion nor of nationality by one party or both will be recognised as allowing them to re-marry in Austria after obtaining a divorce abroad (*s*).

(*q*) Bar, Gillespie, 383 ; Mass. Rev. Stats. of 1835, c. lxxvi. ; 1843, c. xlvii. ; 1877, J. 459.

(*r*) Wharton, 229—231.

(*s*) 1886, J. 469. An Austrian Protestant subject cannot marry a foreign woman a Catholic and formerly an Austrian who, after getting a separation in Austria, went over to the Reformed Church and, getting naturalized in Hungary, obtained a divorce there ; so *ibid.*, 470—471 ; 1877, J.

As will be seen later (*t*) the Austrian Courts do not allow their law to be evaded by Austrian subjects obtaining a separation in Austria and then changing to the Protestant confession and becoming naturalized in another country, *e.g.*, Hungary, and, after obtaining a divorce there, re-marrying an Austrian (*u*). Similarly in Russia there is no divorce of a Catholic marriage (*x*). On the other hand, in France, previously to 1884, when judicial divorce was re-established there, a foreign decree of divorce pronounced by a competent Court was recognised as valid even where one of the parties was French and the marriage took place in France, and perhaps even where both parties were French, and the parties were allowed to re-marry in France (*y*). In Italy it seems that parties legally divorced in their own country can re-marry there (*z*), and in Argentina the law seems to be similar (*a*). In Quebec the Courts will similarly recognise a foreign decree pronounced by a competent Court for this purpose (*b*), and it is the general opinion that this falls under the general rule that a person's capacity to marry is decided by his actual personal law, subject in some systems to the condition that no fraud has been committed by the party against his proper personal law (*c*). It has been already pointed out (*d*) that a restriction against re-marriage imposed by some systems on the spouse divorced for misconduct has no exterritorial effect.

Conflicts of Law as to Forms of Relief.—Again, the *lex fori* may not contain the remedy which a spouse may be entitled to demand by his personal law, *e.g.*, an Austrian wife may claim separation in Germany, and the German Code only allows divorce or judicial

77—78; 1880, J. 275, and 268—278, Lyon Caen; 1878, J. 385; 1888, J. 412; 1893, J. 932, 935; 1885, J. 157, 158, Rittner; 1898, J. 385; Austrian Civil Code, arts. 111, 115, 116.

(*t*) See p. 931.

(*u*) Transylvanian marriages, see *post*.

(*x*) 1897, J. 130, Tunis Court.

(*y*) 1880, J. 298, Amiens, *contrà*, 1877, J. 39, Douai; 1878, J. 499, Cassation. The period of waiting, ten months, after dissolution of marriage before re-marrying does not apply to foreigners whose personal law does not contain such a provision: 1899, J. 218, Ministry of Justice, overruling 1874, J. 31, Paris, which Clunet approves.

(*z*) 1886, J. 175, Fiore.

(*a*) 1903, J. 798; 1886, J. 294. According to Daireaux, Argentina does not recognise foreign divorces, though pronounced by national Courts, of marriages, which are indissoluble by Argentine law. See *post*.

(*b*) Lafleur, 80 *et seq.*

(*c*) See *post*, pp. 930 *et seq.*

(*d*) See pp. 252, 253.

separation convertible at the option of either party into divorce. It has been held in such a case that the German Court could only pronounce separation *à mensâ et toro* as the remedy provided by the husband's national law (*e*). The *forum* cannot, however, it would seem, be asked to grant divorce to a person whose personal law entitles him to it when its own law does not allow it (*f*). This point is further considered under the next head.

Conflict as to Grounds of Divorce between Personal Law and Lex Fori.—The third case of conflict proposed above (*g*), which law is to govern the grounds of divorce when the law of the country to which the parties belong and that of the *forum* both allow divorce, but on different grounds, has also been answered variously in favour of one or the other law. In English law the *lex fori* decides; and a foreign decree of divorce pronounced by a competent Court of the parties' domicil at that time is recognised in England as valid, although the marriage took place in England and the grounds of the decree are not sufficient according to English law (*h*). This view is taken by the Institute (*i*). In Germany the general rule is that in respect of the right to obtain a divorce or judicial separation the laws of the State of which the husband is a subject (*ii*) are conclusive; but this rule is subject to the following modifications: (a) A matrimonial offence committed while the husband was the subject of a foreign State is not deemed a ground of divorce unless it is also a ground of divorce under the law of such State; (b) if at the date of the petition the husband has ceased, but the wife has continued to be a German subject, German law has to be applied; (c) where foreign law is applied no ground of divorce is

(*e*) 1904, J. 193; R. G. vol. 48, p. 144.

(*f*) See Weiss, iii., 593; Laurent, D. C. I., v., 274.

(*g*) P. 905, *ante*.

(*h*) Harvey *v.* Farnie (1882), 8 App. Cas. 43; 1884, J. 193.

(*i*) Ann., x., 75, 1888.

(*ii*) Civ. Proc. Code, 1902, J. 195. Before the new German Civil Code the *lex fori* governed, especially where it was also the *lex domicilii* of the husband, or the *lex loci celebrationis* of the marriage and the *forum* of the wife, but also where the personal law of the spouses forbade divorce: 1885, J. 316, Dresden (Reichsgericht); 1888, J. 530, Reichsgericht; 1892, J. 732, Hanseatic Court; 1892, J. 1041, Reichsgericht, ground of divorce happening in a foreign country where spouses were resident must also be a ground by *lex fori*. Art. 27 of the Introductory Law to the German Civil Code applies German law to cases where the parties' national law makes German law decisive by *renvoi*: see 1901, J. 158, Reichsgericht; 1904, J. 721, *ibid.*

recognised which is not also a ground of divorce under German law (*k*). In Hungary a ground of divorce based on a foreign law is not recognised unless it is also a ground of divorce by Hungarian law (*l*). Similarly the Hague Convention requires that the causes of divorce must be allowed both by the national law and the *lex fori* (*m*). The view has been expressed that the ground of divorce need only satisfy the personal law; this is not now accepted (*n*). In France it seems that a French Court will only grant divorce to a foreigner if it is allowed by his national law, for a cause valid by that law and one not forbidden by French considerations of public order (*o*). In Belgium a similar principle prevails (*p*). The Monte Video Conference was of opinion that, provided that the cause for divorce was admitted by the *lex loci contractus*, the law of the matrimonial domicil should govern (*q*).

Conflict as to Effects of Divorce.—The effects of divorce on the capacity of the parties, *e.g.*, their right to re-marry, are governed by the parties' personal law (*r*); but the *lex fori* may impose conditions of public order upon them (*s*). It seems, too, that the pecuniary consequences are determined by the personal law (*t*), and such

(*k*) Introductory Statute to Civil Code, art. 17.

(*l*) Law of 1894, art. 115.

(*m*) Art. 2; see Kuhn's Meili (1905), pp. 245—247.

(*n*) See Bar, 396, 397; see Labbé, 1885, J. 415; 1885, J. 318, n.; and Barilliet, 1880, J. 352, applies *lex fori*.

(*o*) Weiss, iii., 602; 1886, J. 710, Seine; 1894, J. 120, Algiers. The laws of both spouses must allow it: 1893, J. 849; 1892, J. 194, Seine; 1899, J. 360, Dieppe; 1885, J. 155, Clunet.

(*p*) 1889, J. 713; 1891, J. 273, 592; 1890, J. 724; 1899, J. 859, Brussels; 1898, J. 182, Liège.

(*q*) See Weiss, iii., 609.

(*r*) 1899, J. 878, Geneva; 1900, J. 405, where French wife *separée de biens* held to become surety for her husband without formalities of Genevese law; divorced wife does not lose nationality acquired by marriage: 1898, J. 717, C. A., Paris; 1899, J. 379, Seine; 1900, J. 792, Lyons; and see 1895, J. 602, Seine, rights of separated wives, French by origin, as compared with those of wives, French by marriage: Scott *v.* A.-G. (1886), 11 P. D. 128; Warter *v.* Warter (1890), 15 P. D. 152.

(*s*) *E.g.*, in France the ten months' interval after dissolution of marriage: C. C. 296; and the former prohibition of marriage between adulterer and accomplice: C. C. 298; Weiss, iii., 603, 604. In the former case it seems by the last decision that the personal law will prevail over this requirement of public order. In New York a divorce pronounced for a cause other than adultery has no effect on property of spouses: 1891, J. 610.

(*t*) Germany, R. G., vol. 38, 198; vol. 41, 175, 191; and with this, Story, s. 230 e, agrees as regards all personal property, but as regards real property the *lex situs* governs.

incidental questions as alimony and the custody of children (*u*); though again, as regards these, the *lex fori* will decide the scale of alimony and the measures for giving effect to it (*v*). Further, the pecuniary results of divorce are by foreign Courts treated as governed by the law governing the marriage at the time of the suit being instituted, and not at the time of the judgment being given (*y*). In England the provisions of the English law would probably govern all such incidental questions as alimony and custody, and, as regards the property rights of the spouses, the Divorce Court has power to vary marriage settlements of divorced persons (*z*).

In the United States it is maintained that wherever a divorce is effectual to dissolve the marriage relation it is also effectual to extinguish any rights of either spouse, not already vested in the property of the other, which by the laws of the State that determines the same are dependent upon the continued existence of the marriage (*a*). Thus where a divorce was granted in a foreign State upon constructive service against a non-resident, it was held that the wife's inchoate right of dower was dissolved as to property in the local State (*b*). But where the Courts of a State refuse to give extra-territorial effect to such a divorce, the attitude would obviously be otherwise, as the status would be considered as affected only within the jurisdiction in which the decree was rendered (*c*). The same reasoning applies to the effect of a divorce granted in one State upon the right of action for alimony in another; and wherever the former view obtains, the divorced wife is entitled to obtain alimony in the local State after a divorce granted upon constructive service in a foreign State (*d*). The custody of the children is a matter within

(*u*) Austria, 1886, J. 463, Vienna, custody of children; Italy, 1893, J. 633, Genoa, custody of children.

(*v*) Germany, 1898, J. 939; 1900, J. 635; 1904, J. 195, Reichsgericht, *lex fori* by *renvoi*.

(*y*) Reichsgericht, 1900, J. 161; see Egypt, 1898, J. 780.

(*z*) Matrimonial Causes Act, 1859 (22 & 23 Vict. c. 61), s. 5; Forsyth *v.* Forsyth, [1891] P. 363, though parties domiciled abroad; Nunneley *v.* Nunneley (1890), 15 P. D. 186.

(*a*) Wharton (1905), p. 529, citing Hilbish *v.* Hattle (1896), 145 Ind. 59; 44 N. E. 20, which was a partition for dower; and Arrington *v.* Arrington (1889), 102 N. C. 491, in which the divorce was held to effect a separation of estates of husband and wife as before the marriage.

(*b*) Gould *v.* Crow (1874), 57 Mo. 200; Thoms *v.* King (1895), 95 Tenn. 60; 31 S. W. 983.

(*c*) Doerr *v.* Forsythe (1894), 50 Ohio St. 726; 35 N. E. 1055, with which compare reasoning in In re Hall (1901), 70 N. Y. Supp. 406.

(*d*) Cook *v.* Cook (1883), 56 Wis. 195; 14 N. W. 33; Thurston *v.* Thurston

the jurisdiction of the Court granting the decree, provided the father be domiciled there, for their domicil follows his ; but Wharton maintains (though citing no judicial authority) that their absence might defeat jurisdiction where the father, though personally subject to the jurisdiction, was domiciled elsewhere (*e*).

A point which has been and still is considered as of importance in this connection is whether the application to a Court to exercise jurisdiction is *bonâ fide* or is made to avoid impediments created by the law properly applicable to the parties.

IV. **Divorce in Fraudem Legis.—Burge's View.**—The competence of the tribunals of one country to dissolve a marriage in case it has been contracted, or the parties have their real domicil in another country, becomes a question, in consequence of its not being dissoluble either by the *lex loci contractus*, or by the law of the real domicil. Hence the party resorts to the tribunal of the foreign country for the purpose of avoiding the disability, or contravening the prohibition imposed by the law of his own country (*f*).

It seems scarcely compatible with the respect which States owe and render to the laws of each other, that the tribunals of one should afford assistance to the subject of another State, in withdrawing himself from the operation of a law which is obligatory on him. Nor is it required by any considerations for the supremacy of its own laws that such assistance should be afforded.

Jurists generally concur in considering that a person by his removal from another country, for no other purpose than that of doing an act which the law of his own domicil prohibited, cannot give to such act the validity or legality which the law would have conferred on it if it had been done by one who had become *bonâ fide* domiciled. This subject has been considered in a former part of this work (*g*). It affords a further ground for not applying the law of divorce in such a case. It has been justly observed that *Lolly's Case* might have been decided on its own peculiar circumstances. He was making an engine of the law of Scotland to defeat the law to which he was properly amenable (*h*). The same observation may be made on the case of *Conway* v. *Beazley*.

(1894), 58 Minn. 279; 59 N. W. 1017 ; *contrâ* Knowlton *v.* Knowlton (1895), 155 Ill. 158; 39 N. E. 595, as to an action for separate maintenance.

(*e*) Wharton (1905), 239 f., p. 530.

(*f*) See pp. 241—246, *supra*.

(*g*) Pp. 261—263, *supra*.

(*h*) Ferguss. App., p. 403.

Modern View.—As was pointed out above (*i*), the difficulty caused by spouses resorting to the Courts of another country than their own for divorce in order to evade the prohibitions or restrictions of their own law does not arise on the theory which adopts the law of the domicil as decisive of the right to obtain divorce, as there is no real change of law. On the theory which makes the governing law for this purpose the national law, there would not seem to be any more difficulty with legislations which require a period of residence before granting naturalization, generally five years; but with a shorter period naturalization might be made a means of evading the parties' real law. This is best exemplified in the case of the Transylvanian marriages in Austria (*k*). An Austrian Catholic and Protestant wishing to obtain divorce which they could not get in Austria, would first obtain separation in Austria and then become naturalized in Transylvania (Hungary), obtain divorce there, and then return to Austria and re-marry. Such marriages, as has already been seen, were refused recognition in Austria.

This was the state of things before 1894, as it was easy to obtain divorce in the Transylvanian Ecclesiastical Courts; but the Hungarian civil marriage law of that year extending also to Transylvania, there are no longer any special Transylvanian marriages. The same principle is, however, applied to Austrians becoming naturalized in Hungary and getting divorced there according to the civil law in fraud of their original law. A recent Hungarian law has now made five years' residence in Hungary a necessary condition of naturalization, but has left a loophole in excepting from this rule persons adopted by Hungarians.

The jurists have taken different views as to the validity of these marriages, treating them as instances of marriages and divorces *in fraudem legis* (*l*). But the prevailing opinion seems to regard them

(*i*) See MARRIAGE, p. 244, *ante*.

(*k*) Bar, Gillespie, 389.

(*l*) Bar, Gillespie, 388, is of opinion that if both spouses are naturalized abroad the divorce is good; and that even if only one spouse is, still that marriage, being a bilateral relation, if it ceases to bind one party, has no force to bind the other. Lyon Caen, 1880, J. 268, 274, following Rittner (see 1885, J. 152), thinks that one party cannot make dissoluble a marriage which was indissoluble. Weiss (i., 460; iii., 587, 588, 589) upholds the divorce if both spouses are naturalized in the new country, but not if only one is, regarding it as a matter for which the personal laws of both parties must agree. See Lehr, 1877, J. 114; Beauchet, 1884, J. 271; Labbé, 1877, J. 22.

as valid internationally if both parties obtain naturalization in another country, but not if only one does so (*m*). In Scotland the motive of parties in resorting to a particular country for divorce is immaterial if a real domicil is acquired (*n*). On the Continent, however, fraud will invalidate a divorce obtained in a foreign Court which could not have taken place in the parties' own country, and even naturalization of both parties if effected for this purpose will not make a divorce so obtained good, or give jurisdiction to the Court of the new country to decree it (*o*).

In the celebrated *Bauffremont Case* it was decided that a wife cannot in French or Belgian law acquire naturalization abroad without the authorisation of her husband, and then obtain a divorce there in fraud of her real personal law. In that case a lady of Belgian birth married a Frenchman in France and then obtained a separation from him there. She then settled abroad without her husband's consent and obtained naturalization, and then got a divorce there, and married in Berlin. In France and Belgium the Courts held that the divorce was invalid (*p*). But a French Court will not *vice versâ* examine whether a foreigner's naturalization in France is *in fraudem* of his law or not (*q*).

Law of United States.—As regards the States of the American Union, in many of them the power of divorce can be exercised only when the parties are inhabitants of the State in which the divorce is sought; and in some the particular period of required

(*m*) The French and other Courts have on the whole followed the balance of juristic opinion: 1889, J. 163, C. A., Paris; 1892, J. 662; and favour the need for naturalization of both spouses: 1894, J. 120; but see *contrà*, 1892, J. 933, Tunis; 1883, J. 531, Geneva; 1885, J. 177, Seine; If there is no change of nationality the divorce is *a fortiori* bad; *ibid.* As to Austria, see 1886, J. 170; 1893, J. 932, n.

(*n*) Carswell *v.* Carswell (1881), 8 Sess. Cas., 4th ser., 901.

(*o*) 1878, J. 268, Paris, Vidal Case; and 603, Seine. In Belgium a *bonâ fide* naturalization (a twenty years' domicil) will found a divorce abroad: 1878, J. 513. The French Minister of Justice will intervene to prevent collusion: 1876, J. 362; 1878, J. 268; Bar, Gillespie, 404, note. In Switzerland an authorisation to become naturalized was annulled by the Federal Council for the reason that the party's sole intention was to obtain a divorce against the prohibitions of his native law: Kuhn's Meili (1905), p. 149.

(*p*) Cassation, 1878, J. 505; see 1877, J. 114, Lehr; 1875, J. 409, Labbé; 1876, J. 5, Holtzendorff upholding the marriage; 1876, J. 260, Stolzal, *contrà*; Bar, Gillespie, 158 *et seq.* A synopsis of the various phases of the case is given in Kuhn's Meili (1905), pp. 243, 244.

(*q*) 1892, J. 933.

residence is defined; in others the laws are silent on these points.

Some of the reported decisions on cases in which the parties seeking divorces resided in another State are founded on the particular provisions of the local statutes (*r*).

The Supreme Court of Massachusetts has refused to give effect to a divorce granted in Vermont to persons who had no actual domicil there, for a cause which was not admissible by the law of the State of Massachusetts where the husband was domiciled and where also the marriage had been contracted. The ground of the decision was that there had been no real change of domicil. "If," said the Court, "we were to give effect to this decree, we should permit another State to govern our citizens in direct contravention of our own statutes, and this can be required by no rule of society (*s*).

But when there had been a *bonâ fide* domicil in Vermont and a marriage contracted in Massachusetts had been dissolved in Vermont by a decree, although for a cause which would not have dissolved the marriage according to the law of Massachusetts, the Court of the latter held the divorce valid.

The Court adopted the following reasoning: "Regulations on the subject of marriage and divorce apply not so much to the contract between the individuals as to the personal relations resulting from it, and to the relative duties of the parties, to their standing and conduct in the society of which they are members; and these are regulated with a principal view to the public order and economy, the promotion of good morals, and the happiness of the community.

"The *lex loci*, therefore, by which the conduct of married persons is to be regulated and their relative duties are to be determined, and by which the relation itself is to be in certain cases annulled, must be always referred not to the place where the contract was entered into, but where it subsists for the time, where the parties have had their domicil and have been protected in the rights resulting from the marriage contract, and especially where the parties are or have been amenable for any violation of the duties incumbent upon them in that relation" (*t*).

(*r*) Hopkins *v.* Hopkins (1807), 3 Mass. Rep. 158; Carter *v.* Carter (1810), 6 *ibid.* 263.

(*s*) Inhabitants of Hanover *v.* Turner (1817), 14 Mass. Rep. 227.

(*t*) Barber *v.* Root (1813), 10 Mass. Rep. 265.

The Supreme Court of New York has refused to assist a party who had gone into Vermont and obtained a divorce for a cause not admissible in New York. It was considered that, as there had been no *bonâ fide* change of domicil from that State to Vermont, it was an evasion of the laws of New York to which its Court would not give effect, and an action for alimony founded on this divorce was therefore dismissed (*u*).

A divorce which had also been obtained in Vermont by the husband who had married in Connecticut, where he and his wife were domiciled, was decided to be invalid as being *in fraudem legis* of the State where the parties were married and had their domicil (*x*).

In Massachusetts by statute a foreign divorce granted in fraud of home law is invalid (*y*). In New Jersey a contrary doctrine prevails, and as long as a domicil was in fact acquired, a fraud against the former personal law is not considered (*z*).

In the United States it has been decided that the divorce of citizens of States is exclusively under State control, and State divorces do not conflict with the Federal Constitution and its prohibition of any law impairing the obligation of contracts (*a*).

V. **Judicial Separation.**—There now seems to be a general approximation, except in England and the United States, to the principle that no distinction as regards jurisdiction should be drawn between divorce and separation; both come under the same rules of general jurisdiction in matrimonial matters. In England this distinction continues, and it is established by the decisions that in order to found jurisdiction in separation, matrimonial residence of the parties is sufficient, or residence of one party (*b*). In France the former

(*u*) Jackson *v.* Jackson (1806), 1 Johns. Rep. 424. See also Marshall *v.* Marshall (1874), 2 Hun. 238.

(*x*) Borden *v.* Fitch (1818), 15 Johns. Rep. 121. See Pawling *v.* Bird's Executors (1816), 13 Johns. Rep. 192, 208, 209; 2 Kent's Comm. 108. So Vischer *v.* Vischer (1851), 12 Barbour, 640; McGiffert *v.* McGiffert (1859), 31 Barbour, 70; Hoffman *v.* Hoffman (1869), 55 Barbour, 269; Kerr *v.* Kerr (1869), 41 N. Y. 272; Hunt *v.* Hunt (1878), 72 N. Y. 217. For similar decisions refusing to hear action by wife in the *forum loci celebrationis* when husband was domiciled in another State, or to recognise divorce obtained without domicil or residence, see New Jersey (1879), and Minnesota cases, Gillespie, Bar, 401; Thorp *v.* Thorp (1882), 90 N. Y. 602.

(*y*) Wharton, 229.

(*z*) Tracy *v.* Tracy (1902), 62 N. J. Eq. 807.

(*a*) Wharton, 223, 204, 205.

(*b*) Armytage *v.* Armytage, [1898]

jurisprudence held that the Courts had no jurisdiction to separate foreigners (*c*); but the later tendency is, as in divorce, to accept jurisdiction if the parties are willing (treating the objection as an incompetence *ratione personæ*, not *materiæ*), and are resident or have married in France, provided that their personal law allows it (*d*), and that they cannot show that another Court would have jurisdiction (*e*). In Italy, where there is no divorce, jurisdiction relates exclusively to separation and nullity proceedings. In these the jurisdiction of the Courts to entertain suits affecting the status or family relations of foreigners resident in that country, including applications for the personal separation of spouses, is generally admitted (*f*), at all events in cases where no issue of incompetence is raised by the defendant; but there is a considerable weight of authority for the view that the Italian Courts are incompetent in such matters, and that, not relatively, but absolutely, so that not even the submission of the parties will

P. 178, 196; 1900, J. 646; Christian *v.* Christian (1897), 78 L. T. 86.

(*c*) 1883, J. 294, Seine, even though domiciled in France; 1886, J. 95, Seine, and see 205; 1884, J. 173, Esperson, and n. (3), Clunet; 1878, J. 45, Seine; 1889, J. 474, Vesoul, though marriage was in France and parties have always since lived there; *ibid.*, 666, C. A., Paris; 1876, J. 220, Milan; 1880, J. 303, 194; see Cassation, 1893, J. 177; 1893, J. 174, C. A., Paris, parties not living in France; 1898, J. 131, Narbonne, incompetence for reasons of public order.

(*d*) 1878, J. 452, Demângeat; 1876, J. 183, Toulouse. In France the Marseilles Court has assumed jurisdiction to separate foreigners, even against an exception of incompetence pleaded by the defendant, if they are domiciled in France: 1876, J. 185, of which Clunet approves; 1890, J. 107, Portuguese, Seine; 1900, J. 114, C. A., Paris; 1897, J. 362, C. A., Paris; 1898, J. 1102, Algiers; 1893, J. 173, Algiers; 1884, J. 191. French law does not allow separation by mutual consent: 1904, J. 188. Appearance will found jurisdiction: 1897, J. 581, Rouen; 1898, J. 755, C. A., Paris; 1890, J. 897, Seine; Italy, 1902, J. 634; Spanish persons canonically married are only separable in Spain by Ecclesiastical Courts. So Monaco, 1895, J. 187.

(*e*) 1893, J. 1201, C. A., Paris; 1894, J. 1031, Lyons; 1895, J. 624, Paris, 627, Seine; Belgium, 1893, J. 443, domicil; 1890, J. 107, Portuguese, Seine.

(*f*) Venice, A. C., July 9th, 1872 (Annali, 1873, iii. 149); Lucca, A. C., December 11th, 1872, September 1st, 1875 (*idem*, 1873, iii. 93; 1876, iii. 33); June 28th, 1877 (Foro Ital., 1877, i. 1190); Ancona, A. C., March 12th, 1884 (*idem*, 574); Turin Cass., February 5th, 1895 (Giur. Torino, 1895, 124); Florence Cass., November 25th, 1895 (Foro Ital., 1896, i. 68); Milan, A. C., June 15th, 1899 (*idem*, 1899, i. 785); Pescatore, Filos. e dott. giurid., ii. p. 89; Saredo, Istit. di Proc. Civ., 3rd ed., p. 257; Ricci, Comm. al Cod. Proc. Civ., 7th ed., p. 239; Fiore in Foro Ital., 1891, i. 1242.

cure the defect (*g*). It has been suggested that the *lex fori* should govern separation, but this has not prevailed except in cases of parties whose nationality is uncertain (*h*). By the Hague Convention competence in regard to separation is put on the same footing as in regard to divorce (*i*), as it is also in the Monte Video Conference resolutions (*k*). There is general agreement that the Court of the residence has jurisdiction to order provisory measures for the support or protection of the wife and children of whatever nationality within their territory, quite apart from consent of the parties (*l*); and this is affirmed in the Hague Convention, which in cases where the spouses are not entitled to apply to the *forum* for divorce or separation, allows them to apply to it for the provisory measures granted by its law in view of the termination of the common life, and these measures will be maintained if after the lapse of a year they are confirmed by the national jurisdiction (*m*). In France a foreign decree of separation requires no exequatur to take effect there except for execution process (*n*).

These provisory measures include alimony (*o*), custody of children (*p*), and restitution of conjugal rights (*q*). In England jurisdiction in all these depends on residence of parties; and in

(*g*) Turin Cass., June 13th, 1874 (Annali, 1874, i. 247); Milan, A. C., February 15th, 1876 (Foro Ital., 1876, i. 431); Florence Cass., April 19th, 1881 (Annali, 1881, 270); Rome Cass., April 4th, 1891 (Foro Ital., 1891, i 1242); Pisanelli, Comm. al Cod. Proc Civ. Sardo, i. 1, 536; Gabba in Foro Ital., 1884, i. 549.

(*h*) Demangeat, 1878, J. 450; 1875, J. 273, Marseilles, uncertain nationality; 1897, J. 362, C. A., Paris.

(*i*) See Art. 5 (b), p. 912, *ante;* Kuhn's Meili (1905), p. 533.

(*k*) See Weiss, iii., 609.

(*l*) France, 1891, J. 1195, C. A.; Paris; 1880, J. 191, 303, Seine; 1903, J. 165, Seine, custody of children; 1882, J. 313, Amiens; 627, Seine; 1881, J. 526, Seine, custody of children; 1883, J. 292, not provision *ad litem;* 1889, J. 666, C. A., Paris; 1885, J. 185, Seine; 1895, J. 624, C. A., Paris; custody of children. Provisory measures as to domiciled foreigners are also allowed by the Hungarian marriage law (art. 118).

(*m*) Hague Convention, art. 6; Kuhn's Meili (1905), p. 533.

(*n*) 1903, J. 833, Clermont; and see 1893, J. 577, Cass.

(*o*) 1890, J. 497, Seine; 1890, J. 878; 1899, J. 571, C. A., Paris; 1881, J. 526, Seine; 1893, J. 1155, Dijon; 1880, J. 303, Paris; 1885, J. 670, Paris; 1892, J. 439, Seine; 1898, J. 909, Seine; provision *ad litem*, 1891, J. 1261, Monaco; 1892, J. 1020, Paris: so 1898, J. 1102, Spaniards, Algiers; 1893, J. 573, Seine.

(*p*) 1891, J. 1195, C. A., Paris; Austria, 1886, J. 463; 1895, J. 624, C. A., Paris; 1903, J. 165, Seine.

(*q*) See next note.

restitution of conjugal rights the jurisdiction ceases when the defendant leaves the territorial limits of the Court (*r*). In cases where the parties are temporarily residing in France the French Court, although it would not be competent to pronounce a divorce, has jurisdiction to prescribe alimony and regulate questions as to separate residence, custody of children, preservation of property and all other incidental measures (*s*).

According to the Hague Convention, separation can only be demanded if the national law and the *lex fori* both admit it, a proposed additional rule—that if the national law allows only divorce and the *lex fori* only separation, separation only can be demanded—having been dropped, as was also one making it necessary for the ground of divorce to be expressly allowed by the two laws. If the *lex fori* allows or provides that the national law shall decide, that law only governs (*t*). English law assigns the decision of this to the *lex fori* (*u*).

VI. **Conversion of Separation into Divorce.**—In some systems, as already seen, separation can be converted into divorce after the lapse of a certain time, *e.g.*, in France and Belgium three years (*x*), in Germany and Switzerland (*xx*), and in Hungary two years; and it may be a question whether this provision of these municipal laws applies to foreigners as well as to natives. In Hungary it does (*y*); in France the personal law is taken as the criterion subject to the *lex fori* (*z*), and it has been decided that a foreigner who after being judicially cited has been separated abroad can get a decree of conversion in France on a ground recognised by his

(*r*) Firebrace *v.* Firebrace (1878), 4 P. D. 63, 67; Newton *v.* Newton (1885), 11 P. D. 11; Thornton *v.* Thornton (1886), 11 P. D. 176; Chichester *v.* Chichester (1885), 10 P. D. 186.

(*s*) Cass., April 16th, 1876, 1878, J., p. 506; Trib. Seine, February 14th, 1898, Papodsky; 1898, J., p. 909.

(*t*) Hague Convention, arts. 1, 2, 3; Kuhn's Meili (1905), p. 532.

(*u*) See Armytage *v.* Armytage, [1898], P. 178, at p. 196; Matrimonial Causes Act, 1857, s. 22.

(*x*) Art. 310 of Code Civil, "when separation has lasted three years the decree can be converted into a judgment of divorce on the demand of one of the spouses."

(*xx*) See pp. 847, 849, 850.

(*y*) In Hungary the conversion of a foreigner's separation may only take place after the foreigner has been naturalized, and only if the cause of separation is recognised as a sufficient cause of divorce by the Hungarian law (law of 1894, art. 115).

(*z*) 1887, J. 469, Lyons; 1889, J. 668, Algiers; 1896, J. 151, Bar-sur-Aube; 1891, J. 505, 195; 1902, J. 841, Seine and C. A., Paris; 1903, J. 163, Seine.

national law, and French law (*a*). In Belgium the Courts will convert a foreign separation into divorce as compatible with their law, if the personal law of the parties allows it, but not otherwise (*b*). Bar thinks that only a person who has become naturalized can transform separation into divorce under his or her new personal law, and a mere change of his domicil cannot have that effect if it does not change his personal law: while a foreign wife who has remained abroad in what was formerly her husband's country, after her husband has acquired a new nationality, can change separation into divorce in her own country (*c*). In France it has been held that a husband of a French marriage who, after getting a separation there (it being before 1884), became naturalized in Hungary and there obtained conversion of the separation into divorce, could not re-marry, as his marriage was indissoluble and the naturalization *in fraudem legis* (*d*).

VII. **Recognition of a foreign decree of divorce or separation.**—This is determined by the same considerations as the exercise of the jurisdiction to pronounce it. In the former edition of Burge this was referred to in considering the subject of Foreign Judgments, at least so far as sentences of a separation *à mensâ et toro* went, with the observation that generally the law of the actual domicil of the parties is admitted to be competent to decree such a separation (*dd*); but while such decrees are subject to the general conditions applicable to foreign judgments, the question of competence or jurisdiction in cases of divorce and separation is important enough to require separate notice, and it is dealt with in what follows (*e*).

In English law a foreign decree of divorce is recognised as valid and not examinable in English Courts, if pronounced by a Court of competent jurisdiction, even though there may have been irregularities of procedure in obtaining it, if substantial justice has been done (*f*): and this is the general view. In French law a foreign sentence, having the force of *res judicata* (*chose jugée*), of divorce (even of French subjects married in France, if in accordance with French

(*a*) 1902, J. 578, 841; and see Hague Convention, arts. 6—9, and 1908, J. 1130.

(*b*) 1887, J. 214, Brussels; 491, Liège; 1900, J. 655.

(*c*) Bar, 387, 388, citing Nobele, 1887, J. 575; Humblet, 1888, J. 461.

(*d*) 1889, J. 463, C. A., Paris.

(*dd*) Vol. iii., ch. xxiv.

(*e*) See Gorell Barnes, J., Armytage *v.* Armytage, [1898] P. 178, 190.

(*f*) Pemberton *v.* Hughes, [1899] 1 Ch. 781; 1901, J. 821; Foote, 115.

law) pronounced by a competent Court is held to be a declaration of status which requires no exequatur to take effect in France, though for measures taken to enforce it such sanction is necessary (*g*). Thus in France, while a foreign divorce of French persons, if in accordance with French law, is upheld in France, a foreign divorce of Frenchmen for causes outside French law is regarded as null in France (*h*). In Belgium the law is the same. In Italy there

(*g*) 1892, J. 1022, C. A., Paris; 1898, J. 138. Cf., however, *ibid.*, 130, and 1898, J. 129, Seine; 1900, J. 597, Besançon, foreign divorces of French subjects; 1893, J. 365, Seine, exequatur required for custody of children; 1888, J. 86, Seine; 1903, J. 833, Clermont, so of foreign separation; 1882, J. 74, 76, no exequatur necessary. A French Court will not, perhaps, recognise a foreign divorce of foreigners, not subjects of the tribunal, which is based on a principle of jurisdiction not accepted in French law, *e.g.*, German divorce of Italians on ground of domicil: 1901, J. 967, and 138, Seine; *contrà*, 1902, J. 103, Seine; and it has refused, before divorce was re-established in France, to treat a foreign divorce as equivalent to a separation in France: 1882, J. 89, Seine. To be executory, such judgments must fulfil conditions of French law, publication and registration: 1901, J. 545, Besançon. Irregularity in the procedure of obtaining the foreign divorce would, it seems, prevent its recognition in France: Clunet, 1901, J. 821, note to Pemberton *v.* Hughes. In Belgium, a foreign divorce good by the national law of the parties will be recognised if compatible with public order: 1881, J. 485, Picard.

(*h*) Weiss, iii., 593. Jewish divorces in France are governed by Jewish law if their personal law so provides: 1898, J. 114; 1888, J. 86, T. C., Seine; *ibid.* 87, Dijon; 1882, J. 89; 1883, J. 160, *ibid.* Thus the incapacity formerly imposed on a French adulterous party to marry his or her accomplice followed them abroad, and French Courts did not recognise their marriage: Code Civil, s. 298, now repealed by law of December 15th, 1904. For French divorces of foreigners see 1893, J. 154; 1902, J. 590 (nationality uncertain, Austrian *heimathslose*). Thus Italians cannot be divorced in France: 1891, J. 504, Algiers; 1891, J. 1194, Seine. Nor Spaniards: 1897, J. 535, Pau; 1896, J. 151; 1892, J. 662, Algiers; 1899, J. 350, Narbonne; *ibid.*, 127, Bayonne; see 1885, J. 415, 416; Feraud Giraud, 1885, J. 383. Weiss is of opinion that the personal law of the spouses should be allowed to govern: 600. So Bar, Gillespie, 382. French Courts will only divorce foreigners if their national law allows it: 1892, J. 662, Algiers, Spaniards; 1886, J. 707, Seine, Austrian Catholics; 1886, J. 710, Seine. In Turkey divorce jurisdiction over Greeks is retained by native tribunal: 1903, J. 685. For Œcumenical Patriarch's jurisdiction in Levant over Orthodox persons: see 1895, J. 684; 1900, J. 190. Jewish law has been held to govern Jewish divorces of Ottomans: 1898, J. 114; 1903, J. 805, of Russians, 342; 1904, J. 383, Seine, Austrian Jews; 1903, J. J 832, French Jews in Tunis; 1896, J. 848, Jews in Russia; 1893, J. 189, Jews in Germany before the Civil Code. On the other hand, Belgium does not admit Jewish matrimonial law and divorce for Russians: 1899, J. 859, Brussels; nor does Switzerland

is practical unanimity that full effect is to be given in Italy to the decree of a competent foreign Court, in the case of foreign spouses whose marriage was celebrated out of Italy (*i*). Most of the Italian Courts, indeed, take the same view of a foreign decree of divorce, dissolving the marriage of foreign spouses, even if the marriage was celebrated in Italy, and the foreign nationality was acquired by the spouses, who were Italian at the time of the marriage, for the purpose of obtaining a divorce under the law of the foreign State (*k*). Even those Courts which are most hostile towards foreign decrees of divorce recognise their effect on the property relations of the divorced parties, provided these are not Italian (*l*). Subject to the conditions laid down in s. 328 of the German Civil Code a German Court will recognise a divorce of German subjects pronounced by the competent Court of the country in which the husband is domiciled. In Switzerland, which allows all Swiss citizens to sue for divorce in their native Courts (*m*), there was for a long time a controversy whether a foreign divorce of Swiss citizens should be recognised (*n*). When the Code comes into force, such divorces will be recognised if pronounced by the Court of the foreign domicil, even though the divorce could have been pronounced under Swiss law (*o*). In other Continental countries foreign divorces of their subjects are not recognised, *e.g.*, Austria and Hungary (*p*). In the United States a foreign divorce is not recognised if obtained without notice to the defendant, but his appearance will found jurisdiction against him (*q*). In Pennsyl-

allow Rabbis to pronounce divorce: 1894, J. 1150.

(*i*) Turin Cass., November 21st, 1900, Foro Ital., 1901, i., 227; C. F. Gabba, *ibid.*, 1179, note.

(*k*) Milan, A. C., April 11th, 1898, Foro Ital. Rep., 1898, sub voce *Divorzio*, 4; Modena, A. C., April 12th, 1898, *ibid.*, 7–11; Brescia, A. C., April 28th, 1898, Foro Ital., 1898, i., 698; Milan, A. C., December 6th, 1898, *idem*, 1899, i., 299; Venice, A. C., October 4th, 1900, *idem*, 1901, i., 1179, and August 3rd, 1906, *idem*, 1906, i., 1167.

(*l*) Rome Cass., April 4th, 1891, Foro Ital., 1891, i., 1242; Turin Cass., March 23rd, 1893, Giur. Ital., 1893, 526. The Hague Convention provides for the mutual recognition of decrees of divorce and separation (art. 7).

(*m*) See Federal Law of Civil Status and Marriage, 1874, art. 43; art. 7g added to Federal Law of June 25th, 1891, by art. 61 of the Final Title to the Federal Code.

(*n*) See an article by Professor von Salis in Zeitschrift für Schweizerisches Recht, vol. viii., p. 48.

(*o*) Art. 7g of Federal Law of June 25th, 1891, above cited.

(*p*) Austria, Exekutions-ordnung, art. 81 (3); Hungary, law of 1894, art. 114.

(*q*) Cross *v.* Cross, 108 N. Y. 628;

vania the matrimonial domicil is taken as the sole jurisdiction competent to decree a divorce, and no other will be recognised. The plaintiff must therefore seek redress in the *forum* of the defendant, unless such defendant has removed from what was the common domicil of both (*r*). As between the States, however, full faith and credit must be given to a foreign decree if obtained upon personal service of notice within the jurisdiction of the foreign State (*s*). But although a foreign divorce will not be recognised unless complying with these conditions, so far as to give validity to a subsequent marriage, it has been held that its effects within the State where it was granted will be recognised at least for the purpose of legitimating the children of a subsequent marriage born within that State, for it is said that the status of the parties towards one another has been determined so far as concerns the jurisdiction within which the decree was rendered (*t*). The Federal Courts have recently gone a long way toward sustaining the integrity in every State of the Union of a divorce granted in one State upon the basis of domicil. Following the provision of the Federal Constitution that the judgments of a State shall be granted full faith and credit in every State, the Court granted recognition of a divorce decreed against the wife in Kentucky upon constructive service of the summons and complaint, so as to be valid within the State of New York, upon the ground that the wife was in fact domiciled in Kentucky and therefore that the Kentucky Court had obtained jurisdiction over the person of the defendant by means of such constructive service (*u*). Of course, had the jurisdictional fact of the wife's domicil been lacking, a personal service would have been requisite in order to sustain the decree of the Kentucky Court in a foreign State by virtue of the constitutional provision.

VIII. **Nullity of Marriage.**—Jurisdiction in nullity should be determined by the same principles as jurisdiction in divorce, *i.e.*,

15 N. E. 333; New York, C. A., 1888, J. 691; People *v.* Baker (1878), 76 N. Y. 78; 32 Am. Rep. 274; 1880, J. 313; and Lynde *v.* Lynde (1900), see note (*t*), *post*; 1901, J. 391.

(*r*) Colvin *v.* Reed (1868), 55 Pa. 375; approved in Est. of Fyock (1890), 135 Pa. 522.

(*s*) Federal Constitution, art. 4, s. 1, and see Burge, vol. ii., p. 55, note (*y*).

(*t*) In re Hall (1901), 70 N. Y. Supp. 406, citing Lynde *v.* Lynde (1900), 162 N. Y. 412; 56 N. E. 981.

(*u*) Atherton *v.* Atherton (1900), 181 U. S. 155; but see Haddock *v.* Haddock, Burge, vol. ii., p. 55, note (*y*).

either by the law of the domicil or that of nationality. This principle is adopted by the German law (*x*). Bar also gives jurisdiction to the Court of the wife's domicil if she has not followed her husband to his (*y*). In England the Courts go farther, and hold themselves competent to pronounce nullity if the matrimonial domicil of the parties is in England or if the marriage took place there (*z*).

In the United States, the statutes do not usually contain special requisites for jurisdiction (*a*), but the Courts have in practice reached the same result as the English judicial rule. In a recent case in New York (*b*), it is said that, "Inasmuch as no reference is made to residence in actions to annul a marriage, while residence within the State of at least one of the parties is required in actions for the divorce (except in the one instance specified) and for separation, the legislature, in a carefully prepared and elaborated scheme of matrimonial action, intended, in actions to annul a marriage contracted within the State, to confer jurisdiction upon the Courts to adjudicate as to the validity of the contract, irrespective of the residence of the parties."

All countries claim jurisdiction over their subjects' marriages, whether at home or abroad, and foreigners' marriages within their territory (*c*). In France it is held that for causes of form the *lex loci contractus* decides, while as regards absence or want of consent, existence of previous marriage, kinship or alliance between spouses, and disregard of formalities in a foreign marriage the personal

(*x*) Code of Civil Procedure, s. 606.

(*y*) Bar, 390; 1874, J. 73, Seine; Switzerland, Federal law, arts. 43, 56; Martin, 1897, J. 758, 759; Germany, 1902, J. 862, Reichsgericht; Belgium, 1903, J. 410; Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 6.

(*z*) Sottomayor *v.* De Barros (1877), 3 P. D. 1; Niboyet *v.* Niboyet (1878), 4 P. D. 1; Simonin *v.* Mallac (1860), 2 S. & T. 67; 29 L. J. P. & M. 97. Westlake bases it on residence: s. 49, p. 89; Dicey, (2nd) ed., r. 51, 268, bases it on residence or *locus celebrationis;* see Linke *v.* Van Aerde (1894), 10 T. L. R. 426; Brennan *v.* Brennan (1902), 18 T. L. R. 467.

(*a*) See, for example, s. 1742, N. Y. Code Civ. Proc. (ed. 1909).

(*b*) Becker *v.* Becker (1901), 58 App. Div. 374.

(*c*) Austria, 1878, J. 386, last common domicil of Austrian spouses in Austria founds jurisdiction in nullity and divorce; 1886, J. 469 *et seq.*, 1894, J. 1074, even where spouses were never domiciled in Austria; 1898, J. 942; France, 1878, J. 268, 602; 1887, J. 66, 187, not between foreigners; 1885, J. 241; 1899, J. 799. In France residence is enough to found it: 1898, J. 1080; 1902, J. 151; Hay *v.* Northcote, marriage in France, 1900, J. 613, Cass.

law will govern (*d*). It was formerly said that foreign Courts have no right to annul a marriage between French subjects, even though the nullity is due to disregard of the form required by the *lex loci* (*e*); but this has not been approved (*f*). A French Court can entertain a nullity suit in respect of a marriage made abroad between a Frenchwoman and a foreigner, and can also by consent adjudicate on a defence of nullity in respect of a marriage between foreigners (*g*).

The rules of the Institute provide that a marriage can be annulled if contracted outside the conditions of the national law of one of the spouses as regards age, prohibited degrees, publication of banns; as also it can be if contracted outside the conditions prescribed by the national law of the husband as regards consent of parents or guardians. A null marriage may, however, have the effects of a valid marriage if it is a putative marriage (*h*).

(*d*) Weiss, iii., 572 ff, citing cases; 1894, J. 1020, C. A., Lyons; 1875, J. 273, Rouen; 1884, J. 67, Seine; 1884, J. 627; 1882, J. 84, Seine; 1885, J. 296, Pontoise. The same rules apply to foreigners in France, and apply in Italy; 1887, J. 49; Fiore, Weiss, iii., 575.

(*e*) 1877, J. 146, Seine.

(*f*) Clunet, 1877, J. 148.

(*g*) 1880, J. 300, Paris; Wharton, 213; Feraud Giraud, 1885, J. 383, 384.

(*h*) Lausanne Rules, 1888, rr. 8, 9; Ann. x. 77. For putative marriages, see 1889, J. 463, C. A., Paris; 1882, J. 539, Bordeaux (marriage putative by *lex loci*); 1889, J. 616, Algiers.

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