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Robert Waters

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## The Effect of Modern English Statute Law upon the Contractual Status of Infants.

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(*Abbreviation, I. R. A. = Infants' Relief Act, 1874*).

The Infants' Relief Act has largely altered the contractual status of Infants. Before this Statute came into operation the contracts entered into by an Infant were, for the most part, regulated by the Common Law, with one principal statutory exception. This exception arose in connexion with an Infants' Marriage Settlement. Previous to the enactment in question, it had been decided that neither the approbation of parents or guardians, nor even of the Court of Chancery would make in the Infants' settlement binding on him. This inconvenience called for Statute remedy, and in 1855, an Act was passed which enabled Male Infants not under 20, and Female Infants not under 17, with the approbation of the Court of Chancery, to make valid settlements of all their property real or personal and whether in possession, reversion, remainder, or expectancy, (*18 and 19 Vict., c. 43*). Subject to the legal effect of this Statute, and the statutory necessity that ratifications of voidable executory contracts must be in writing, as required by Lord Tenterden's Act, 1829 (*9 Geo., c. 14*), and now repealed as unnecessary, Common Law rules governed the contracts of Infants.

The object of this Essay is to exhibit the effect of modern English Statute Law upon the contractual status of Infants. In order to carry this out we will take the I. R. A. as a dividing line in time. The contracts to which an Infant can be a party will then be separated into divisions which from a legal standpoint appear to be distinct. We will then endeavour to set out and illustrate the legal rules which governed each class of contract, previous to the operation of the I. R. A. The effect of this Act (if any) on each class will be noted and, if necessary, briefly discussed. Later modifications brought about by more recent legislation, and modifications entirely dependent on Statutory enactment subsequent to 1874, will also be dealt with. In treating of the contractual position before and after the I. R. A., we will, usually, consider first the Infants' liability, and secondly his rights against the other party.

Before the I. R. A. became operative, the contracts to which an Infant might have been a party may be differentiated as follows :—

- I. VOIDABLE, *i.e.* capable of affirmation or rejection at the Infant's option.
- II. VALID, *i.e.* capable of being enforced against either party.
- III ABNORMAL, *i.e.* of a nature peculiar to an Infant's position, as—Contracts of Apprenticeship.

As a preliminary to the treatment of I, it is desirable to enquire if, by the Common Law, any contract entered into by an Infant was *absolutely void*. Such contracts as were manifestly to the prejudice

of the Infant are considered by some writers to have been void (*Simpson, Infants 2nd edit., p. 9*). If this view be correct, no such contract could ever be enforced against the Infant either during or after the period of infancy, whether ratified or not. If a "void" contract mean that the obligatory bond is never fastened, then, it would seem that the other party would also be free from liability. Eminent legal opinion, however, regards the contracts of Infants by Common Law to have been voidable only, even if such contracts were clearly not for the Infants' benefit (*Anson, Contracts, 7th edit., p. 107*). There are cases indeed in which it has been said that such and such a contract is void, but they are cases in which it was not necessary to distinguish between void and voidable contracts. Between void and voidable acts and contracts there is much confusion in the older books. The distinction between these two terms must always cut keenly, but we submit that the view before quoted from Sir Wm. Anson may be safely taken as the most correct attainable.

The importance indeed of the distinction is now much lessened by the effect of the I. R. A. Under this Statute large classes of contracts previously voidable are now incapable of ratification, and unenforceable against the Infant, under any conditions. Supposing, however, the legal opinion before-mentioned be open to doubt, there is still a class of contracts, viz. :—those which involve *continuous* liabilities, rights and duties—formerly voidable, and still held to be outside the operation of the Statute—regarding which the differentiation of "void" and "voidable" is of consequence. This importance arises from the fact that the acqui-

escence of the Infant after the attainment of majority affirms this kind of contract, and this acquiescence cannot make a contract binding which was actually void. The liability of the other party would in addition be affected, if we take "void" to mean, that no obligatory bond was formed at all, and both parties are in the same legal situation as they were before. We again, however, submit that the opinion quoted is correct both for continuing and non-continuing contracts, viz.:—that previous to the operation of the I. R. A., the contracts of an Infant when not valid, were voidable at the option of the Infant.

I. We now proceed to consider the contracts, which before 1874, were voidable at the option of the Infant. With the exception of contracts for necessities, and a limited class of contracts for the benefit of the Infant, all contracts entered into by him were voidable at his option.

"The general doctrine is," said the Court in *Williams v. Moor*, (1843), "that a party may, after he attains the age of 21 years, ratify, and so make himself liable on contracts entered into during infancy." (*Anson Contracts*, 7th edit., p. 107.)

In all classes of voidable contracts before the I. R. A. the contract which an Infant had entered into with an adult was binding on the other party. The latter might therefore be sued for a breach of the contract, though he could not enforce it. (*Holt v.*

*Ward Clarendieux*, 1733, 2 Stra. 937; *Warwick v. Bruce*, 1813, 2 M. and S., 205). There was, however, one exception to this rule. An Infant could not obtain specific performance of a contract, for specific performance will not be granted where the remedy is not mutual. (*Flight v. Bolland*, 1828, 4 Russ., 298). This exception still holds good and is not affected by modern legislation.

Some contracts, as before stated, were invalid unless ratified; in others ratification was implied, unless the Infant repudiated the agreement either before, or within a reasonable time after the attainment of full age. The I. R. A. has largely affected that class of contracts which required express ratification. On the other hand, contracts in which ratification was implied unless definitely disaffirmed appear to retain the old legal *status*. We will therefore distinguish these two sub-classes of I., viz.:—

- IA. Voidable contracts which needed for validity express ratification by the Infant.
- IB. Voidable contracts under which an Infant had acquired an interest in land or property of a permanent nature, to which obligations were attached, or which involved continuing rights and liabilities, and which, in order to be avoided required express disclaimer by him on his coming of age.

IA. As before mentioned, the express ratification by the Infant which was necessary for the validity of these contracts, was, by Lord Tenterden's Act, required to be in writing, but this enactment has been rendered

unnecessary by statutory changes, and was repealed in 1875.

The provisions of the Infants' Relief Act are as follows :-

1. "All contracts whether by specialty or by simple contract henceforth entered into by Infants for the repayment of money lent or to be lent, or for goods supplied or to be supplied (other than contracts for necessaries), and all accounts stated with Infants, shall be absolutely void: provided always that this enactment shall not invalidate any contract into which an Infant may by any existing or future Statute, or by the rules of Common Law or Equity enter, except such as now by law are voidable."
2. "No action shall be brought whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification made after full age of any promise or contract made during infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age."

We have to consider the effect of this Statute on contracts voidable by the Infant before the operation of the Act. Contracts voidable in the sense of requiring express ratification for legal validity: *i.e.*, contracts under sub-heading IA. Section I. makes contracts entered into by Infants for the repayment of money lent or to be lent, or for goods supplied or to be supplied, and all accounts stated with Infants, which before were voidable, absolutely void. The language is emphatic. An application was made in *Keeping v. Brown*, (1895 xi. T. L. R., 595), where it was decided that where payment on account had been made in respect of purchases made during and after infancy, the vendor cannot appropriate the payment to the

purchases made during infancy. It is definitely stated in the section that contracts for necessaries, and contracts into which an Infant might enter by any existing or future Statute, or by rules of Common Law or Equity, and which were not voidable at the date of the enactment, were not affected by the Act. Therefore contracts which before 1874 came under our headings II. and III., find their way past the Statute.

Section II. would seem to deal with all contracts except those, which, in the way of inclusion or exclusion come under the operation of section I. That is to say, contracts voidable previous to the operation of the I. R. A., and which are not of the kind rendered void by section I., cannot be ratified under any circumstances on the attainment of full age. They are *unenforceable* against one of the parties, while the contracts specified in section I. are styled "void." The distinction, however, would seem to be a very fine one, on account of the legal interpretation of the latter word being an uncertain sound. The result of the operation of the Statute is that ratification has altogether lost its former legal power of awaking the liability which slept during the period of infancy. It was decided that the Act applied to ratifications made after its passing, of contracts made before that time. (*Exp. Kibble, 1875, 10 Ch., 373.*)

A good example of the application of section II. to contracts of the kind we have been considering is *Smith v. King* (1892, 2 Q. B 547). We quote from Anson (*Contracts, edit. 7, p. 113 and 114*).

King, an Infant, became liable to a firm of brokers for £547 : after he came of age they sued him, and he

compromised the suit by giving two bills of exchange for £50. The firm endorsed one of the bills to Smith, who sued upon it. The Queen's Bench Division held that the bills were a promise, based on a new consideration, to pay a debt contracted during minority, that here was a ratification of the sort contemplated by the Act, and that Smith could not recover.

“We have in the present case,” said Charles J., “first a promise by King during his minority to pay a sum of money ; secondly a promise by him after full age to pay a portion of that sum. It is said that the forbearance of the then plaintiffs to carry on their action afforded a new consideration and a good consideration for King's promise to pay the bills of exchange. In my opinion, however, that case is amply provided for by section 2 of the Act. I think that there was here a new consideration for the defendant's promise ; but the section expressly says that no action shall be brought on such a promise even where there is a new consideration for it. The case of *ex parte Kibble* seems strongly to support that view. In that case the plaintiff had obtained a judgment by default for a debt incurred by the defendant during infancy, and the judgment had been followed by a judgment debtor summons and a petition for an adjudication in bankruptcy. The Court inquired into the consideration for the judgment, and finding that it was a debt contracted during infancy held that section 2 applied to the case, and dismissed the petition for adjudication.”

An Infants' trading debts it must be remembered come under the operation of the Statute. He cannot be sued on his trading debts, nor on contracts entered into by him for the purpose of carrying on a trade. He cannot be made bankrupt in respect of them. They are unenforceable against him. (*Exp. Jones, in re Jones*, 1881 ; 18 Ch., D. 109). In concluding this part

of the subject we again repeat that the Courts have kept voidable continuing contracts on much the same footing as of old.

With regard to the legal position of the other contracting party, it seems clear that in contracts which come under the operation of section II., no change has been made. Whether the void contracts which come under section I. have any obligatory hold on him is a question which, so far as we know, has not yet been brought before the Courts. If by a "void" contract is meant that there is no *vinculum juris*, we cannot see how the liability of the adult party arises. Modern legal opinion appears, however, to hold the view that the liability exists. If that position be correct we can but say that the shifting meaning of "void" is further evidenced.

Although the I. R. A. has rendered express ratification null and void, even though there be fresh consideration for the promise made during infancy, there is often but a short step between the ratification of an old promise, and the making of a new one. Perhaps one effect of the I. R. A. has been to make the Courts studious to prevent the Infant abusing in this respect the privileges given by the Statute, which, to apply an old saw, were given for a shield not for a sword. The treatment by the Law of an Infants' promise to marry is illustrative of this. The legal effect of these cases is thus summed up by Sir William Anson (*Contracts*

p. 114). Where the parties to mutual promises of marriages remain on the footing of an engaged couple after the promisor has attained his majority, the maintenance of the engagement has been held to be a ratification, and to be insufficient to sustain an action for breach of the promise. But where the mutual promises made during infancy are conditional on consent of the man's parents, and the promise is renewed by him after majority with their consent; or where an engagement is made during minority with no date fixed for the marriage, and after the man comes of age, the parties agree to name a day on which it shall take place, the promises so made have been held to be new promises, and the breach of them is actionable. Cases quoted (*Coxhead v. Mullis*, 1878, 3 C. P. D., 439; *Northcote v. Doughty*, 1879, 4 C. P. D., 385; *Ditcham v. Worrall*, 1880, 5 C. P. D., 410).

Two recent cases of a more general character seem also to shew that under certain circumstances in spite of the Act, the ratification of voidable contracts reappears with a slightly altered face. In *Walton v. Etherington* (1884, 1 T. L. R., 396), an Infant entered into an employment, and covenanted, under a penalty, that he would not on leaving solicit his employer's customers. The Infant remained on in the employment after having attained 21. It was held, that assuming the original contract was void, the proper inference to draw was that there was a new contract of service entered into after the Infant came of age.

Again in *Brown v. Harper* (1893, T. L. R. ix., 429), the defendant, while an Infant, in a contract of service to the plaintiff bound himself by a penalty not

to do certain acts, but after attaining the age of 21 he continued in the service as before and his wages were from time to time increased. In an action for injunction to restrain the defendant from doing the acts referred to, it was held, that, even if the original contract was void, the Court would infer that a new contract was entered into between the plaintiff and the defendant after the latter had come of age, and that the plaintiff was entitled to the injunction.

In his judgment in the case of *Ditcham v. Worrall* (1880) before referred to, Lindley, L.J., said :—

“ A so-called ratification which introduces new terms and stipulations, is, at least as to these, a new promise, and is binding as such if there is a consideration to support it, but not otherwise. Where there is a consideration and no new terms introduced, the intention of the parties, if clearly expressed, will afford a test whereby to determine whether there has been a new promise or only a ratification of a former promise. But where the intention of the parties respecting this particular point is obscure, their words or conduct ought to be so interpreted as to render valid the transaction in which they were engaged, if it is also clear that this result, at all events, was intended by them, or if there is no law rendering such interpretation inadmissible.”

We now submit with much doubt and hesitation that another class of contract was before the I. R. A. voidable, but now by its operation is incapable of ratification. In the preliminary analysis we stated that a class of contract previous to the Act was valid. A

prominent example of this class was a contract by which an Infant obtained employment enabling him to live. This contract, as we shall see, is valid still, and recent legislation has but regulated and developed the old legal position. But suppose a contract of this nature purporting to confer this benefit on the minor, but containing extraordinary and unusual terms neither reasonable nor for the Infant's benefit. In *Clements v. L. & N.W.R. Co.* (1894, T. L. R. x., 236), Mathew, J., said in the course of his judgment :—

“It would be impossible to frame any deed between master and servant in which there might not be some provisions against the servant. If we find any stipulations in the deed which make the whole unfair, then it would be *void*. But the stipulation must be so unfair as to make the whole unfair to render it *void against the Infant*.”

According to this judgment it is quite possible for an Infant's contract by which he obtains employment to be “void.” Taken in connexion with Fry L. J.'s judgment in *Francesco v. Barnum*, 1890 (T. L. R., vi. 463), which is approved, we would gather *the decision has old foundations*: Therefore it would be correct to have said, before 1874, that an Infant's contract of this kind, might be described as “void”; as “void” it might be to-day. But as we have seen, high legal opinion states that an Infant's contract was never “void,” but “voidable” only. We repeat that the legal meaning of “void” has been fluttering and uncertain, but this really lessens the difficulty here. We submit (1). That previous to the I. R. A., an unsuitable contract professing to enable an Infant to earn his living was “void” in the sense of being unenforceable against the Infant

*whilst an Infant*, but capable of ratification if the Infant was unwise enough to ratify it on attaining majority. (2). That since the I. R. A. became law such a contract now, as before, is "void" against the Infant whilst an Infant, *and also "void" when he has left infancy behind in the sense of being unenforceable against him whether he ratify or not.*

~~In support of the view that the word "void" is~~ capable of the interpretation suggested, we would refer to *Flower v. L. & N. W. R. Co.*, 1894 (T. L. R. x., 427). This was a contract professing to enable a boy to proceed cheaply and expeditiously to his daily work, but with various conditions attached which were prejudicial to the Infant. The Infant was held not to be bound by the contract, and though the word "void" does not seem to have been used, the judgment may be said to run on the same lines as the two decisions already referred to. The expressions are but "unenforceable" writ large. Inelo

A. L. Smith, L. J. said, "The question was, whether the agreement as a whole, was so much to the detriment of the Infant ~~as to make it unfair that he should be bound by it.~~"

In considering non-continuing voidable contracts previous to, and as affected by the I. R. A., we have confined ourselves to those of an *executory nature*. If consideration passed, what was the legal position before 1874 and what is it now?

When the Infant had received or enjoyed the consideration or part of it, he might avoid the contract but could not recover the purchase money. If he bought goods or used them, the same consequences would

follow. (*Simpson, Infants, 2nd edit., p. 75, quoting L. & N.W.R. v. McMichael, 1850*). Since the I. R. A. the Infant may claim that the contract is void or unenforceable against him by Statute, but the Courts would take a similar view as before regarding the return of consideration. Where an Infant had hired and occupied a house and bought and used the furniture in it, it was held that he could not recover part of the price of the furniture already paid, although he obtained relief from future liabilities. (*Valentini v. Canali, 1889, 24 Q. B. D., 166.*)

Said Lord Coleridge in this case :—

“When an Infant has paid for something and has consumed or used it, it is contrary to natural justice that he should recover back the money which he has paid.”

In short before as well as after the I. R. A. an Infant's right on avoiding a contract, to recover back money paid by him (whether the avoidance be by Common Law right or by Statute) seems to depend on the question whether he has derived any benefit from the contract.

If the consideration has moved from the Infant, and he has received nothing, he could by avoiding the contract recover the consideration or obtain a monetary equivalent (*Coape v. Overton, 1833, 10 Bing, 252*). We are not able to quote a case to shew that since the I. R. A. this principle would still be upheld in connexion with this particular species of contract. We submit that as in *Hamilton v. Vaughan, Sherrin Electrical Engineering Co., 1894, 3 ch., 587*, the decision is followed in the case of continuing contracts, the Courts

would follow similar lines with regard to contracts under IA. We do not forget that here again the meaning of the word "void" in section I. of the I. R. A. may be of importance. Is the other party bound at all? If some modern legal opinion is right in asserting that he is in executory contracts, he is *a fortiori* in this case. If the opinion be incorrect to use Lord Coleridge's words before quoted "it is contrary to natural justice" he should be free when he uses the Infant's consideration without return, and the Courts would doubtless find means of ensuring that "natural justice" is satisfied.

Subsequent to the I. R. A., there is only one other Statute which materially affects the class of contracts we have been considering, viz.:—The Betting and Loans (Infants') Act, 1892, (55 Vict., c. 4), section 5 of which provides

"If any Infant, who has contracted a loan which is void in law, agrees after he comes of age to pay any money which in whole or in part represents or is agreed to be paid in respect of any such loan, and is not a new advance, such agreement, and any instrument, negotiable or other, given in pursuance of or for carrying into effect such agreement, or otherwise in relation to the payment of money representing or in respect of such loan, shall, as far as it relates to money which represents or is payable in respect of such loan, and is not a new advance, be void absolutely as against all persons whomsoever."

"For the purposes of this section any interest, commission, or other payment in respect of such loan shall be deemed to be a part of such loan."

This enactment appears but to strengthen section I. of the I. R. A. The words "absolutely void as

against all persons whomsoever" certainly seem to give "void" here the meaning of unenforceable. If "void" means that the lender and the borrower are not, on account of the character of their agreement, bound together by any *obligatio*, the word of itself would be sufficient, and the five words following a redundancy. The result of the section we submit, is simply to strengthen the legal fort already erected by the I. R. A. to defend the Infant from the money lender.

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## I.B.—Continuing Contracts.

Before the I. R. A. these contracts were voidable by the Infant, but there must have been an express disaffirmation within a reasonable time after the attainment of majority, or the Infant would be bound. As previously stated, continuing contracts may be generally described as contracts under which an Infant has acquired an interest in land or property of a permanent nature, to which obligators are attached, or which involve continuing rights and liabilities. Contracts relating to land, marriage settlements, contracts of partnership, the contracts express or implied, entered into by the shareholder in a Company are leading examples of continuing contracts. The question at first sight appears very natural :—Does not the I. R. A. in one or other of its sections affect all contracts of Infants voidable before its operation ; there is no exemption of a particular species of such contract ?

Until various cases involving these contracts came before the Courts there seems to have been some doubt as to the effect of the Statute. In Chitty on Contracts, 11th edit., p. 153, it is stated that "It may be questioned whether the Statute was intended to apply to those cases in which, as we have seen, the ratification of a continuing contract made by an Infant has been implied from his acts and conduct after he came of age."

The word "voidable" would seem to have a somewhat different signification in connexion with the contracts under the respective headings IA and IB. Contracts which required express ratification might be described as "invalid until confirmed." Continuing contracts as "valid until repudiated." It is submitted that the second section of the I. R. A. might rightly or wrongly have a very wide construction given to it, in fact so as to leave little room for the operation of section I. Nevertheless its language might certainly be construed as failing to include contracts "valid until repudiated." Ratification as read in the section requires *positive* action; potentiality has to be translated into actuality. Section I., as we have seen, applies only to three kinds of contracts. It has been thought that the language of the proviso enlarges the class of contracts falling within the enactment, but so far as we know the best legal opinion coincides with the decision of Mr. Justice Kekewich in *Duncan v. Dixon* (1890, L. T. R. vi., 222). It is interesting to notice that in the course of his judgment he said, "I find it difficult to connect "the first and second sections of the Act together so "as to make a coherent whole."

Whatever value this reasoning may have, the fact

remains, that continuing contracts which formerly needed renunciation by the Infant if he would avoid them, are not affected by the I. R. A. Leading cases which establish this important point are *Whittingham v. Murdy*, 1889, 60 L.T. 956; *Carter v. Silber*, 1892, 2 Ch. (C.A.), 278. In the former case an Infant had become a member of a Building Society, had received an allotment of land, and for four years after he came of age had paid instalments of the purchase money. Then he endeavoured to repudiate the contract. In the course of his judgment Hawkins, J., said :—

“The question I have to decide is, whether the contract he [the Infant] entered into was void or merely voidable, . . . I do not think the original contract was void. The defendant had a right when he came of age to say, I entered into the contract while I was a minor, and I now wish to repudiate it. The Act of Parliament (37 and 38 Vict., c. 62) does not affect such a contract as this. There were many cases cited before me to support this, but it is unnecessary to consider them at length, as the case of *L. & N.W.R. Co. v. McMichael*, 1850 (5 Ex. 97), lays down the principle of law and represents the view I take of it. In that case, as here, the Infant contracted in respect of a subject of a permanent nature. As it is not denied it was presumably for his benefit at the time he made the contract. Under these circumstances an Infant is entitled to repudiate, but if he does not, the contract is treated as still existing, especially if he actually ratifies it.”

It will be noticed that the Judge supports his decision in 1889 with a case adjudicated on in 1850, and expressly states that the 1874 Act does not apply.

An Infant who becomes a *partner* and so makes himself a party to an important species of continuing con-

tract, is in the same legal position as he was in 1821. In that year *Goode v. Harrison* (5 B. and Ald. 159) was decided. We give the case as quoted by Sir Wm. Anson :—

“Where an Infant held himself out as in partnership with X, and continued to act as a partner till shortly before he came of age, and then, though ceasing to act as a partner, did nothing to disaffirm the partnership, he was held liable on debts which accrued, after he came of age, to persons who supplied X with goods.”

“Here,” said Best, J., “the Infant, by holding himself out as a partner, contracted a *continual obligation*, and that obligation remains till he thinks proper to put an end to it . . . . If he wished it to be understood as no longer continuing a partner, *he ought to have notified it to the world.*”

The law is the same now. If an Infant desires to retire from a firm he must express his determination speedily and unequivocally on attaining 21. (*Simpson, Infants, 2nd edit., p. 47*, quoting *Lindley Partnership, 5th edit., p. 76*). While he remains an Infant he incurs no liability (*Lovell v. Beauchamp, 1894, App., Cas. 607*). As between the partners the Infant cannot insist that he shall be credited with profits and not be debited with losses (*L. & N. W. R. Co. v. McMichael, 1850*). If on attaining his majority, his share in the assets being insufficient to answer his share of the losses, the other parties sue him for contribution, possibly the I. R. A. (section I.) might be relied on for defence. If this is correct a solitary exception to our statement of the non-effect of the Statute on this class of contract is provided.

The modern case *Carter v. Silber*, before referred

to has primary reference to that kind of continuing contract so well known as a settlement. Lindley, L. J. said that the deed in question was voidable and not void. Also he said "*it was well settled law that such a settlement was binding upon the Infant unless and until he repudiated it.*" Before 1855, indeed, except in the case of a settlement by a female Infant of her chattels real, or personal estate, to which the adult husband became entitled on the marriage, and in the settlement of which he concurred, repudiation could *always* take place within a legally reasonable time. This exception, however, no longer exists, being put an end to by the Married Women's Property Act, 1882.

This defect of an Infant's personal incapacity could not be supplied by the consideration of a competent settlement, the concurrence of parents or guardians, nor an order of the Court. The law is still the same, except when settlements are made under the Statute about to be mentioned. (*Field v. Moore*, 1855, 7 De G. M. & G., 691; *Seaton v. Seaton*, 1888, 13 App., Cas. 61.)

By the Infant's Settlement Act, 1855 (briefly before referred to), of it is enacted that

"From and after the passing of this Act, it shall be lawful for every Infant upon or in contemplation of his or her marriage, with the sanction of the Court of Chancery, to make a valid and binding settlement, 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, and whether in possession, reversion, remainder, or expectancy; and every conveyance, appointment, and assignment of such real or personal estate, or contract to make a conveyance, appointment, or assignment thereof, executed by such Infant,

with the approbation of the said Court, for the purpose of giving effect to such settlement, shall be as valid and effectual as if the person executing the same were of the full age of 21 years. Provided always that this enactment shall not extend to powers of which it is expressly declared that they shall not be exercised by an Infant." (Section I.)

#### Section IV. provides

"That nothing in this Act shall apply to any male Infant under the age of 20 years, or to any female Infant under the age of 17 years."

Under the Judicature Acts various orders have been made regulating procedure under the Statute, and the action of the Court under different circumstances is governed by sections II. and III. It has been decided by the Court of Appeal that the Act extends to post-nuptial settlements, if the Infant is a ward of Court; (*Re Sampson and Wall*, 25 Ch., D. 467), and by the Chancery Division that there is jurisdiction to direct a settlement under it, after a married female Infant has attained the age of 17, before which age the Act does not apply; but the House of Lords has expressly refused to decide the point, and it must be considered doubtful (*Seaton v. Seaton*, 13 App., Cas. 61). The House of Lords also laid it down that the Act removed the disability of Infancy only, leaving unaffected the disability of coverture (*Seaton v. Seaton*), but this decision can have but little practical effect, owing to the effect upon the latter disability of the Married Women's Property Act, 1882. (See *Simpson, Infants*, 2nd edit., p. 341 and 345.)

An Infant may be a shareholder in a Company. This is expressly contemplated in Companies formed under the Companies Clauses Consolidation Act, 1845. (*3 Vict., c. 16*), for by section 79 provision is made for a minor voting. There is nothing in the Companies Act, 1862, to prevent an Infant being a shareholder. He may subscribe the Memorandum of Association (*In re Nassau Phosphate Co.*, 1876, 2 Ch., D. 610). He cannot, however, compel the Company to register him as a shareholder (*R. v. Midland Co.*, 9, L. T. N. S., 155), and if he has been registered, on the Company discovering that he is an infant, they may reject him as a shareholder. (*Simpson, Contracts, 2nd edit., p. 48 and 49.*) If shares have been transferred to an Infant, the transfer is voidable not only at the option of the Infant, but also at the option of the Company. (*Gooch's case*, 1872, L. R., 8 Ch., 266; *Curtis's case*, 1868, L. R., 6 Eq., 455). If, however, the Infant be accepted as a shareholder, what is his legal position? This liability was, and is still, similar in principle to that which arose and still arises in connexion with the other classes of continuing contracts we have mentioned. If he wish to repudiate his shares he must do so plainly and within a reasonable time after the attainment of majority. But he is also liable in case of non-repudiation to calls which have accrued during infancy (See cases quoted by *Simpson, Contracts*, p. 49). If the Company be wound up during the infancy of the shareholder, his name must be struck off the list of contributories (*Symon's case*, 1870, L. R., 5 Ch., 298). If he is of age, the question depends upon whether or no he has elected to take shares, *i.e.*, whether he has

repudiated the shares within a reasonable time after coming of age, or whether he has exercised acts of ownership over the shares. If the former question be answered in the negative, and the latter in the affirmative, he is liable to contribution (*Lumsden's case*, 1868, L. R., 4 Ch., 31; *Dublin and Wicklow Ry. Co. v. Black*, 1870, L. R., 8 Ex. 181).

As an example of the non-application of the I. R. A. to contracts of this nature, we mention a case decided in 1888 (*In re Yeoland's Consols*, 58, L. T., 922). Here an Infant received an assignment of shares in 1883; he said he would repudiate them, but did not do so. He reached full age in 1886; in 1887, the Company was wound up and he was not permitted to take his name off the list of contributories.

In all continuing contracts as in contracts of an executory nature, to which an Infant is a party, the general rule is that the parties other than the Infant, provided they possess full legal capacity, are bound. It may be said to be within the sphere of exception to this rule, that (1.) the transfer of shares to an Infant is, as we have stated, voidable at the option of the Company as well as the option of the Infant, and (2.) that where the Company at the time of the Infant's coming of age is being wound up, that even if the Infant wish to retain the shares, his name may be removed from the register at the instance of the liquidator. (*Simpson, Infants*, p. 50.)

What is a reasonable *time* to be allowed for repudiation depended and depends on the circumstances

of each case. When the Infant has derived no benefit from the contract, and the position of other parties has not been affected by the delay, the contract may be repudiated after a very considerable time. Thus in one case it was held that a lady could repudiate a settlement made by her 37 years previously as under it she had not received any income. (*In re Jones, Farrington v. Forrester*, 1893, 2 ch., 461). In the two leading cases *Whittingham v. Murdy* and *Carter v. Silber* already quoted for other purposes this question of time of repudiation arose. In the former the payment of four and a-half years' subscriptions to the Building Society effectually excluded repudiation. In the latter it was held that an attempt to renounce a marriage settlement five years after the attainment of majority was not repudiation within a reasonable time. In an ordinary case of partnership liability decided 80 years ago, four months' acquiescence after coming of age was held sufficient to bind the Infant (*Holmes v. Blogg*, 1817, 8 *Tawn* 39).

An Infant shareholder, knowing he is on the Company's register, has been held to be bound by delays of one year, two years, or even five months, coupled with a transfer of some of the shares. (*Simpson, Infants*, p. 49 and 50, and cases there quoted.)

If an Infant avoid a continuing contract on coming of age, from which contract he has received no benefit, can he recover back money paid by him? We have seen that an affirmative answer was given to this

question in <sup>non-continuing</sup> ~~executory~~ contracts by *Coape v. Overton* in 1833, and we submitted would still be given by the Courts. With regard to the class we are now considering the modern leading case is, we believe, *Hamilton v. Vaughan-Sherrin Electrical Engineering Co.*, 1894, 3 Ch., 589. Here a lady aged 18 had allotted to her 20 £5 shares on which she paid £60. The Company afterwards went into liquidation, and on repudiating the shares, she was allowed to prove for the amount paid up. The old cases *Holmes v. Blogg*, 1817, 8 Taun 508; and *Ex parte Taylor*, 1856, 8 De G. M. and G. 254, were followed in principal and the circumstances distinguished. For the Infant to recover his consideration it must be clearly shewn he has derived no benefit from the contract. The two cases mentioned above are still law, the first refers to a contract relating to leaseholds, the later one to a contract of partnership. To both these kinds of continuous contracts we infer the principle acted on in the 1894 case would apply, if the Infant party wished to recover consideration.

We now proceed to consider Infants' contracts which are "valid" and come under heading II. We will sub-divide them as follows :—

IIA.—Contracts for Necessaries.

II B.—Contracts under the Infants' Settlement Act, 1855.

IIc.—Other Valid Contracts.

## IIA.—Contracts for Necessaries.

The term "necessaries" in relation to an Infant's contract does not mean only such things as food, clothing, or lodging, which are necessary to the support of life. "Such Articles as are necessary and suitable to the station, degree, and condition of the Infant," come under the term. (*Peters v. Fleming*, 1840, 6 M. and W., p. 46.) What these articles are, in a particular case, is a question of mixed law and *fact*. As to the respective provinces of Judge and Jury in the decision see *Anson's Contracts*, 7th edit., p. 114 and 115.

Articles which are purely ornamental can never be considered necessaries, because they cannot be requisite to anyone (*Peters v. Fleming*; *Ryder v. Wombwell*, 1868, L. R. 4., Ex. 32). For a long list of articles held to be "necessary" and "non-necessary," under many differing circumstances, see *Simpson's Infants*, 2nd edit., p. 90-92. The limits of legal necessaries are wide, *varying* from daily bread to a racing bicycle. (*Clyde Cycle Co. v. Hargreaves*, 1898, T. L. R. xiv., 338.)

Education in a trade may be considered a necessary and under certain circumstances the Infant is liable on a bond to pay a reasonable premium. (*Walter v. Everard*, 1891, T. L. R. vii. 469.)

Can articles be considered as necessaries when at the time of their purchase by the Infant, he was sufficiently supplied with things of the same kind? Elementary text-books might be a necessary to a student of law, but hardly eight or ten copies of Stephen's Commentaries. The older cases were some-

what in conflict on this point. But in *Johnstone v. Marks* (19 Q. B. D. 509), decided in 1887, it was held that—

“It lies upon the plaintiff to prove, not that the goods supplied belong to the class of necessaries as distinguished from that of luxuries, *but that the goods supplied, when supplied, were necessaries for the Infant.* The fact that the Infant was sufficiently supplied at the time of the additional supply is obviously material to this issue as well as fatal to the contention of the plaintiff in respect of it.”

It is in regard to this over-supply of necessaries we have to mention the only direct effect of modern legislation on the Infant's contract for necessaries. The Sale of Goods Act 1893 (56 and 57 Vict., c. 71) section II. enacted that capacity to buy and sell is regulated by the general law concerning capacity to contract and to transfer and acquire property: provided that where necessaries are sold and delivered to an Infant, or minor, he must pay a reasonable price therefor. The term “necessaries” means goods suitable to the condition in life of such Infant or minor, and to his actual requirements at the time of the sale and delivery.

This enactment did little more than translate case law into Statute law.

A false impression which the Infant may have conveyed to the tradesman as to his station and circumstances will not affect his liability: if a tradesman supplies expensive goods to an Infant because he thinks that the Infant's circumstances are better than in fact they are, or if he supplies goods of a useful class not knowing that the Infant is already sufficiently supplied

he does so at his peril. (*Anson Contracts*, 7th edit., p. 115 and 116.)

Even if given in exchange for necessaries an Infant cannot bind himself by a bill of exchange or a promissory note (*In. re Soltykoff*, 1891, 1 Q. B. 413). The I. R. A. has affected the contracts of Infants which arise under these negotiable instruments. Before they were voidable, now they are void. Indirectly, therefore, the Statute may be said to have slightly altered the legal position of the Infant's contract for necessaries.

With regard to an Infant's liability on a bond entered into by him for necessaries we would quote a portion of Lord Esher's judgment in *Walter v. Everard* (T. L. R. vii., 469, 1891).

“The first and greatest authority on the subject was a statement of Lord Coke (Co. Litt. 172, A.), in which he laid down that if an Infant entered into a double bond—that was to say, a bond for double the amount due, or a bond for a penalty in order to secure the payment of an amount due from him, he could not be sued on the bond; but if he entered into a single bond—that was to say, for the amount due only, to secure the payment of a sum due from him for necessaries—he could be sued on that bond. That seemed most sensible, for, since if there was no bond the Infant could be sued for necessaries supplied to him, it was the height of unreasonable technicality to say that because he had given a bond he could not be sued for the price of the necessaries. . . . A person might, therefore, be sued on a bond entered into by him while an Infant for necessaries, but the action must be treated as if there were no deed, and the plaintiff must show that the things supplied were necessaries to the Infant; that they had been supplied to the Infant by him; and that the price asked for them was reasonable.”

The bond consequently appears to be free from Statutory influence when given by the Infant for necessaries, provided it does not take the form of a penalty bond.

It was long ago the equitable doctrine that one who lent money to an Infant to pay a debt for necessaries was entitled to stand in the place of the creditor for necessaries. (*Marlow v. Pitfield*, 1719, I. P. Wms. 558). This doctrine has been undisturbed by legislation.

The Infant's contracts for necessaries have then, with the exceptions mentioned, been regulated by "judge-made" law since Lord Coke wrote "An Infant "may bind himself to pay for his necessary meat, "drink, apparel, necessary physicke, and such other "necessaries, and likewise for his good teaching or "instruction, whereby he may profit himself after- "wards." (*Co. Litt.*, 172 A.).

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## II B.—Contracts valid under the Infants' Settlement Act, 1855.

For the purpose of this thesis we have written sufficiently at length regarding this species of contract, when treating it as an important Statutory exception, to the voidable continuing contract of Settlement.

### IIIc.—Other Valid Contracts.

The I. R. A. by the wording of its sections leaves unaffected the contracts of Infants valid before 1874. The chief, perhaps the only, example of such contracts valid by Statute previous to that date we have already shortly dealt with. Contracts which by the rules of Common Law or Equity were binding before the Act came into operation are now the subject of enquiry. An attempt will be made to state clearly their legal features unaffected by Statute; and then very cursorily to exhibit these features modified and altered by some members of that large family of Statutes of the last 25 years, which have so strongly influenced the social and industrial life of the Country. Sir Wm. Anson says (*Contracts*, 7th edit., p. 111), "The only illustration (of this kind of contract) which I can adduce is a contract securing permanent employment to an Infant and the means of maintaining himself." We can suggest no addition. The Infant's contract whereby he secures employment will therefore be considered as equivalent to "other valid contracts" under our heading IIIc.

We may submit that a *locus classicus* on this subject is the judgment of Fry, L. J., in *De Francesco v. Barnum*, 1890, T. L. R. vi., p. 464. From this judgment we make the following extract:—

"From the earliest days it had been held that an Infant cannot bind himself by a contract, but to this there were well-known exceptions; one such exception was that an Infant could enter into a contract for being taught a profession or occupation by

which he might thereafter be benefitted, *another exceptions based on the desirability of an Infant being employed, wa, that of a contract by which he obtained employment enabling him to live.* Therefore a contract by an Infant to learn a trade or business was *primè facia* binding on the Infant. But to this there were well-defined and well-known exceptions. Where the contract contained extraordinary and unusual terms, and it was not reasonable and for the benefit of the Infant, the contract was void. It was obvious that such a contract must contain some clauses that were not for the benefit of the Infant; it must contain some terms for the benefit of one party to it and some for the benefit of the other party. The question, therefore, was one of fact, whether the contract, as as a whole, was for the benefit of the Infants.”

The “Infants” in this case were apprentices rather than servants under age, but the Judge, it is noted, applies the same law, so far as relates to the validity and the fairness or unfairness of the terms, to both classes of contracting parties. The contract into which an Infant apprentice enters for being taught an occupation—the contract into which a minor enters for obtaining means to enable him to live—are alike binding on the apprentice and the servant. The legal standard of benefit derived is also similar for both. As further evidence that these are correct, we also extract from the judgment in *Corn v. Matthews*, 1893, T. L R. ix., 183.

“The mere fact that some of the conditions in the deed are against the apprentice does not enable us to say that the agreement is void. It would be impossible to frame any deed between master and servant in which there might not be some provisions against the servant. If we find any stipulations in the deed which make the whole unfair, then it would be void. But the stipulation must be so unfair as to make the whole

unfair to render it void against the Infant. *These observations equally apply to a contract of service and employment with an Infant.*"

We have already attempted to deal with the legal aspect of contracts of service and employment which are vitiated by conditions grossly unfair to the Infant party. If the contract be legally "fair" to the minor and he is therefore bound by it, in case of a breach, what in general terms are his liabilities? Outside Statutory enactment he seems to be liable for damages or to an injunction, but not for a penalty. Riley, an Infant, entered into a contract with the Farmers and Cleveland Dairies Co. to serve them as a milk-seller on certain terms set forth, in a special agreement, one of which was that he would not carry on any such business within five miles of Hull; and that if he did, he would forfeit and pay to his employers £25. It was alleged that he had so acted as to incur the penalty, which the Company sued for. The case was brought on appeal before the Q. B. Division, from the Hull County Court Judge who had decided against the Company. The Court upheld the decision. The Judge, they said, had followed the ancient and well-established rule of law, that an Infant was not liable for a penalty. (*Farmers and Cleveland Dairies Co. v. Riley*, 1893, T. L. R. ix., 260.) Two cases tried before North, J., were quoted, viz., *Evans v. Ware* (1892) and *Batho v. Tunks* (1892). The Court said that in these decisions the Judge had only stated that damages might be recovered. But there was all the distinction in the world between damages—that is, the real damages caused—and a penalty which might be a hundred times the real damage.

As has been stated the law relating to Master and Servant, Employer and Workman, &c., where the second named person in both cases is an Infant, has come within the grasp of several modern Statutes. But a regulated expansion rather than an attenuation has been thereby given. The underlying idea is still the same, viz., an aiming at the benefit of the Infant. The minor cannot be held liable for breach of contract under any of these modern enactments if the agreement has been decidedly against his best interests, for if thus invalidated, we hold, as before stated, it passes over to the ranks of the old voidable contracts rendered incapable of ratification by the 1874 Act. Under 39 and 40 Vict., c. 22, s. 9, any person over 16 may become a member of a trade union unless it is otherwise provided by the rules. An Infant may enter into a valid contract by bond under the Customs Act (39 and 40 Vict., c. 36, s. 165). He may become a member of a building society (37 and 38 Vict., c. 42, s. 38), or a friendly society (38 and 39 Vict., c. 60, s. 15). In these last two cases, however, his contracts might be of the continuing class and so could be directly repudiated after majority if the minor wished to be free from liability. An important Statute affecting the contract of employment is "The Employers and Workmen Act, 1875" (38 and 39 Vict., c. 90), which enlarged the jurisdiction of the County Court in cases of dispute between employers and workmen. The Act also gives jurisdiction in cases of disputes where the amount claimed does not exceed £10, to Courts of summary jurisdiction which it carefully defines. The workman must be "one engaged in "manual labour." He may be *21 or under*, and

the Act will apply to such an one if he has entered into, or worked under, a contract with an employer, whether express or implied, oral or in writing, and whether a contract of service or one personally to execute any work or labour. In 1877 an Infant was held liable for breach of covenant under this Act (*Leslie v. Fitzpatrick*, 3 Q. B. D. 229), the Court being satisfied that the terms were beneficial to him. To shew in detail how the legal position of the Infant has been modified by the numerous Statutes which regulate the contractual bond between master and servant, would almost mean giving an abstract of these lengthy enactments. Suffice it to say that *if the contract with the employer is on the whole to his advantage*, the minor is concerned with nearly as huge body of Statutory legislation as is an adult employee, and has also Statutory advantages peculiarly his own, *e.g.*, The Factory and Workshop Acts, 1878 to 1895. The Coal Mines Regulation Acts, 1887 to 1896, take him under their protection normally as an adult, and abnormally as a "child" or "young person." The Shop Hours Acts, 1892 to 1895 vitiate any contract which a male or female Infant under 18 enters into, which contains terms contrary to the provisions of these Acts.

To briefly illustrate these statements we draw a few leading particulars from the Statutes regulating mining and factory life.

By the Acts (1887—1896) regulating employment in coal mines, the conditions under which young people may be employed (to the extent of which conditions their contractual freedom is of course affected), are as follows :—Boys between the ages of 12 and 16 may

not be employed below ground for more than 10 hours in any day, or 54 in any week. Above ground no boy or girl under 12 years of age may be employed at all; between 12 and 13 the hours are limited; from 13 to 16 they may be 54 per week, but on Saturday afternoon or Sunday their work is forbidden. No boy or girl may be employed more than five hours continuously without an interval for meals. (See 50 and 51 Vict., c. 58, secs. 4, 5, and 7.)

The conditions of an Infant's employment in Factories and Workshops are also studiously regulated by modern legislation. At the age of 18 both males and females cease to be "young persons," and certain provisions for their welfare then cease to be applicable and to a corresponding extent their freedom of contract with the employer is less cribbed, cabined, and confined. But now the female "young person" becomes a "woman," and is, under the Factory Acts, surrounded by a legal environment peculiar to such a personality. On the other hand the male is now an adult workman in the eye of these particular Acts, but in the larger field of vision stretched out before the general law he is under contractual disabilities equally with other infants for three more years. (See Factory Acts, 1878, 1883, 1891, 1895.)

An Infant has the same rights as an adult under the Employers Liability Act, 1880 (43 and 44 Vict., c. 42), and the Workmen's Compensation Act, 1897 (60 and 61 Vict., 37).

By the Naval Enlistment Act, 1884 (47 and 48 Vict., c. 46), a minor of 18 may bind himself to serve in the Navy for a period not exceeding 12 years for continuous and general service; if under 18, he may be bound for a period not exceeding the time required for him to attain the age of 30.

The enlistment for service of soldiers in the army is regulated by the Army Act, 1881 (44 and 45 Vict., c. 58). By section LXXVI., the period must not exceed 12 years. Minors may be enlisted notwithstanding that enlistment is in the nature of a contract. In *R. v. Rotherfield Greys*, 1823, 1 Barn and Cress 345, it was said that public policy requires that a minor should be at liberty to contract an engagement with the State.

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### III.—Contracts of Apprenticeship.

An Infant apprentice is a person (male or female), who, when under age, voluntarily binds himself for a definite term to serve and learn from a master, who covenants to treat him his trade or calling. For the purposes of this thesis we are only called upon to state (1) in what respects the contract of apprenticeship differs from the other classes under headings I. and II., and so justify its differentiation, and (2), the effect of Modern Statute Law upon this special contract.

From *Francesco v. Barnum* and *Corn v. Matthews*, recently quoted, we gather that the rule of law is, that *taking all conditions together* the contract, in order to

be valid, must be of a nature beneficial to the apprentice. So far the contract resembles the valid contract of service. But from the time of *Gylbert v. Fletcher*, 1627, Cro. (3) 179, it has been a rule of law that no action can be brought against an infant apprentice on his covenant to serve. The Courts, however, will not allow this rule to be abused. In *Walter v. Everard*, 1891, T. L. R. vii., 469, already referred to, the apprentice was sued for the balance of a premium secured by a bond. The decision illustrates a relationship between the contract of apprenticeship and the contract for necessaries. The case was acknowledged to be peculiar, the defendant had property; and when the action was brought he was over 21 years of age. The Court of Appeal held that the plaintiff was entitled to succeed on the implied contract for necessaries just as if there was no bond. In the course of his judgment Fry, L. J., said :—

“The only case which had been relied upon for the defendant was that of “*Gylbert v. Fletcher*,” in which it was held that an Infant could not be sued on a covenant in an indenture of apprenticeship to serve his master. The reasons for that decision were not given, but they were probably twofold. In early days a master had at Common Law a very large power of correcting and chastising his apprentices, and by very early Statutes power was given to Justices of the Peace to deal with recalcitrant apprentices, and it was probably felt that it was better to leave the master to his remedy against the apprentice, either in the domestic forum or before the Justice, rather than to allow him to sue him upon his covenant. The case, therefore, did not in any way affect the law as to the liability of the Infant on a covenant to pay for his education.”

An Infant can avoid the indenture the moment he comes of age (*Exp. Davies*, 1784, 5 T. R., 715), but if

he wishes to avoid he must do so within a reasonable time after attainment of majority. A master has no Common-Law right to dismiss his apprentice for ordinary misconduct (*Winstone v. Linn*, 1823, 1 B. and C. 460; *Phillips v. Clift*, 1859, 4 H. and N. 168). He can only do so where the contract gives him the power to dismiss him (*Westwick v. Theodor*, 1875, L. R. 10 Q. B. 224). A master may, however, dismiss an apprentice who, in addition to continued unsatisfactory conduct, is an habitual thief (*Learoyd v. Brook*, 1891, T. L. R. vii., 237).

The master is liable on his covenant to keep, teach, and maintain the Infant (*Ellen v. Toppp*, 1851, 6 Ex. Rep. 424), but although

“In an ordinary apprentice deed the covenants by the master are independent covenants, the performance of which does not depend upon the performance by the apprentice on his part of the obligations imposed him by the deed. . . . where an apprentice by his own wilful act prevents a master from teaching, the master can set this up as a defence when sued upon his covenant to keep, teach, and maintain the apprentice, whether the apprentice has performed his obligation under the deed or not . . . . The master has contracted to teach the apprentice how to carry on a pawnbroker’s trade honestly. That must be the contract by the master. The apprentice, by becoming an habitual thief, has rendered this impossible.” (*Learoyd v. Brook*, 1891.)

’ The master’s power of corporal punishment still exists, but if he use excessive violence or cruelty towards his apprentice, he will be liable to fine or imprisonment (24 and 25 Vict., c. 100. s. 26). The same enactment makes it a misdemeanour if necessary food, clothing, or lodging are withheld from the

apprentice. By 38 and 39 Vict., c. 86, s. 6, to these Statutory obligations of the master, which are repeated, medical aid is added. The penalty of fine or imprisonment is again imposed in case of serious injury through the master's default. If the master become bankrupt the apprentice can avail himself of the provisions of the Bankruptcy Act, 1883 (46 and 47 Vict., c. 52, s. 41, sub-secs. 1 and 2).

The Employers and Workmen's Act, 1875 (38 and 39 Vict., c. 95), enacts, sec. 6 :—

“In a proceeding before a Court of Summary jurisdiction in relation to a dispute under this Act between a master and an apprentice, the Court shall have the same powers as if the dispute were between an employer and a workman, and the master were the employer and the apprentice were the workman, and the instrument of apprenticeship a contract between an employer and a workman, and shall also have the following powers :—

(1) It may make an order directing the apprentice to perform his duties under the apprenticeship ; and,

(2) If it rescinds the instrument of apprenticeship it may, if it thinks it just so to do, order the whole or any part of the premium paid on the binding of the apprentice to be repaid.

“Where an order is made directing an apprentice to perform his duties under the apprenticeship, the Court may from time to time, if satisfied after the expiration of not less than one month from the date of the order that the apprentice has failed to comply therewith, order him to be imprisoned for a period not exceeding 14 days.

“Sec. 12.—This Act in so far as it relates to apprentices shall apply only to an apprentice to the business of a workman as defined by this Act upon whose binding either no premium is paid, or the premium (if any) paid does not exceed twenty-five pounds, and to an apprentice bound under the provision of the Acts relating to the relief of the poor.”

Apprentices have the same rights as normal persons under the Workmen's Compensation Act, 1897 (60 and 61 Vict., c. 37, s. 7, sub-sec. 2).

If an apprentice contract an engagement with the State by enlisting in the Army, the master may claim him, if under 21, and bound by regular indenture for four years. He must, however, carefully observe the procedure prescribed by the Army Act. (44 and 45 Vict., c. 58, sec. 96.)

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## Sea Apprentices

from the year 1703 (2 and 3 Anne, c. 6), have received Statutory treatment peculiar to themselves. Their position, however, is now chiefly governed by that bulky example of codification, the Merchant Shipping Act, 1894. Various special provisions are enacted as to their hiring, &c., secs. 105 to 112. The legal position of apprentices to the *sea-fishing* service is differentiated. Apprentices are not "seamen" within the meaning of the M. S. A., 1894 (s. 742), but they are subject to the same discipline and liabilities, and enjoy the same rights and protection as regards their wages, property and service. The provisions of the Employers' and Workmen's Act, 1875 (38 and 39 Vict., c. 90), have been applied to apprentices to the sea service since 1880 (43 and 44 Vict., c. 16, s. 11).

## Fraud.

When fraud enters into an Infant's contract the legal aspect of his liability is to a degree changed. Equity has for the most part dealt with the question which is little influenced (directly) by Statute law. We make, however, the following quotation from *Simpson, Infants*, 2nd edit., p. 101 and 102, quoting *Exp. Jones* 18 Ch., D. 109.

“Payment by trustees to an Infant who represented himself to be of age was held good ; so also a release given under similar circumstances, and a bond for an advance made to him. The equitable doctrine now prevails ; but it is doubtful whether since the I. R. A. an Infant can be adjudicated a bankrupt for a trading debt, even if he has expressly represented himself to the petitioning creditor as of full age”

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## Torts arising from Contract.

“Where an Infant commits a wrong of which a contract, or the obtaining of something under a contract, is the occasion, but only the occasion, he is liable.” (*Pollock, Torts, 4th edit., p. 50*). This doctrine is illustrated by *Barnard v. Haggis* (1863, 32 L. J. C. P.); and *Burton v. Levey* (1891, T. L. R. vii., 248).

Modern legislation can only be said to have indirectly affected the Infant's position here when by evil doing he was actually passed from the civil to the criminal sphere. In the two cases quoted he may be said to have stayed on the boundary line. In the

report of the latter case, *The Queen v. M'Donald* (15 Q. B. D. 323) was referred to, where an Infant over 14 years of age converted to his own use goods which had been delivered to him by the owner under an agreement for the hire of the same ; it was held that he was rightly convicted of larceny as a bailee of the goods under 24 and 25 Vict., c. 96, sec. 3.

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## Principal and Agent.

The capacity of a person to enter into and incur liability upon a contract of agency, whether as principal or agent, *depends upon his general capacity to contract* (*Smally v. Smally*, 1700, 1 Eq., Ca. Abr. 6). An Infant's contractual position, therefore, as principal or agent is affected by the Statutory regulations already mentioned, so far as they apply to the particular class of contract under review, and to the circumstances of any special agreement. But it is an old legal principle that Infants and others not *sui generis*, though their own contractual capacity is incomplete, can bind the principal for whom they act as agent.





# The Effect of Modern English Statute Law upon the Contractual Status of Married Women.

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*Abbreviations.*—*M. W. P., 1870* = *Married Women's Property Act, 1870.*

*M. W. P., 1874* = *Married Women's Property Act, 1874.*

*M. W. P., 1882* = *Married Women's Property Act, 1882.*

*M. W. P., 1893* = *Married Women's Property Act, 1893.*

*Macqueen* = *Rights, &c., of Husband and Wife, by J. F. Macqueen, 3rd edition, 1885.*

*Lush* = *Law of Husband and Wife, by Montague Lush, 2nd edition, 1896.*

Between 1870 and 1893, legislation to a large extent removed the contractual disabilities of married women which existed prior to the former date. The Act of 1882 (45 and 46 Vict., c. 75), may be called the Citadel Statute, by which the rights *in personam* of a *feme covert* are preserved, while three other Statutes which became law in 1870, 1874, and 1893 respectively, (33 and 34 Vict., c. 93; 37 and 38 Vict., c. 50; 56 and 57 Vict., c. 63), form its outworks. The armament of the two former, however, superseded by the heavier

guns of the citadel, are now only useful in a very limited area, but the last named Act is an important supplement to the central enactment. Previous to the date of the earliest of this group of Statutes, the married woman's contractual position was regulated chiefly by the Common Law, tempered at times by the gentler influence of Equity. The year 1870 will therefore be taken as a time division. We will then endeavour to present briefly but clearly the contractual status of a *feme covert* prior to the operation of the M. W. P., 1870. The successive legal effects wrought by this and the three following M. W. P. Acts will be traced and illustrated. We will also note in the proper place, modifications in the legal position brought about by other Statutes. The contracts of divorced women, and women judically separated from their husbands, will be considered by way of appendix to the main thesis.

Before 1870, a married woman was emphatically an "abnormal" person as regarded her contractual rights and liabilities. There were, however, some exceptional cases.

(1) The wife of the King of England is of capacity to grant and to take, sue and be sued as a *feme sole*, at the Common Law. (*Co. Litt.*, 133 A.)

(2) Under the old law the wife of a man *civiliter mortuus* was, if a trader, liable to bankruptcy (*Exp. Franks*, 7 Bing. 762; also *Sparrow v. Carruthers* cited in *Lean v. Schutz*, 1778, 2 Black W., 1197). The civil

death which arose by taking monastic vows or by abjuring the realm, has of course, long since departed. A man might, however, have been *civiliter mortuus* by conviction and attainder for treason and felony, up to the date of the Forfeitures Act (33 and 34 Vict. c. 23, s. 1), which coincided with the operation of the M. W. P., 1870. Civil death can now arise only from outlawry. The contractual position of the wife of a man now *civiliter mortuus* would probably be placed on a more comprehensive basis by reason of the operation of the M. W. P. Acts. It is possible in this respect she might even be in the eye of the law a *feme sole*.

(3) The custom of the City of London enabled a married woman to trade, and for that purpose to make valid contracts. She could not bring or defend an action upon these unless her husband was joined with her as a party, but she did not thereby involve him in her trading liabilities (*Anson*, p. 121).

The custom as translated from the Liber Albus in the Town Clerk's office, is as follows :—

“Where a *feme covert* of the husband useth any craft in the said City on her sole account whereof the husband meddleth nothing, such a woman shall be charged as a *feme sole* concerning everything that toucheth the craft, and if the husband and wife be impleaded, in such case the wife shall plead as a *feme sole*, and if she be condemned, she shall be committed to prison till she have made satisfaction, and the husband and his goods shall not in such case be charged nor impeached.”

Upon this custom, Mr. Roper says :—

“The trade must be carried on within the City, and on the wife's sole account, it seems, therefore, that if by any means it can

be proved that her husband had any concern in it, the case will not be protected by the custom. The husband's intermeddling is expressly provided against by the custom. He may, however, determine his wife's trading in future, but he cannot do so in retrospect, neither can he do any act to injure her creditors, who are entitled to be satisfied out of her property in trade; but after those demands are satisfied, he may, as it would seem, by law, possess himself of the surplus of her property; for custom does not extend to this point, it regarding only trade and commerce." (*Macqueen*, p. 334.)

(4) Before 1870, in fact up to the date of the M. W. P., 1882, becoming operative, a *feme sole* had certain proprietary rights with regard to her *choses in action* when not held for her separate use. In *Purdew v. Jackson*, 1823 (1 Russ., 1), Sir Thomas Plumer thus states the law on the subject:—

“Marriage is only a qualified gift to the husband of the wife's choses in action upon condition that he reduce them into possession during its continuance. The wife's right is not divested by the marriage. The chose in action continues to belong to her; so that, if the husband happen to die before his wife, she, and not his personal representatives will be entitled to it. The husband, therefore, acquires no right to his wife's chose in action. Reduction into possession is a necessary and indispensable preliminary to his having any right of property in himself, or to his being able to convey any right of property to another. If he does not perform this condition in his life-time, the right of his widow after his death continues unaltered, exactly as if she had never married.”

Choses in action consist generally of personal property recoverable by action, *e.g.*, debts, money on deposit, possibly balance of a current account, arrears of rent, legacies, residuary personal estate, trust funds, &c. Formerly it was considered that negotiable

instruments were choses in possession to which the husband was entitled *jure mariti* (*McNeilage v. Holloway*, 1818, 1 Bam. and Ald. 218), because the husband might endorse his wife's negotiable instruments; but this doctrine has not prevailed (*Sherrington v. Yates*, 1844, 12 Mee. and W., 855).

In this kind of property, therefore, the husband had but an inchoate interest which could only be made absolute by reducing *res in posse* to *res in esse*. Marriage did not divest choses in action out of the wife, but the husband acquired by marriage a right to reduce them into possession. It is obvious that a *feme covert* could not make a valid contract regarding this species of property while her husband possessed these legal powers.

The chose in action, however, might be of such a nature as not to admit of immediate reduction into possession, for example, where it consists of a reversionary interest in a trust fund. The nature of the title the husband could make under this condition is thus expressed in Lord Lyndhurst's judgment in *Honner v. Morton*, 1825 (3 Russ., 65):—

“If at the time of the assignment he is in a condition to reduce the chose in action into possession, the assignment operates immediately. If he is afterwards in a condition to reduce the thing into possession, the assignment will then have full effect; but if he dies before the event happens on which the chose in action may be reduced into possession, the assignment becomes altogether inoperative.”

These words expressing the old law accurately, which we submit, is the case, it is obvious that if the reversion *could not possibly rest in possession until after*

*the husband's death*, no alienation by the husband could defeat the wife's title by survivorship. Regarding reversionary choses in action which fall into possession during the lifetime of the husband, it is apparent at once that the wife's contractual position is the same as in the case of possessory choses in action. Reversionary personalty so conditioned as to absolutely bar the husband's legal touch would seem to be of a differing order, but the Courts have rigidly prevented not only the husband, but husband and wife acting jointly and amicably from assigning such personalty. (See *Wade v. Saunders*, 1824, Taun and Russ., 306; *Whittle v. Henning*, 2 Ph., 731; *Box v. Box*, 1 Drury, 42; an appointment however, by a *feme covert* of reversionary personalty in exercise of a power given by a settlement drawn up in accordance with an ante-nuptial verbal agreement, held to be confirmed by the wife's conduct, is valid. *Greenhill v. North British and Mercantile Insurance Co.*, 1893, L. T. 69, 526.) The contractual power of the wife was therefore *nil* with regard to every species of choses in action, until the operation of the Statute about to be mentioned.

In 1857 an Act was passed (20 and 21 Vict., c. 57), commonly called Malin's Act, which enacted :—

“Sec. 1.—After the 31st day of December, 1857, it shall be lawful for every married woman by deed to dispose of every future or reversionary interest, whether vested or contingent, of such married woman, or her husband in her right, in any personal estate whatsoever to which she shall be entitled under any instrument made after the said 31st day of December, 1857 (except such a settlement as after mentioned), and also to release or extinguish any power which may be vested in or limited or reserved to her in regard to any such personal estate,

as fully and effectually as she could do if she were a *feme sole*, and also to release and extinguish her right or equity to a settlement out of any personal estate to which she, or her husband in her right, may be entitled in possession under any such instrument as aforesaid, save and except that no such disposition, release, or extinguishment shall be valid unless the husband concur in the deed by which the same shall be effected, nor unless the deed be acknowledged by her as hereinafter directed: Provided always that nothing herein contained shall extend to any reversionary interest to which she shall become entitled by virtue of any deed, will, or instrument by which she shall be restrained from alienating or affecting the same."

"Sec. 2.—Every deed to be executed in England or Wales by a married woman for any of the purposes of this Act shall be acknowledged by her, in the manner prescribed by 3 and 4 Will. 4, c. 74; and every deed to be executed in Ireland by a married woman for any of the purposes of this Act shall be acknowledged by her in the manner prescribed by 4 and 5 Will. 4, c. 92; and all and singular the clauses and provisions in the said Acts concerning the disposition of lands by married women, including the provisions for dispensing with the concurrence of the husbands of married women, in the cases in the said Acts mentioned, shall extend and be applicable to such interests in personal estate and to such powers as may be disposed of, released, or extinguished by virtue of this Act, as fully and effectually as if such interests or powers were interests in or powers over land."

It follows, we submit, that from the time this enactment began to operate a married woman might, and still may, deal with her reversionary personalty by a contract made by deed, acknowledged by her, and concurred in by her husband. It may be thought that considering the scope of this thesis we have dealt somewhat fully with legal positions which are rapidly losing importance, but to women married before

January 1st, 1883, whose right to a chose in action has accrued before that date, the law as stated still applies. The two earlier M. W. P. Acts do not affect this kind of interest, but a great change has been wrought by the M. W. P., 1882. Section 24 of that Statute states :—“ The word ‘ property ’ in this Act includes a thing in action.” This gives a married woman the same extensive rights over her choses in action as she receives over her property generally by the same Act. The following section (25) enacts :—“ The date of the commencement of this Act shall be the first of January, one thousand eight hundred and eighty-three.”

The powers of contracting allowed by the law to married women, and which we have hitherto considered are quite of an exceptional and partial nature either as to the person, or the subject matter, and do not affect the bulk of English matrons. Before 1870, what was the normal legal position of a *feme covert* as regards :—

- A.—Contracts entered into before marriage.
- B.—Contracts with reference to her separate Estate.
- c.—Contracts as Agent.
- D.—Contracts with Husband.

How has contractual status in these four respects been affected by legislation subsequent to 1870? We will endeavour to answer this question in some detail.

First as to contracts under A.

Under the old law, to use the words of Blackstone, the husband "adopted his wife and her circumstances together" (Comms. Bk. 1, c. 15). "Adopting her circumstances" was equivalent to becoming subject to her debts, and being responsible for her previous contracts. He was not, however, in strict contemplation of law *personally* liable for them. He was liable to be sued in respect of them jointly with her simply because she could not be sued alone, on account of the disability to which marriage subjected her. He could not be sued alone; and upon his wife's death, unless judgment had been previously recovered against them, he became freed from liability, except that, as administrator he was liable to the extent of the assets which he became possessed of in that capacity (Lush, p. 271-2). The bankruptcy and discharge of the husband after action brought against both jointly for the wife's ante-nuptial obligations discharged both at law of their liability; but, it seems, the wife's separate estate could in equity be reached to satisfy such obligations (*Chubb v. Stretch*, 1870, L. R. 9, Eq. 555). Said Lindley, L. J., in *Beck v. Pierce*, 1889 (23 Q. B. D., 320):—

"At Common Law the husband was liable for his wife's ante-nuptial debts to the whole extent of his property, whether he knew of their existence or not, and whether he obtained any property from his wife or not, but he could not be sued alone for such debts if his wife were alive, and he could not be sued at all for them after her death."

We submit that the terms of this judgment might be applied generally to the contractual liability of a *feme covert* incurred before her marriage.

Such, very briefly, was the law previous to the year, 1870. In considering the changes made by recent legislation it is necessary to remember that none of the M. W. P. Acts are retrospective. With regard to ante-nuptial liability, the legal position of the parties married is regulated by the Common or Statute Law in force at the date of the marriage. Consequently to persons whose marriage took place before August 9th, 1870 (the date of the operation of the M. W. P., 1870), the Common Law applies; where the marriage was on, or subsequent to that date, and prior to July 30th, 1874 (the date of the operation of the M. W. P., 1874), the respective rights and liabilities come under the 1870 Act; and the position similarly changes in the case of marriages between the respective dates when the M. W. P., 1874, and the M. W. P., 1882, came into force. The first two Acts in fact "are" and "are not." They are repealed, and yet they affect and control present legal relations. Sec. 22 of the M. W. P., 1882, enacts:—

"The Married Women's Property Act, 1870, and the Married Women's Property Act, 1870, Amendment Act, 1874, are hereby repealed: Provided that such repeal shall not affect any act done or right acquired while either of such Acts was in force, or any right or liability of any husband or wife, married before the commencement of this Act, to sue or be sued under the provisions of the said repealed Acts or either of them, for or in respect of any debt, contract, wrong, or other matter or thing whatsoever, for or in respect of which any such right or liability shall have accrued to or against such husband or wife before the commencement of this Act."

The only ante-nuptial liabilities with which the M. W. P., 1870, dealt with were debts. Debts, however,

are frequently founded on contract, we must therefore briefly make mention of the effects of this Act. From the wife's ante-nuptial debts the husband was relieved altogether, and it was enacted by sec. 12 that the wife alone should be liable to be sued for, and any separate estate belonging to her should be liable to satisfy, such debts as though she had continued unmarried. The wife might be sued alone (*Williams v. Mercier*, 1882, 9 Q. B. D., 337), and the plaintiff might recover judgment without proving that the defendant had separate estate (*Downe v. Fletcher*, 1888, 21 Q. B. D., 11); but the married woman was not made personally liable on the judgment, the creditor's only remedy being an equitable remedy against her separate estate (*Exp. Jones*, 1879, 12 Ch., D. 484); but this was liable though subject to restraint on anticipation.

“In 1871 the question arose before Lord Romilly whether this (Sec. 12 of the Act) applied to separate property of the wife's as to which there was a ‘restraint against anticipation,’ which ordinarily protected it from creditors, and it was urged that this had not been intended. Lord Romilly held that it did, and said:—‘I am sure that the question did not escape the attention of Parliament. I have a distinct recollection that this effect of the enactment was intended, for the whole Act was under discussion, and it was said to be only reasonable that, as the liability of the husband was taken away, the liability should be laid on the whole property of the wife. At all events, that is the true construction of the Act, and the enactment extends to the property of a married woman though it is subject to a restraint against anticipation.’ (Quoted from “*Times*” Law Report of *Axford v. Reid*, 1889, v. 214, which case supports the principle Lord Romilly lays down.”)

As has been stated the M. W. P., 1870, seems only to deal with ante-nuptial *debts*, including, of course,

debts arising from contract. Apparently it does not affect the liability of the parties in respect of a breach of contract made by the wife before her marriage, and from which breach a debt has not arisen (*Lush*, 273-4). Under it the husband must still bear the burden of ante-nuptial breaches of contract by his wife from which debts have not arisen.

Some anomalies came quickly to light after the 1870 Act began to operate. A husband who had become possessed of property of the wife *jure mariti*, was in respect of her ante-nuptial debts, irresponsible absolutely. A settlement made *bonâ fide* with the object of protecting the wife against an extravagant husband had no force against her creditors. This anomaly survived until January 1st, 1883.

The M. W. P., 1874, repealed so much of the Act of 1870 as enacted that a husband should not be liable for the debts of his wife contracted before marriage, and provided (sec. 1) that husband and wife might be jointly sued for any debt contracted, or for any tort committed, by the wife before marriage, or for *the breaches of any contract* made by the wife before marriage, and that the husband should be liable (sec. 2) in respect of such matter to the extent of the following assets :—

- (1.) "The value of the personal estate in possession of the wife, which shall have vested in the husband.
- (2.) The value of the choses in action of the wife which the husband shall have reduced into possession, or with reasonable diligence might have reduced into possession.
- (3.) The value of the chattels real of the wife which shall have vested in the husband and wife.

- (4.) The value of the rents and profits of the real estate of the wife which the husband shall have received, or with reasonable diligence might have received.
- (5.) The value of the husband's estate or interest in any property, real or personal, which the wife, in contemplation of her marriage with him, shall have transferred to him or to any other person.
- (6.) The value of any property, real or personal, which the wife, in contemplation of her marriage with the husband, shall, with his consent, have transferred to any person with the view of defeating or delaying her existing creditors. (Sec. 5.)"

It was provided (sec. 5) that when the husband after marriage paid any debt of his wife, or had a judgment *bonâ fide* recovered against him in any such action as in this Act mentioned, then to the extent of such payment or judgment the husband should not in any subsequent action be liable. By sec. 2 the husband was enabled in addition to other pleas, to plead that he was not liable in respect of assets. If he did not thus plead he was taken to have confessed liability as far as assets were concerned. If it was not found that the husband had assets, he was entitled to judgment with costs, whatever were the result of the action against the wife (sec. 3). When the liability of the husband was established the judgment was a joint judgment against husband and wife to the extent of this liability, and a separate judgment against the wife for the residue of the debt or damages (sec. 4). In the case of an action against the husband and wife jointly, where the husband is found not liable in respect of any such assets as are mentioned in the Act, the plaintiff will be allowed to add the costs of the husband's defence to his own, and recover both against the wife. Thus in *London and*

*Provincial Bank v. Bogle* (7 Ch., D. 773), the husband, in an action by the Bank against himself and his wife for debts contracted previously to marriage, pleaded that he had not, and never had, at the time or since his marriage any assets in respect of which he was liable for such debts of his wife. Judgment was entered for him, with costs, but against his wife; and the Bank were held entitled to add his costs to their original debt, and recover the whole against the separate estate of the wife.

It has also been held under this Statute, that an Englishman married in England to a woman who had contracted debts in a foreign country where she resided prior to the marriage, is liable in England only to the extent of assets derived from his wife (*De Greuchy v. Wills and Wife*, 4 C. P. D., 362; See *Macqueen*, p. 75-6).

As under the Act of 1870, so under this Act, it was unnecessary to prove the existence of separate estate, either at the time when judgment was recovered, or when the action was commenced (*Downe v. Fletcher*, 1888, 21 Q. B. D., 11), and the liability on the judgment against her was not a personal but only a proprietary liability, and the judgment could only affect her separate estate, though that was liable whether free or subject to restraint on anticipation (*Downe v. Fletcher*, 1888; *Axford v. Reid*, 1889; *Scott v. Morley*, 1887, 20 Q. B. D., 120).

Sec. 1 of the 1874 Act rendered it necessary that the husband and wife should be sued jointly, and gave no power to sue the husband alone. Consequently if the wife died before action was brought the husband

escaped liability, even though he were possessed of assets sufficient for the discharge of the debt (*Bell v. Stocker*, 1882, 10 Q. B. D., 129).

It has been held under this Act, that if a woman possessed of shares in a joint-stock company, marries, and the shares are settled upon her marriage to her separate use, the husband is liable, upon the company being subsequently wound up, to be placed on the register as contributory in his own right under 78th Section of the Companies Act, 1862; and that his liability is not limited by the 1874 Statute to the assets therein specified. *Lush*, p. 278, quoting *Re West of England Bank, Exp. Hatcher*, 12 Ch., D. 284.)

The Section referred to is as follows:—

“If any female contributory marries, either before or after she has been placed on the list of contributories, her husband shall, during the continuance of the marriage, be liable to contribute the same sum as she would have been liable to contribute if she had not married; and he shall be deemed to be a contributory accordingly.”

As before stated, the M. W. P., 1882, repealed the Acts of 1870 and 1874, *except as to rights and liabilities acquired and incurred under them*. Three sections have particular reference to ante-nuptial liabilities, viz.: sections 13, 14, and 15, which we give in full.

13. “A woman after her marriage shall continue to be liable in respect 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, including any sums for which she may be liable as a contributory, either before or after she has been placed on the list of contributories, under and by virtue of the Acts relating to joint-stock companies;

and she may be sued for any such debt and for any liability in damages or otherwise under any such contract, or in respect of any such wrong; and all sums recovered against her in respect thereof, or for any costs relating thereto, shall be payable out of her separate property; and, as between her and her husband, unless there be any contract between them to the contrary, her separate property shall be deemed to be primarily liable for all such debts, contracts, or wrongs, and for all damages or costs recovered in respect thereof: Provided always, that nothing in this Act shall operate to increase or diminish the liability of any woman married before the commencement of this Act, for any such debt, contract, or wrong, as aforesaid, except as to any separate property to which she may become entitled by virtue of this Act, and to which she would not have been entitled for her separate use under the Acts hereby repealed or otherwise, if this Act had not passed.

14. A husband shall be liable for the debts of his wife contracted, and for all contracts entered into and wrongs committed by her, before marriage, including any liabilities to which she may be so subject under the Acts relating to joint-stock companies as aforesaid, to the extent of all property whatsoever belonging to his wife which he shall have acquired or become entitled to from or through his wife, after deducting therefrom any payments made by him, and any sums for which judgment may have been *bonâ fide* recovered against him in any proceeding at law, in respect of any such debts, contracts, or wrongs for or in respect of which his wife was liable before her marriage as aforesaid; but he shall not be liable for the same any further or otherwise; and any court in which a husband shall be sued for any such debt shall have power to direct any inquiry or proceedings which it may think proper for the purpose of ascertaining the nature, amount, or value of such property: Provided always, that nothing in this Act contained shall operate to increase or diminish the liability of any husband married before the commencement of this Act, for or in respect of any such debt or other liability of his wife as aforesaid.

15. A husband and wife may be jointly sued in respect of any such debt or other liability (whether by contract or for any wrong) contracted or incurred by the wife before marriage as aforesaid, if the plaintiff in the action shall seek to establish his claim, either wholly or in part, against both of them ; and if in any such action, or in any action brought in respect of any such debt or liability against the husband alone, it is not found that the husband is liable in respect of any property of the wife so acquired by him or to which he shall have become so entitled as aforesaid, he shall have judgment for his costs of defence, whatever may be the result of the action against the wife if jointly sued with him ; and in any such action against husband and wife jointly, if it appears that the husband is liable for the debt or damages recovered, or any part thereof, the judgment to the extent of the amount for which the husband is liable shall be a joint judgment against the husband personally and against the wife as to her separate property ; and as to the residue, if any, of such debt and damages, the judgment shall be a separate judgment against the wife as to her separate property only."

Under this Act therefore, a plaintiff's remedy against a *feme covert* for her ante-nuptial liabilities (which include breach of contract), is threefold (1.) He may sue the married woman herself (sec. 13). (2.) the husband (sec. 14). (3.) husband and wife jointly (sec. 15). And he may sue the wife and the husband one after the other (*Beck v. Pierce*, 1889, 23 Q. B. D., 316), judgment against one being no bar to proceedings against the other (*ibid*). The plaintiff may sue both jointly, but in this case the judgments may be separate, or the judgment may be a joint judgment against the husband personally, and against the wife as to her separate property (*ibid*). As between husband and wife the former is entitled to be indemnified out of the latter's separate property, for, subject to a contract with

her husband her separate estate is primarily liable (*ibid*). If sued alone, the husband cannot require the wife to be joined; if she is sued alone in respect of her separate estate, she cannot require her husband to be joined (*ibid*). The words "before marriage" in the Statute have received a liberal interpretation from the Courts. In *Jay v. Robinson*, 1890 (25 Q. B. D., 467), judgment for a sum of money was recovered against a married woman, who subsequently obtained a dissolution of her marriage and married again, and by settlement made by her on the second marriage, property belonging to her was settled to her separate use without power of anticipation. The judgment debt was held to be a "debt contracted before her marriage" within the meaning of sec. 13; also it was a "debt contracted before marriage" within the meaning of sec. 19, so that the restriction upon anticipation contained in the settlement had no validity against it. All liabilities arising from breach of contract are, we submit, equally influenced by this judgment so far as a previous marriage is an element in the legal position. In secs. 13 and 7 the liability to which a *feme covert* was previously subject to under contracts arising from holding shares in a joint-stock company is placed on the same footing with her other liabilities. She may now be sued alone for any sums due from her as contributory. The Act removes the anomaly mentioned before, as to the separate property, bound by a restraint against anticipation, being liable *in every case* to the claims of the creditor. Sec. 19 provides that, with one exception therein stated, nothing in the Act shall affect any settlement, made before or after marriage,

respecting the property of any married woman, or render inoperative any restriction against anticipation. A proviso is added to protect creditors against fraudulent settlements :—

“ No restriction against anticipation contained in any settlement or agreement for a settlement of a woman’s own property to be made or entered into by herself shall have any validity against debts contracted by her before marriage, and no settlement or agreement for a settlement shall have any greater force or validity against creditors of such woman than a like settlement or agreement for a settlement made or entered into by a man would have against his creditors.”

It would seem, therefore, that now a restraint if imposed by a stranger in a marriage settlement or articles, is good against all the wife’s ante-nuptial liabilities, and if imposed by the wife herself is void as against ante-nuptial creditors. The former restriction was disallowed, as we have seen, in cases decided under the Acts of 1870 and 1874. It is a question whether the latter part of sec. 19 applies to ante-nuptial liabilities outside “ debts ” which are alone specifically mentioned, and the question is the more acute if the settlement were made for valuable consideration (see *Lush*, p. 256). The Statute only contemplates actions being brought against the wife by strangers. A husband cannot proceed against his wife to recover money which he had lent her before marriage (*Butler v. Butler*, 1885, 14 Q. B. D., 831). This view is, however, accepted with hesitation by Mr. Lush (p. 396, note (*d*)).

Although the words of sec. 13 of the Act are “ in respect and to the extent of her separate estate,” it was laid down in a recent case that even if coverture be

pleaded, it is not impossible for an ante-nuptial creditor to obtain a *personal judgment* for his debt, and not merely a judgment enforceable out of the married woman's separate property. (*Robinson v. Lynes*, 1894, 71 L. T. 24.) This decision is, however, not considered to be final (*Lush*, p. 176). In fact it is contrary to the tenor of judicial decisions generally which relate to the Act, which almost without exception declare the liability to be proprietary only.

A plaintiff, if he wish, may pass by the *feme covert* and (sec. 14) proceed against the husband alone in respect of the wife's ante-nuptial debts or breaches of contract. We have already seen that the liability on the part of the husband is entirely independent of his wife's (*Beck v. Pierce*, as before). In the same case it is laid down that as regards this liability, the Statute of Limitations begins to run, not from the date of the marriage, but from the first accrual of the cause of action against the wife. The extent of the husband's liability is not set out elaborately as in the 1874 Act, but though it is really made more comprehensive *de verbo*, it is narrowed *de facto* by the operation of the Statute. The liability is co-extensive with the amount of property belonging to the wife, which the husband shall at any time have acquired or become entitled to from or through her. Inasmuch, however, as every woman married after the commencement of the operation of the Act, is entitled to hold as her separate property, 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, it follows that the amount of property, which a husband may acquire from or through his wife is limited to what he obtains by gift or settlement, or estate *by the curtesy*. Moreover, before the plaintiff can obtain a verdict, he must allow the defendant to deduct from such assets as are available (a) the amount of any payment made by him, and (b) any sums for which judgment may have been *bonâ fide* recovered against him, in respect of any such ante-nuptial debts and contracts. The Court has also power to direct any enquiry it may think fit as provided in sec. 14. We have seen that by the M. W. P., 1874, the husband was legally responsible for his wife's liability as a contributory under the Companies Act, 1862, and that this responsibility was not limited to the extent of the assets received from her. It is submitted that since 1882 he is only liable to the extent of such property as he may have acquired from or through his wife. In short, under this section, the remedy against the husband is in the nature of a right *in rem*, and apparently continues, so long as there are any assets as before mentioned, in his possession or under his control, *irrespective of the fact whether the wife is alive or not.* (*Bell v. Stocker*, 1882, 10 Q. B. D., 129.) Under the Act of 1874, the husband's liability departed with the wife.

The manner of judgment against husband and wife when both are sued jointly has already been mentioned.

We have already seen that under sec. 19 of the M. W. P., 1882, that no settlement or agreement for a settlement made before marriage respecting the property of any married woman is rendered inopera-

tive by the Act, unless it be made by the *feme covert* herself in order to cheat her ante-nuptial creditors.

Sec. 5 of the same Act reads as follows :—

“Every woman married before the commencement of this Act shall be entitled to have and to hold and to dispose of in manner aforesaid as her separate property all real and personal property, her title to which, whether vested or contingent, and whether in possession, reversion, or remainder, shall accrue after the commencement of this Act, including any wages, earnings, money, and property so gained or acquired by her as aforesaid.”

We consider now ante-nuptial settlements.

These two sections have been considered difficult to reconcile. A marriage settlement made in 1862, contained a covenant for the settlement of the after-acquired property of the wife, from which interests settled or limited to her separate use and disposal were excluded. The wife became entitled under the Will of her mother, who died January 14th, 1883, to her residuary personal estate. It was held by Pearson, J., that the effect of sec. 19 was to exclude the operation of sec. 5, and that the residuary personal estate so acquired by the wife was bound by the covenant, and was not separate property within the exception contained in the covenant. (*Re Stonor's 1883 Trusts*, 24 Ch., D. 195.) *Hancock v. Hancock*, 1888 (38 Ch., D. 78) is to the same effect. (See *Lush*, p. 482-5.) In fact, settlements made before the Act were made on the footing that the Act had not been passed. Consequently sec. 5 forms no part of such settlements, and to impart its operation would be to interfere with or affect the settlement. Property, therefore, belonging to a woman

who is a party to a settlement under such circumstances, is bound by her covenant. (See *Lush*, p. 486.)

With regard to an ante-nuptial settlement where one or both of the parties are under age, we would refer to what we have said in Part I. of this thesis, p. 19-21. It is also necessary to mention that in this as in other contracts, if one of the parties is of age, the infant party may avoid the provisions, but the adult is bound, provided there is no fraud practised by the infant (*Lush*, p. 502-3, and cases there cited).

By sec. 24 of the M. W. P. Act, 1882, the word "contract" includes :—

"The acceptance of any trust, or of the office of executrix or administratrix, and the provisions of this Act as to liabilities of married women shall extend to all liabilities by reason of any breach of trust or devastavit committed by any married woman being a trustee or executrix or administratrix *either before or after her marriage*, and her husband shall not be subject to such liabilities unless he has acted or intermeddled in the trust or administration."

The provision in this section that he is not to be answerable unless (*i.e.*, except so far as) he has intermeddled, seems to limit his liability to post-nuptial cases, for he could not intermeddle *quâ* husband before marriage. The effect of the section appears to limit the scope of sec. 14, under which if a woman who is trustee or executrix wrongfully misappropriates trust property before her marriage, her husband would seem, to the extent of the property referred to in the section, to be liable as well as the wife. We are not aware of any case which illustrates the co-meaning of these two enactments. If it be true that the later section limits

the operation of the earlier in the manner stated, the old Common Law decisions have been so far superseded. In *Palmer v. Wakefield*, 1841 (3 Beav. 227), where a woman when *sole* had committed a breach of trust, and the question was whether her after-taken husband should make good the loss sustained by the trust estate, Lord Langdale said :—

“In this situation she married Mr. Wakefield, and it was by the marriage and by his assuming the liabilities to which she was subject, that he also, as I think, became liable to pay the money.”

As any separate property belonging to a married woman is made liable, under the several Acts, for her ante-nuptial debts, &c., it is obvious that jewels, settled upon her marriage to her separate use, come within the liability (*Williams v. Mercier*, 1882, 9 Q. B. D., 337).

While the husband succeeds to his wife's liabilities, to the extent to which he may become entitled to property from or through her, the wife continues free from any share in his liabilities whatever property she may have acquired from or through him.

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## Contracts with reference to separate Estate.

Before the M. W. P., 1882, began to operate, a married woman had not as a general rule and under ordinary circumstances any original capacity to contract as a *feme sole*. Neither the M. W. P., 1870, nor its

amending Statute four years later *directly* dealt with her power of contracting, though under these Statutes fresh separate estate was created, and she might contract so as to bind these Statutory additions. The development, however, of a married woman's contractual power was but small under the 1870 Act.

Speaking generally it may be said that previous to the passing of the 1882 Act, the legal position as to a married woman's separate estate is indicated by quotations from the judgments in two cases, viz.: (1.) *Murray v. Bailee*, 1834 (4 My. and K., 220). (2.) *Ashworth v. Outram* (5 C. D., 941).

- (1.) "That at *law* a *feme covert* cannot in any way be sued, even for necessaries is certain. Bind herself, or her husband, by speciality, she cannot; and although living with him, and not allowed necessaries, or apart from him, whether on an insufficient allowance or an unpaid allowance, she may so far bind him that those who furnish her with articles of subsistence may sue him; yet even in respect of these, she herself is free from all suit. This is her position of disability, or immunity at law; and this is now clearly settled. Her separate existence is not contemplated; it is merged by the coverture in that of her husband; and she is no more recognized than is the *cestui que trust* or the mortgagor, the legal estate, which is the only interest the law recognises, being in others. But in *equity* the case is wholly different. Her separate existence, both as regards her liabilities and her rights is here abundantly acknowledged: not indeed, that her person can be made liable, but her property may, and it may be reached through a suit instituted against herself and trustees."

- (2.) "In former years . . . . Judges of what used to be called the Common Law Courts of this realm delighted in applying rigidly and strictly a series of rules and maxims which their predecessors had delighted themselves in devising, although they did not always commend themselves to the apprehension of the million. Amongst these maxims was one by which a married woman was held incapable of taking a gift either from her husband or a stranger. . . . . But the Court of Chancery (a very great Court in its day, although it has now ceased to exist), invented that blessed word and thing '*the separate use of a married woman.*'"

With regard to this separate estate the Courts of Equity allowed to a certain extent the power of contracting. The contract, however, was distinctly of an abnormal type. The Element of personal responsibility essential to a contract was wanting; the only liability a married woman could ever incur in respect of her engagements was a proprietary liability, a liability affecting her particular property—a liability *in rem* as distinguished from a liability *in personam*; it was her property not herself that was the debtor. Her separate estate was clothed with a kind of entity of its own, which the married woman could bind almost as an agent binds his principal. (*Lush*, p. 298, and cases there cited.)

In *Pike v. Fitzgibbon*, 1881 (17 Ch., D. 454), Brett, L. J. said:—

"It is not true that equity has recognized or invented a *status* of a married woman to make contracts; neither does it seem to me that equity has ever said that what is now called a contract is a binding contract upon a married woman. What equity seems to have done is this: *it has recognized a settlement as*

*putting a married woman into the position of having what is called a separate estate, and has attached certain liabilities not to her but to that estate."*

It appears, notwithstanding what has been said, that outside the 1882 Act a writ of *ca. sa.* might be issued against a *feme covert*, and she might be arrested under it. (*Scott v. Morley*, 1887.)

Before a contract could be enforced against the separate estate it had to be made, either by express words or by implication of law, with reference to and to bind the separate estate, and it lay on the plaintiff to establish this (*Murray v. Bailee*, 1834), though as will be seen in the second judgment about to be quoted this onus was not always a heavy one. Extracts from two cases, viz.: (1.) *Johnson v. Gallagher*, 1861 (3 De G. F. and J., 494). (2.) *Mrs. Matthewman's case*, 1866 (L. R., 3 Eq., 781), illustrate these principles.

- (1.) "I think [said Jenner, L. J.], that in order to bind the separate estate by a general engagement, it should appear that the engagement was made with reference to and upon the faith and credit of that estate; and whether that was so or not, is a question to be judged by the Court upon all the circumstances."
- (2.) "If a married woman, having separate property, enters into a pecuniary engagement, whether by ordering goods or otherwise, which (if she were a *feme sole*) would constitute her a debtor, and in entering into such engagements, she purports to contract, not for her husband, but for herself, and on the credit of her separate estate, and it was so intended by her, and so understood by the person with whom she was contracting, that constitutes an obligation for which the person with whom she contracts has the right to make her separate estate liable; and the question whether the obligation

was contracted in such manner must depend upon the facts and circumstances of each particular case. It clearly is not necessary that the contract should be in writing, because it is now admitted that if a married woman enters into a verbal contract expressly (or impliedly) making her separate estate liable, such contract would bind it; nor is it necessary that there should be any express reference made to the fact of there being such separate estate, for a bond or promissory note given by a married woman, without any mention of her separate estate, has long been held sufficient to make her separate estate liable. If the circumstances are such as to lead to the conclusion that she was contracting, not for her husband, but for herself, in respect of her separate estate, that separate estate will be liable to satisfy the obligation."

Only the separate estate of which she was possessed *at the time of making the promise*, or entering into the engagement could be reached by her creditor. It was only because she had bound it that it was liable: and she could not bind what did not belong to her. Consequently if she had no separate estate to bind at the time she entered into the engagement it was immaterial that she subsequently acquired separate estate. On the same principle separate property acquired by her subsequent to the date of a contract which bound her estate in being at the time it was made, was free from any liability in connexion with the contract. The *locus classicus* supporting this view seems to be the judgment of the Court in a case already quoted, which was decided only the year before the passing of the M. W. P., 1882. We mean *Pike v. Fitzgibbon*. In the course of his judgment, James, L. J., made use of the following language:—

"It is said that a married woman having separate estate has not merely a power of contracting a debt to be paid out of that

separate estate, but having a separate estate, has acquired a sort of equitable *status* of capacity to contract debts, not in respect only of that separate estate, but in respect of any separate estate which she may thereafter in any way acquire. It is contended that because equity enables her having estate settled to her separate use, to charge that estate, and to contract debts payable out of it, therefore she is released altogether in the contemplation of equity from the disability of coverture, and is enabled in a Court of Equity to contract debts to be paid and satisfied out of any estate settled to her separate use *which she may afterwards acquire*, or, to carry the argument to its logical consequences, out of any property which may afterwards come to her. *In my opinion there is no authority for that contention."*

The mere contract entered into by a *feme covert* did not in any way fetter the separate estate or prevent the married woman from parting with it freely (*Johnson v. Gallagher*, 1861; *Hemingway v. Braithwaite*, 1889, 61, L. T., 224). The contract only gave the creditor (1.) a right to a judgment declaring that the separate estate which at the date of the contract was, *and at the date of the judgment remained*, vested in the married woman as her separate estate, *excluding any separate property which she was restrained from anticipating*, was liable to satisfy the debt or engagement. (2.) The benefit of an enquiry as to what was the separate estate which the married woman had at the time of contracting the debt or engagement, and whether that separate estate or any part of it remained capable of being reached by the judgment and execution of the Court (*Pike v. Fitzgibbon; Robinson v. Pickering*, 1881, 16 Ch., D. 660). The creditor also had the right to the appointment of a receiver. (*In re Peace and Waller*, 1883, 24 Ch., D. 405.) Separate property subject to a restraint on

anticipation could not be bound by a contract, nor could it be reached after the death of the husband to satisfy a contract or engagement made in his lifetime. (*Pike v. Fitzgibbon.*)

A debtor's summons could not issue against a *feme covert*. (*Exp. Jones*, 1879, 12 Ch., D. 484.) In *Hodgson v. Williamson*, 1880 (15 Ch., D. 87), it was held that the Statute of Limitations had no application to these engagements, but the decision of the Court of Appeal in *re Lady Hastings*, 1887 (35 Ch., D. 94), appears to lay down a contrary doctrine. As this case deals with some of the legal positions already mentioned, we will quote at length the judgment of Cotton, L. J. The facts were as follows. In April, 1875, Mr. Heane, the second husband of Lady Hastings, paid to her separate account £400, without taking any security in writing for the same. Lady Hastings died on December 30th, 1884, without having made any payment of interest or principal in respect of this £400, or given any acknowledgment in writing of her liability to repay it; though evidence was given that she had verbally admitted that the £400 had been lent to her and agreed to repay it with interest at 5 per cent., out of her separate estate. Lady Hastings at the time of her death was possessed of separate estate, consisting of furniture and household effects, which would be available for payment of the £400 if the claim could be established. In an action to administer her estate, Mr. Heane carried in a claim to rank as a creditor against her separate estate for £400 and interest. The claim was disputed by the executors. Mr. Justice Kay held that assuming the £400 paid by Mr. Heane in

1875, to have been a loan, there was no ground for saying that a simple contract debt contracted by a married woman should not be treated in equity as barred by analogy to the Statute of Limitations; and accordingly that this debt was barred, and the summons must be dismissed. Mr. Heane now appealed.

“Lord Justice Cotton, after disposing of another question raised by the appeal, but not of any public interest, said that he would assume, though he did not decide the point, for counsel on behalf of the respondents had not been heard, that the loan was made by the appellant to his wife, the late Lady Hastings, in 1875, and that this advance of £400 was never repaid up to the time of her death in December, 1884, and that there had been neither acknowledgment of the debt in writing nor any payment of interest. The question, then, was whether the claim by the appellant was barred by the Statute of Limitations. Mr. Justice Kay had decided, and in his Lordship’s opinion rightly decided, that the Statute operated as a bar. What, according to the doctrine of Courts of Equity, was the position of married women with regard to their separate estate? As the debt on which the claim was made was contracted in 1875, the case was not governed by the provisions of the Married Women’s Property Act, 1882, but by the general rules of equity as to separate estate. The doctrine of separate estate was created by Courts of Equity in favour of married women, who were allowed a protection which would not be annexed to the estate of a man. When a restraint on anticipation was imposed, a married woman was precluded from binding by her act property which belonged to her for her separate use. But where no restraint on anticipation had been imposed, the Court considered the married woman, so far as regarded that separate property, as being in the same position as if she were a *feme sole*—that is to say, she was capable of entering into contracts which would bind her separate property just as if she were unmarried. Such contracts could not be enforced against her personally,

though they would bind her separate property. And after the claim had been established in an action by her creditor, an inquiry would be directed as to what separate estate she had at the time of contracting the debt, and the trustees would be directed to apply the property in their hands in satisfaction of the claim. Being, therefore, entitled to contract as regarded her separate property (not restrained from anticipation) just as if she were a *feme sole*, the only possible consequence was that the Statute of Limitations was applicable to the contracts of a married woman just in the same way as it would apply to the contracts of a *feme sole* or any other person not incapacitated from entering into a contract. The analogy of the Statute of Limitations, therefore, was applicable to the debts and obligations of a married woman. Then it was said that the Statute ought not to run in this case because the debt was contracted by the married woman with her husband, who could not bring an action against his own wife. It was no doubt true that there could be no judgment in an ordinary way against a married woman, and that the Court would require the trustees to be before the Court. The fact that in this case the husband was himself the trustee would not have prevented his obtaining payment of the debt, as he had the legal ownership of the fund which was liable to satisfy the debt. His Lordship, after referring to and explaining the cases which had been cited in argument, said, in reference to the Irish case of *Vaughan v. Walker* (8 Ir. Ch. Rep., 458), on which reliance had been placed on behalf of the appellant, that it was to be observed that Lord Justice Blackburn had differed from the Lord Chancellor of Ireland, who had (in his Lordship's opinion), come to a wrong conclusion in thinking that the Statute of Limitations did not affect a simple contract claim against the separate estate of a married woman. The decision of Mr. Justice Kay was correct, and the appeal must be dismissed."

The M. W. P., 1882, has emphasized this doctrine. On January 1st, 1883, every married woman became discoverable within the meaning of sec. 7 of the Statute

of Limitations. (21 Jac. 1, c. 16; *Lowe v. Fox*, 1885, 15 Q. B. D., 667.)

Before January 1st, 1883, a married woman could make a valid contract to sell or charge her *lands*, provided that her husband concurred, and the contract were made by deed acknowledged in accordance with the Fines and Recoveries Act (3 and 4 Will. iv., c. 74), as amended by sec. 7 of the Conveyancing Act, 1882. The husband's concurrence might be dispensed with by leave of the Court in certain cases (sec. 91). These relations of husband and wife are, however, now rendered of comparatively little importance by the operation of the M. W. P., 1882, about to be considered, although it must always be remembered that none of these M. W. P. Acts are retrospective, except in details not affecting the argument.

As in this Thesis chronological order is being generally observed, the effect of sec. 39 of the Conveyancing and Law of Property Act, 1881 (44 and 45 Vict., c. 41), will here be noted. The section is as follows:—

- (1.) "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."
- (2.) "This section applies only to judgments or orders made after the commencement of this Act."

The parties themselves could not and still are not able *by consent* to get rid of a restraint against anticipation. Previous to the powers conferred by the Act the Court had no authority to release a married woman from the restraint, even when it was plainly for her

interest to do so. (*Lush*, p. 264.) But it has been laid down that under the Statute, a very strong ground must be shown for such an application to be granted. It was held in, in *re Wood-Wood v. Kimber*, 1884 (1 T. L. R., 192), that the Court would not exercise the power conferred by the section in question and remove the restraint on anticipation imposed upon a married woman interested in settled property, unless it would be manifestly for her benefit to do so, or for the benefit of her husband and family.

“This is a discretionary power, which, in my opinion, ought to be exercised with extreme caution, and only where a very strong case for its exercise is made out. If we acceded to the present application, I think we should be holding out encouragement to tenants for life with powers of appointment to form schemes of this kind for getting the benefit of the reversionary interests of their children. (Per. Lopes, L. J., in *re Little, Harrison v. Harrison*, 1889, 40 Ch., D. 424.)

From these and other cases we may gather that the Court will not allow the restraint to be removed in order to benefit the creditors, but where the petitioner is harassed and annoyed by their pressing claims, it will grant her application.

Some changes in procedure by which the rights and liabilities of married women are enforced have already been noted. It will, however, be more convenient in view of the alterations brought about by the M. W. P., 1882, to postpone any detailed notice of changes in the “adjective law” relating to the

subject to a separate section. Consequently in the following pages there will be a curtailment of treatment of this branch of the Thesis until the section in question is reached.

When the M. W. P., 1882, became law, the contractual status of a married woman underwent alteration. After enacting (sec. 1, sub-sec. 1), that :—

“A married woman shall, in accordance with the provisions of this Act, be capable of acquiring, holding, and disposing by will or otherwise, of any real or personal property as her separate property, in the same manner as if she were a *feme sole*, without the intervention of any trustee.”

Sub-sec. 2, 3, and 4 of sec. 1 proceed :—

- (2.) “A married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract, and of suing and being sued, either in contract or in tort, or otherwise, in all respects as if she were a *feme sole*, and her husband need not be joined with her as plaintiff or defendant, or be made a party to any action or other legal proceeding brought by or taken against her ; and any damages or costs recovered by her in any such action or proceeding shall be her separate property ; and any damages or costs recovered against her in any such action or proceeding shall be payable out of her separate property, and not otherwise.”
- (3.) “Every contract entered into by a married woman shall be deemed to be a contract entered into by her with respect to and to bind her separate property, unless the contrary be shown.”
- (4.) “Every contract entered into by a married woman with respect to and to bind her separate property shall bind not only the

separate property which she is possessed of or entitled to at the date of the contract, but also all separate property which she may thereafter acquire."

The first question which arose on this Act was as to what sort of liability the Legislature intended to impose upon a married woman. Was it a *personal liability*, or, as formerly, a proprietary liability attaching only to the separate estate? Would the remedy of the person who sued her be by personal action against herself or by action *in rem* to establish a charge against the separate estate? Sub-sec. 2 reads "a married woman shall be capable of rendering *herself* liable, although the subsequent wording may be taken as a qualifying clause in respect of and to the extent of her separate property." The same sub-sec. declares that a married woman may be sued in all respects as if she were a *feme sole*, which *primâ facie* would seem to imply that she might be sued to judgment as a *feme sole*, and that therefore a personal judgment might be obtained against her. And yet on the other hand, as we have seen, the Act certainly seems to contemplate a distinction between a proprietary liability and a personal liability of the normal kind. It says in the 15th sec., that a joint judgment against husband and wife in respect of a debt contracted by the wife before marriage shall be "a joint judgment against the husband *personally*, and against the wife as to her *separate property only*."

There is certainly a difficulty arising from the phraseology of the enactment as to whether a married woman was intended by the Act to contract a personal liability or not. The first case where the question

actually came up for decision was *Draycott v. Harrison*, 1886 (17 Q. B. D., 150). In that case the plaintiff endeavoured to establish that since the Act of 1882, a married woman whose only property was subject to a restraint on anticipation could render herself personally liable, and could be imprisoned under the Debtor's Act. Judgment had been actually signed against her by default, execution being limited to the separate property not subject to any restraint on anticipation, unless by reason of sec. 19 of the M. W. P., 1882, the property be liable to execution notwithstanding such restriction. The only evidence of her ability to pay was, that since the date of the judgment she had received sufficient income of separate property subject to a restraint on anticipation. The Court held that to attach dividends accrued due after the judgment would indirectly do away with the restriction, and that sec. 5 of the Debtor's Act only applied to personal judgments, and that the judgment in this case was not a personal, but a proprietary judgment only.

In *Palliser v. Gurney*, 1887 (19 Q. B. D., 517), this confinement to proprietary liability was again laid down, and the decisions at last came to a head in *Scott v. Morley*, 1887 (20 Q. B. D., 120), when it was decided that the Statute had not altered the nature of a married woman's liability. This decision still embodies the law on the subject. A judgment may be against a married woman, but execution is confined to her separate property.

Lord Esher, M. R., in the course of his judgment in this case said :—

“What were the liabilities imposed upon a married woman by the Married Women’s Property Act, 1882? Sec. 1, sub-sec. 2, imposed a new liability upon her in respect of her contracts made after marriage, and gave a new remedy at law, and so the ordinary rule applied that where a Statute imposed a new liability and provided a new remedy, the remedy so provided was the only remedy. The sub-sec. said that any damages should be payable out of her separate property. It did not say that the damages should be payable by her. The judgment under that sub-sec. ought to follow the words of the Act. The judgment imposed a new liability at law which produced the same result as that previously given in equity—namely, a charge only upon her separate estate. The last question was whether the Debtor’s Act, 1869, was applicable to such a judgment. Sec. 5, in speaking of “the debt due from him,” meant the debt which he was personally liable to pay. If the Debtor’s Act was treated as conferring a power to commit, it was a penal Statute, and must be construed strictly as involving the liberty of the subject. If the Act was treated as a remedial Act, it was not wanted, as there was nothing to modify. Therefore, the Courts had no power to apply the Debtor’s Act, 1869, to judgments under the Married Women’s Property Act, 1882.”

The form of the judgment which the M. W. P., 1882, enables a plaintiff to recover against a married woman was settled by the Court of Appeal in connexion with the same case. It is as follows:—

“It is adjudged that the plaintiff do recover £      and costs, to be taxed against the defendant (the married woman), such sum and costs to be payable out of her separate property, as hereinafter mentioned, and not otherwise. And it is ordered that execution hereon be limited to the separate property of the defendant (the married woman) not subject to any restriction against anticipation, unless by reason of sec. 19 of the M. W. P., 1882, the property shall be liable notwithstanding such restriction.”

A bankruptcy notice cannot be issued against a married woman for :—

“Sec. 4, sub-sec. 1 (*g*), of the Bankruptcy Act, 1883, was the sub-sec. under which it was to be served, and by that sub-sec., if a creditor obtained a final judgment against a person, the notice was to require that person to pay the judgment debt in accordance with the terms of the judgment. The bankruptcy notice to be served must require the person to pay the judgment debt in accordance with the terms of the judgment, and must be in the prescribed form. Form No. 6 did not follow the form of judgment against a married woman. There was no form given which followed the form of judgment against a married woman. The judgment against a married woman required her to pay the debt out of her separate estate. This bankruptcy notice required her to pay the debt personally. That was not in accordance with the terms of the judgment. The consequence was that as against a married woman a bankruptcy notice could not be issued. (Per Lord Esher, M. R., in *re Lynes*, 1893, 2 Q. B., 113.)”

Even if the husband dies after the judgment and before the notice served, there is the same failure of application so far as a bankruptcy notice is concerned. Proceedings under the Debtor's Act, as we have seen, cannot be taken to enforce the married woman's liability (*Scott v. Morley*), though garnishee proceedings may be taken against her. (*Holtby v. Hodgson*, 1889, 24 Q. B. D., 103.) In this case Lord Esher defined “proprietary liability” a term we have used freely in this Thesis.

“Proprietary liability is a short and compendious way of stating the proposition that a judgment obtained against a married woman must be executed against her property, and not against her person.”

If then (subsequent to the M. W. P., 1882, becoming operative), under a contract, the liability of a married woman is only a charge on her separate estate not restrained from anticipation, the questions arise, what is the separate estate that can be charged, and in what particulars (if any), has the law on the subject previous to 1882, been changed. We will take the second question first. Under the old law, as consummated in *Pike v. Fitzgibbon*, 1881, in order to make a judgment available against the separate estate of a married woman it was necessary to prove (as before stated), that (*a*) at the date of the contract she was possessed of or entitled to property for her own separate use; (*b*) it was not fettered by any restriction against anticipation; (*c*) some of that property still remained at the date of the judgment. Sec. 1 (sub-sec. 4) of the Act enacted that whenever the conditions of (sub-sec. 3), have been fulfilled—*i.e.*, when a contract has been entered into by a *feme covert* which presumably binds her separate property—then execution may issue *not only against the separate property she originally possessed when contracting (if any still remain), but also against any that she has subsequently acquired.* The words in italics indicate the change that has been wrought. Creditors, however, were still at a disadvantage, on account of the interpretation of sub-sec. 3 by the Courts, which amounted to leaving the old law as it was in one important respect. It was decided in a series of cases that a corollary of the married woman's liability being only proprietary was this:—that the plaintiff had to prove the possession of separate property at the time

of making the contract. (In *re Shakespear*, 1885, 30 Ch., D. 169; *Palliser v. Gurney*, 1887, 19 Q. B. D., 519; *Stogdon v. Lee*, 1891, 1 Q. B., 661.)

“The plain object of the Act was to confer on married women having separate estate a capacity to contract and to extend the capacity which they had already in Courts of Equity. The enabling clause was sub-sec. 2, and if any one sued a married woman under that clause *it was clear that he could not succeed unless he showed that she had separate estate.* (Per Lindley, L. J., in *Palliser v. Gurney.*)”

Under the 1882 Act the separate property must have been such that the married woman could reasonably be supposed to contract with reference to it. (*Harrison v. Harrison*, 1888, 13 P. D., 180; *Beckett v. Tasker*, 1887, 19 Q. B. D., 7; *Leake v. Driffield*, 1889, 24 Q. B. D., 98; *Braunstein v. Lewis*, 1891, 65 L. T., 449.) In the last named case, Kay, L. J., said:—

“By the Married Women’s Property Act, 1882, a married woman can contract with respect to her separate property. It was argued that the law would presume the contract to be made with respect to her separate property, if she had any, however small, at the time of the contract. That, however, would involve an absurdity. It would be absurd to presume that a married woman with £2 10s. in her pocket as her separate property had contracted a debt of £1,000 with respect to that separate property.”

In *Leake v. Driffield*, the separate estate consisted merely of the clothing of the married woman and her children.

It was also decided that under sec. 1 (sub-sec. 4) of the Act, property which a married woman acquired

after the death of her husband could not be reached by a creditor who had recovered a judgment on a contract made by her during the coverture. (*Beckett v. Tasker*, 1887; *Pelton v. Harrison*, 1891, 7 T. L. R., 686.) In reading the judgment of the Court in the last named case, Kay, L. J., said with reference to sec. 1 (sub-sec. 4) of the 1882 Act:—

“In my opinion, the mischief which this section of the Act was intended to remedy was that pointed out by the decision in *Pike v. Fitzgibbon*, where it was held that separate property acquired during coverture after the date of the engagement sued on could not be reached under a judgment against the married woman. It was intended to make such after-acquired separate property liable to execution, but not any property acquired by her when not under coverture, nor any property, though separate property, as to which during coverture she was restrained from anticipation. It does not enable a married woman who has no separate property at the time to bind herself by a contract or engagement. (*Palliser v. Gurney*, 19 Q. B. D., 519; *Stogdon v. Lee*, 1891, 1 Q. B., 661.) Nor does it enable her, if she has separate property, to bind herself except in respect of that separate property and any other which she may thereafter acquire. The point was decided in the same way in *Beckett v. Tasker*, 19 Q. B. D., 7.”

With regard to this binding of the separate property, the Act is not retrospective. In *Turnbull v. Forman*, 1884, 1 T. L. R., p. 557, this doctrine was laid down with regard to sec. 1 (sub-sec. 4). Where judgment had been obtained against a married woman on a promissory note made before the passing of the Act, judgment could only operate on such property as the defendant had *at the time when the note was made*, and was then freed from any restraint on anticipation,

thus following the lines of the decision in *Pike v. Fitzgibbon*.

By sec. 19 of the Act (subject to the proviso at the end of the section already quoted) property subject to a restraint on anticipation is unaffected by the Statute. In *Draycott v. Harrison*, 1886 (17 Q. B. D., 150), it was held that a married woman is no more capable of contracting and rendering herself liable upon contract in respect of her separate property, which is subject to a restraint upon anticipation, than she was before the Act of 1882 was passed.

The question arises, does a restraint on anticipation apply to arrears of income become due and payable at or before the date of the judgment?

In 1891, an action by a married woman was dismissed with costs, execution being limited to her separate estate without restraint on anticipation. The Court of Appeal upheld an order giving her trustees liberty to retain the costs out of income, to which she was entitled for her separate use, without power of anticipation, which had accrued since the commencement of the action. (*Cox v. Bennett*, 1891, T. L. R. vii., 317.) This decision has been in principle confirmed in the important case of *Hood Barrs v. Heriot*, 1896, A. C., 174, after the law had passed through an intermediate stage of uncertainty as expressed in *Pillars v. Edwards*, 1894 (71 L. T., 788), and *Hood Barrs v. Cathcart*, 1894, 2 Q. B., 559. In the case of *Hood Barrs v. Heriot*, the circumstances, as has been intimated, were similar to those in *Cox v. Bennett*. Had the appellant the right to enforce payment of a

judgment which he had obtained against the respondent, a married woman having property, the income of which she was restrained from anticipating, out of the arrears of income which were due to the respondent at the date of the judgment, and which had not then reached her hands. In his judgment Lord Macnaughten said :—

“The order under appeal depends upon the proposition that it is not competent for a married woman, entitled for her separate use without power of anticipation, to dispose of income accrued due unless and until it reaches her own hands or the hands of her agent. This proposition was laid down for the first time in 1894 by the Court of Appeal. There is nothing to suggest it in the circumstances which originally gave rise to the restraint on anticipation. Nor can it, I think, be supported on principle, or on any grounds of convenience, or on authority. Everybody, I suppose, would concede that in limiting income to the separate use of a married woman, without power of anticipation, the primary intention is that if things go wrong she may have a sure and certain provision for her maintenance. But what is to happen if things do go wrong and her income is in arrear? Tenants are sometimes behindhand; mortgagors are not always prompt. If the Court of Appeal is right, it might well happen that a married woman with an ample provision, and striving honestly to live within her income, would be brought into great straits. If her income fell into arrear she would be unable to procure an advance; she could make no contract even for the necessaries of life. It is all very well to prevent a married woman from gathering the fruit, which will be hers in time, before it becomes ripe. When it is ripe, why should she be forbidden to touch it? Why should she have to wait until it falls into her lap? Why should the Court, in its zeal for the security of her property, place it out of her reach when it ought to be in her pocket, and when, perhaps, she wants it most, and all for fear it should come into her husband’s hands? So long as things go well there is no

reason why a married woman should not let her husband have her income, if she knows what she is about. If things go amiss there is the restraint on anticipation, ready for use, and as useful for all practical purposes as if it had the effect attributed to it by the Court of Appeal, and without the disadvantage of bringing with it liability to a most inconvenient embargo."

The law therefore is, that a judgment against a married woman may be enforced against arrears of income, subject to restraint upon anticipation, accrued due at or before the date of the judgment.

With regard to this important judgment it has been written "*sed quære*, at any rate since the Act of 1893, sec. 1." For similar questions arising with regard to orders to pay costs see *post* (p.     ).

It is clear that income coming to hand after the judgment, cannot be reached to satisfy the judgment. *Whiteley v. Edwards*, 1896 (2 Q. B., 48.)

The main object of the M. W. P., 1893 (56 and 57 Vict., c. 63), appears to be the alteration of the rule established by such cases as in *re Shakespear*, 1885 (30 Ch., D. 169); *Palliser v. Gurney*, 1887 (19 Q. B. D., 519); *Braunstein v. Lewis*, 1891 (65 L. T., 449); and *Stogdon v. Lee*, 1891, 1 Q. B., 661), all before quoted.

We have already seen the effect of the cases which declared that a contract of a married woman, not made by her as the agent of her husband, is void unless at the time of contract she possesses separate estate free from restraint on anticipation, and of such a character that the Court will presume she intended to charge it with the fulfilment of the contract. The object of this amending Statute is to enable a creditor of a married

woman to obtain payment out of any property free of restraint she may have at the date of his obtaining judgment (and after), without requiring him to prove that the woman was possessed of separate estate at the time she entered into the contract.

The first section provides that every contract hereafter entered into by a married woman, otherwise than as agent,

(a) Shall be deemed to be a contract entered into by her with respect to and to bind her separate property, whether she is or is not in fact possessed of or entitled to any separate property at the time when she enters into such contract ;

(b) Shall bind all separate property which she may at that time or thereafter be possessed of or entitled to; and

(c) Shall also be enforceable by process of law against all property which she may thereafter while discovert be possessed of or entitled to ;

Provided that nothing in this section contained shall render available to satisfy any liability or obligation arising out of such contract any separate property which at the time or thereafter she is restrained from anticipating.

The fourth section repeals sub-secs. 3 and 4 of sec. 1 of the M. W. P., 1882, the provisions of which are more widely enacted by sec. 1 of the later Statute.

Sub-sec (c) reverses the law as laid down in *Beckett v. Tasker*, 1887 (19 Q. B. D., 7), and *Pelton v. Harrison*, 1891 (T. L. R. vii., 686).

Sec. 2 is considered in the division of the Thesis which treats particularly of Procedure.

The concluding portion of sec. 1 re-enacts the similar provision in sec. 19 of the M. W. P., 1882, and leaves unaffected sec. 39 of the Conveyancing and Law of Property Act, 1881.

It has been mentioned (p. 29), that in equity, a married woman incurred no liability in the absence of separate estate at the date of *the trial*. Since the M. W. P. Acts, 1882 and 1893, it is perhaps unnecessary to prove such existence, although the legal position is not altogether clear. (See *Lush*, pp. 308-310.)

POST-NUPTIAL SETTLEMENTS.—Where the settlement is post-nuptial, all those weighty and important considerations which spring from the independent position of the parties before matrimony, and from their altered state after it, are wanting. The husband and wife were formerly incapable of contracting with each other because the wife was under the disability of coverture.

“What I go upon is this, that here was no contract on the part of the wife. She was incapable of contracting, being under coverture.” (*Per Lord Hardwicke in Lanoy v. Duchess of Athol*, 2 Atk. 444, 448.)

In equity, however, a wife might have validly contracted with her husband as to her separate property.

Now by the M. W. P., 1882, the doctrine of equity has received Statutory recognition. (*Macqueen*, pp. 264-5.)

Post-nuptial settlements in general will be deemed voluntary for want of consideration, but if a settlement is executed after marriage in pursuance of a valid ante-nuptial agreement it of course acquires the validity of an ante-nuptial settlement. Under certain circumstances, such as where valuable consideration moves from third parties, a post-nuptial settlement may be rendered unimpeachable (*Macqueen*, p. 266, and cases there cited). The discussion of these conditions is not, however, within our province.

We have already commented on sec. 19 of the 1882 Act (pages 19 and 21). Under it the validity of settlements is not disturbed, subject to a proviso against fraud. A voluntary post-nuptial settlement made by wife or husband, of course will be void against creditors under this proviso, and 13 Eliz., c. 5, though binding as between the parties themselves, and subsisting for all other purposes (*Lush*, pp. 228-9). Voluntary post-nuptial settlements made by a wife would probably come under sec. 47 (1) of the Bankruptcy Act, 1883, the result of which briefly speaking, is that if a person makes a voluntary post-nuptial settlement of his property and becomes bankrupt within two years of doing so, the settlement is void against his creditors; and if the settlor becomes bankrupt within even ten years of the settlement, he must be prepared to show that he was solvent when he made it, without the aid of the property comprised in the settlement. This section refers only specifically to settlements made by a *man* on his wife and children. We need not limit the application. A *feme covert* carrying on a separate trade can now be made bankrupt; and under such circumstances her

voluntary settlements would come under the section ; for the proviso in sec. 19 of the M. W. P., 1882, places her in the same position as a man so far as that enactment is concerned ; also by sec. 152 of the Bankruptcy Act, 1883, "nothing in this Act shall affect the provisions of the M. W. P., 1882."

Mention has been made (p. 25) of settlement policies which received Statutory recognition by the M. W. P., 1870. Sec. 11 of the 1882 Act re-enacts the earlier clause with variations, but there is a proviso to protect creditors against fraud.

With regard to the possessions of a wife married after January 1st, 1883, and to property acquired by a wife subsequent to that date, the M. W. P., 1882, would bar any binding of such separate property by a covenant in a post-nuptial settlement, unless the wife joined in the covenant, or made a separate covenant. (*See cases quoted in Lush, p. 515, note k.*)

SEPARATE TRADING BY A MARRIED WOMAN.— It has been stated already, that judgment may be obtained against a married woman, but only her separate "free" property can be taken in execution. That therefore she cannot be imprisoned on a debtor's summons, and that a bankruptcy notice of an *ad personam* character cannot issue against her. Nevertheless she can be made bankrupt, for by sec. 1 (sub-sec 5) of the M. W. P. 1882, "every married woman carrying on a trade separately from her husband shall, in respect of her separate property, be subject to the bankruptcy laws in the same way as if she were a *feme sole*." It would seem that if there had been no special provision on the subject in this Statute a

married woman would in every case have been capable of being made a bankrupt. But the law has in this respect placed her in an exceptional position. Only *while carrying on the separate trade* is she subject to bankruptcy law in respect of her trading contracts and liabilities. Otherwise she is under a personal incapacity to be made bankrupt. (See *post*, page .)

Under the old law, a *feme covert*, whether she had separate estate or not, was not under any circumstances liable to bankruptcy law, unless she were a trader within the customs of London, or her husband was *civiliter mortuus*. (See pages 2-4.) In *exp. Jones*, 12 Ch., D. 484, the question was raised whether a married woman possessed of separate property was capable of being made a bankrupt. James, L. J., in his judgment remarked as follows :—

“The married woman who contracts in that way is not a debtor in any sense of the word, and she, not being a debtor, the whole foundation of the appellant’s case fails. A debtor’s summons is a summons against the debtor. The respondent is not a debtor, and therefore there was no legal authority to issue a debtor’s summons against her, and no proceedings in bankruptcy founded upon it could be effectually taken.”

If a married woman is made bankrupt only her separate property is affected (sec. 5 of the M. W. P., 1882). In the case, therefore, of a woman married before the operation of this Act, her interest in real estate not settled to her separate use, of which she and her husband are seised in her right, as also any *choses in action* her title to which accrued before January 1st, 1883, and which have not been reduced into possession by her husband, would not be included.

Previous to recent Statutory provision the *feme covert* who traded on her own account was not indeed liable to bankruptcy law, for she could not in reality trade "separately" at all. With the slight exceptions already alluded to (pages 2-4), she could only trade as her husband's agent, and the wages and earnings she might acquire by her own independent labour and skill, belonged in common with her own personal property to her husband. The M. W. P., 1870 (sec. 1), interfered to a certain extent with this doctrine.

This section applied to *all* married women whether married before or after the commencement of the Act. Under its operation it was decided in *re Dearmer James v. Dearmer* (53 L. T., 905) that if a woman married before the passing of the M. W. P., 1870, carried on a separate business as a schoolmistress with the permission of her husband, who lived in the same house, but for her own benefit, the goodwill of the business belonged to the wife, and not to the husband's executors. The marriage took place in 1862, and the husband died in 1877.

This provision in the earlier Act has, however, been superseded by the 1882 Statute, the 2nd sec. of which enacts, that :—

"Every woman who marries after the commencement of this Act shall be entitled to have and to hold as her separate property, and to dispose of in manner aforesaid, all real and personal property which shall belong to her at the time of marriage, or shall be acquired by or devolve upon her after marriage, including any wages, earnings, money, and property gained or acquired by her in any employment, trade, or

occupation, in which she is engaged, or which she carries on separately from her husband, or by the exercise of any literary, artistic, or scientific skill."

The 5th sec. makes the same provision with respect to women married before the commencement of the Act.

In *Smith v. Hancock* (1894, T. L. R. x., 433), it was held that if a vendor of a business covenants "not to carry on or be in anywise interested in" a business similar to that sold, there is no breach of such covenant where the vendor's wife carries on such business trading separately from him with her separate estate. Lindley, L. J., observed in reference to the case :—

"An agreement by a husband not to do a thing does not oblige him to prevent his wife from doing that same thing if *she has a right to do it independently of him.*"

And Smith, L. J., in his judgment said :—

"Before the passing of the Married Women's Property Acts of 1870 and 1882 I do not doubt that a wife, setting up business in the way Mrs. Hancock has, would have done so as agent for her husband, for as long as coverture existed she could do so in no other capacity, and her acts would then constitute a breach of covenant by the husband, on the principle *qui facit per alium facit per se*. But this is not so now. *The wife, although coverture exists, can nevertheless trade with her own separate property, apart from her husband and free from his control, as if she were a feme sole, as and when she pleases, and, if she does so, she is no more the agent for her husband than his father, uncle, or brother would be under like circumstances, nor can the husband restrain his wife from so acting.*"

We need not enlarge on "wages" or earnings acquired by literary, &c., skill. The chief legal questions

arise under a married woman's *separate trading*. So far as relations between the wife and husband are concerned, it is clear that under the later Act *all* that the wife earns and acquires by her separate trade is her own, provided there is no contract between husband and wife to the contrary.

What constitutes carrying on a trade separately from the husband? It is clear from the *Dearmer* case already referred to, that there need be no "visible" separation between husband and wife. They may live in the same house.

The husband may render "reasonable assistance" and the wife will still be separate trader. *Ashworth v. Outram* (5 Ch., D. 923). If he actually *interferes*, he takes the case out of the Statute. If he assumes the proprietorship, and acts in such a way as to make himself the real master, and liable as principle to third parties, if he "makes the business his own," the trade is not such a "separate trading" by the wife as to entitle her (in the absence of contract), to the profits and trade property as her separate property, by virtue of secs. 2 and 5 of the 1882 Act. (*Lush*, p. 165 and cases cited; *ibid* for details of evidence required as to what the trading relations really are.)

"What does 'trading separately from the husband' in the Married Women's Property Act of 1882 mean? It must mean, as it seems to me, without attempting any precise definition or description of "separately trading," a trading in such a way that in fact, as between herself and her husband, the husband could make out no claim to the property and benefits of the trading; in such a way that the profits of the business and the assets of the business, as between husband

and wife, belong solely to her." (Per Kennedy, J., in *re Helsby*, 1893, L. J. Q. B., 261.)

From what has just been said it is *a fortiori* probable that a trade is not a married woman's separate trade if carried on in partnership with her husband. And this is the law. (In *re Helsby*.)

A wife may, however, be a partner in a trading partnership, to the extent of the contractual power given her by the M. W. P. Acts, 1882, and 1893. She may be a partner with her husband. (*Butler v. Butler*, 1885, 16 Q. B. D., 374.) She may have her stipulated right to share in the profits of the concern; she will incur the liabilities of the firm; and the fact that she is carrying on business as a partner has been held to be sufficient evidence that she was possessed of separate estate at the time when it was necessary to prove the existence of separate estate to make her liable on a contract made under the Act of 1882. (*Eddowes v. Argentine Co.*, 62 L. T., 602; See also in *re Helsby* and *Lush*, p. 170.)

A *feme covert* can now enter into a contract with her husband as if she were a *feme sole*, and thus by contract regulate her trading *status* so far as relates to him, independently of Statutory protection.

We have seen that in *re Dearmer* the goodwill of the business is reckoned an asset equally with the earnings, so in the 1882 Act *property* gained or acquired in the separate trade is specifically mentioned.

As long as the trade debts remain unpaid the the married woman is carrying on the trade. (In *re Dagnall*, 1896, 2 Q. B., 407.)

## Contracts as Agent.

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### I.—AGENT FOR HUSBAND.

This is a most important branch of law. "In no case pleaded before in this Court were a larger portion of mankind concerned; for the judgment delivered in it concerned the two sexes—that is, so many of each as are married or will be married. Nor could such interest be nearer or more direct, since it related to the acts of wives, who are by the law of this Country and the law of God, accounted identical with their husbands." (*Manby v. Scott*, 1661, quoted in Smith's Leading Cases, 10th edit., vol. II., 437-8.) It can no longer be said that by "the law of this Country" wives are "accounted identical with their husbands." Nevertheless "*Manby v. Scott*" is the leading case on the subject. Followed up by *Montague v. Benedict*, 1825 (3 Barn and Cress, 631), *Seaton v. Benedict*, 1828 (5 Bing., 28), *Jolly v. Rees*, 1864 (15 C. B., N. S., 628), *Debenham v. Mellon*, 1880 (6 App., Cas. 24), and illustrated on different sides by other cases a body of *lex non scripta* has been developed, on which modern legislation has had but little *direct* effect. It is therefore not within the scope of this Thesis to treat this branch of a married woman's contracts at any length. Notwithstanding the quoted observations of some of the Judges in *Manby v. Scott* as to the legal identity of husband and wife, for a very long time the authority of a wife to bind her husband by her contracts has been considered to be a branch of the law of principal and agent. "A man

shall be charged in debt for the contract of his bailiff or servant, where he giveth authority to his bailiff or servant to buy or sell for him ; and so for the contract of his wife, if he giveth authority to his wife, otherwise not" (*Fitzy. Nat. Brev.* 120 G.). The wife was considered as an agent who stipulated for no personal liability (*Smout v. Ilbery*, 1842, 10 Mee. & W. I.), so that she could not be sued, either on an implied warranty of authority, or on the contract, when her husband was in fact dead at the time when the goods were supplied (*ibid*).

The mere fact of marriage does not imply that authority is given by the husband to the wife to act as his agent. (*Debenham v. Mellon*, 1880.) In this case the Court said :—

“ If there is an establishment of which there is a domestic manager, although the wife may be the most natural domestic manager, and though the presumption may be strongest when she is so, yet the same presumption may and often does arise from similar facts, when the actual manager is not a wife, but merely a woman living with a man and passing as his companion, with or without the assumption of the name of wife. It is also the same where the person, to whom the domestic arrangement is delegated, is a housekeeper or a steward, or any other kind of superior servant.”

The authority given by the husband may be either (1) *express*, (2) *implied*, or (3) *ostensible*, *i.e.*, the husband may have so conducted himself as to preclude himself from denying the authority. The general legal treatment and differentiations of these various kinds of agency contracts have been elaborately dealt with in various treatises, and are without our sphere, as

indicated by the title of the Thesis. Cases 1 and 3 are independent of recent legislation. With regard to 2, it is submitted that although recent legislation has not *formally* altered the liability of the husband for contracts made by his wife, as his agent (*Wilson v. Glossop*, 1888, 2 Q. B. D., 354), yet, as by sec. 1 (sub-sec. 3) of the 1882 Act, every contract entered into by her *shall be deemed to be entered into with respect to and to bind her separate property, unless the contrary be shown, the onus was placed on the married woman to remove the presumption that she intended in entering into a contract to bind her separate property. Formerly the burden of proof lay on the other party; who had to make it clear, ordering "necessaries" that she intended to make her separate property liable. It appeared, however, to be forgotten that most women contract as agents, so 11 years later we find that agency is distinctly recognized in the latest of the M. W. P. Acts. Sec. 1 of the 1893 Act enacts, "Every contract hereafter entered into by a married woman, otherwise than as agent, &c."*

Although in the later Act agency is specifically referred to, the proviso in the earlier Statute "unless the contrary be shown," is omitted. Therefore if agency be not established, separate property, present or future,\* would seem to be irresistibly bound. The establishment of implied authority is a question of fact; different considerations apply, according as husband and wife are living together, or apart.

Where the parties were living apart by mutual consent, and the husband had agreed to pay the wife an allowance and neglected to do so, the wife, if she

had not sufficient means of her own, had an absolute right by law to pledge the husband's credit for suitable necessities.

“The wife's necessities are such articles as the law deems essential to her health and comfort ; chiefly food, drink, lodging, fuel, washing, clothing, and medical attendance. They are to be determined, both in kind and amount, by the means and social position of the married pair, and must therefore vary greatly among different grades and at different stages of society. Thus a large milliner's bill might not be deemed necessities for the wife of a labourer, while a wealthy merchant would be bound to pay it. So too, necessities to-day are not what they were fifty years ago. Nor is the ordinary test to be found in the real situation and means of the married parties (for this a tradesman cannot be expected to investigate), but in their apparent situation, the style they assume, and the establishment they maintain before the world ; which every husband is supposed to regulate with sufficient prudence. Articles too, may be of a kind which the law pronounces necessities, and yet a wife may be so well supplied as not to need the particular articles in question,—a distinction of some consequence. The decisions in the books, relating to necessities, are therefore somewhat confusing, as might be expected ; the more so since the dividing line between law and fact in such cases is not marked with distinctness. Sometimes the Court decides whether articles are necessary, sometimes a jury. The ordinary rule is that the Court shall decide whether certain articles are to be classed as necessities ; while the jury may determine the question of amount and apply the classification to the facts.” (*Schouler, Law of Domestic Relations, 5th edit., p. 99.*)

These statements are, we submit, supported by the English decisions, *e.g.*, *Phillipson v. Hayter* ; *Jolly v. Rees* ; *Hunt v. De Blaquiere* ; *Emmett v. Norton*, all quoted in *Smith's L. C.* (10th edit., vol. 2, pp. 475 and 487.)

When the husband and wife cohabit, it was laid down in the first named case that "necessaries" should "fall fairly within the domestic department which is ordinarily confined to the management of the wife."

The word in fact has a different connotation according as the parties are living together in the usual way; or living together while the wife is deprived of the bare means of subsistence; or living apart.

The wife, however, can now by virtue of power conferred by legislation, sue her husband on the contract to pay alimony. Notwithstanding this newly given contractual status, it seems that the common law authority of the wife still exists as a concurrent remedy.

The husband used to be liable, whether he made his wife an allowance, or not, for the cost of legal proceedings rendered necessary through his misconduct; and her solicitor could recover from him, whatever the event of the proceedings might be, provided he conducted the litigation properly, and fairly investigated the charges brought, and saw a reasonable prospect of success. (*Robertson v. Robertson*, 1881, 6 P. D., 119.) The effect of the M. W. P. Acts on this liability is not clear. In *Harrison v. Harrison*, 1888 (T. L. R. iv., 646), the facts were as follows:—In May, 1886, Mrs. Harrison obtained a decree for dissolution of marriage on the ground of her husband's adultery and cruelty. In March, 1887, an order was made by Mr. Justice Butt directing Mr. Harrison to secure to Mrs. Harrison during their lives the annual sum of £130, being about one-third of his income. After this order was pronounced, Mrs. Harrison changed her solicitors. On

June 5th, 1888, her former solicitors obtained from Mr. Justice Butt, in Chambers, an order giving them a charge, under sec. 28 of the Solicitors Act, 1860, for the amount of their costs on the sum which had been ordered to be paid to Mrs. Harrison for permanent maintenance. From that order Mrs. Harrison appealed. In giving the judgment of the Court of Appeal, Cotton, L. J., said :—

“It had been said that the solicitors could not, since the passing of the Married Women’s Property Act, 1882, have made any claim against the husband for their costs, because since that Act a married woman was capable of contracting and could bind her separate property. But that was subject to this qualification—‘unless the contrary is shown’; and here, although there was some evidence that the married woman had separate property, it appeared on looking at the marriage settlement that all her separate property was subject to a restraint on anticipation. That fact, therefore, prevented it being assumed that there was any contract made by the wife with reference to her separate estate. Under the circumstances, therefore, he was of opinion that the solicitors had not made out a *primâ facie* case that they could not otherwise than by obtaining the charging order sought get payment of their costs, and, therefore, that there was not a sufficient case made out by them to justify the order of Mr. Justice Butt.”

From this case it appears that the separate property of the *feme covert* being subject by the marriage settlement to a restraint on anticipation shut out the liability for costs. Under sec. 2 of the M. W. P., 1893, it would probably now be held that a wife who has separate property whether subject to restriction or not, has no longer the right to pledge her husband’s credit for costs as formerly, unless his misconduct renders them necessary, and that her solicitor would

have to look to her alone for payment. Sec. 2 runs as follows :—

“In any action or proceeding now or hereafter instituted by a woman or by a next friend on her behalf, the Court before which such action or proceeding is pending shall have jurisdiction by judgment or order from time to time to order payment of the costs of the opposite party out of property which is subject to a restraint on anticipation, and may enforce such payment by the appointment of a receiver and the sale of the property or otherwise as may be just.”

In cases where the husband would be liable for necessaries supplied to the wife, he was not liable *in law* for money lent to her, and applied by her in procuring necessaries. (*Knox v. Bushall*, 1857, 3 C. B. N. S., 334); *secus*, in Equity (*Deare v. Soutten*, 9 Eq., 151); and the rule of Equity now prevails under the Judicature Act, 1873, sec. 25, sub-sec. 11.

A husband is liable to pay the expenses of his wife's funeral, whatever the wife's means may be, and whether the parties are living together or apart. (*Jenkins v. Tucker*, 1788, 1 Black, H. 90; *Ambrose v. Kerrison*, 1851, 10 C. B., 776); unless, perhaps, the wife is living apart from him by her own default. A person who voluntarily incurs these expenses in good faith can recover them from the husband (*Bradshaw v. Beard*, 1862, 12 C. B. N. S., 344). Formerly the husband could not reimburse himself out of the wife's separate estate unless she had charged it with these expenses. (*Willeter v. Dobie*, 1856, 2 Kay and J., 647.) But since the M. W. P., 1882, he probably can (in *re McMyn*, 1886, 33 Ch., D. 575).

We submit that if a married woman has obtained an order under the Summary Jurisdiction (Married Women) Act, 1895, by which the husband is ordered to pay to her a reasonable weekly sum, and the order is obeyed, she will thereby be debarred from rendering her husband liable on any of her contracts unless his authority is expressly given.

The *general and indirect* effect of modern legislation has been to slightly limit the liability of the husband on the wife's contracts as his agent. But the increase of the wife's contractual power under recent legislation has not been accompanied by any proportionate decrease in his responsibilities. This is not the place, nor have we the presumption to criticise the legal position. Nearly 250 years ago the placing of the husband in an unreasonable degree at the mercy of his wife's agency contracts was thus picturesquely commented on by Wyndham, J. :—

“If the husband shall be bound by this contract :—

- (1.) “The husband will be accounted the common enemy; and the mercer and the gallant will unite with the wife, and they will combine their strength against the husband.
- (2.) “Wives will be their own carvers, and like hawks, will fly abroad and find their own prey.
- (3.) “It shall be left to the pleasure of a London Jury to dress my wife in such apparel as they think proper.
- (4.) “To charge the husband on the contract of his wife without his actual assent will tend to subvert the law of God and of nature, which has given the husband power and government over the wife: and this is the very saying of God Himself, ‘*Erga virum appetitus tuus erit, et ipse regnabit in te.*’ . . . True it is, as has been observed by those who have argued

for the plaintiff, that the husband, by marriage, declares that he will sustain and comfort his wife, and that he says he will endow her with his worldly goods. But though husbands are bound, not by the law of God alone, but by the law of nature also, to maintain their wives, yet from this it cannot be inferred that they must be bound by their contracts." (*Manby v. Scott*, as quoted in Smith's L. C., 10th edit., pp. 453-5.)

We are not concerned here with the discussion of this manner of calling to witness the "law of God" and the "very saying of God Himself," but English municipal law has most certainly modified the husband's power and government over his wife. In short, though in a legal sense the effect of modern legislation has been to suck the husband's blood, the wife's contractual figure, previously attenuated, has attained great rotundity, while at the same time the emaciated body of the husband has to bear the old burden, but slightly reduced in size and weight.

## II.—GENERAL AGENCY.

The capacity of a person to enter into and incur liability upon a contract of agency, whether as principal or agent, *depends upon his (or her) general capacity to contract.* (*Smally v. Smally*, 1700, 1 Eq., Ca. Abr. 6.) The contractual ability of a *feme covert* has been enlarged and developed by modern legislation, and in accordance with the doctrine laid down in the above-mentioned old case, her legal status as agent will be correspondingly affected. In fact there can be but little doubt that she could be made liable for breach of warranty of authority, or otherwise, in any case where an ordinary agent would be so liable.

## Contracts with Husband.

*A.*—At Common Law husband and wife could not contract together (*Phillips v. Barnett*, 1876, 1 Q. B. D., 436). In the eye of the law they were one person. If two contracting parties intermarried, the contract was suspended during the marriage. *Fitzgerald v. Fitzgerald*, 1868, L. R. 2 P. C., 83.)

In equity, however, since married women have been permitted to acquire and dispose of separate estate, the rule has been different, and husband and wife, so far as the latter's separate estate is concerned, may be bound together by an *obligatio*. In *Woodward v. Woodward*, 1850 (3 De G. and Sm., 672), Lord Westbury laid it down that a wife might enter into a contract of loan with her husband by advancing money to him out of her separate estate. "It is quite clear," said his Lordship, "that if money, part of the income of her separate estate, be handed over by her to her husband upon a contract of loan, she may sue her husband upon that contract." It has been held in a case decided before the Act that a wife may sue her husband's executors for money lent to her husband (*Green v. Carlill*, 4 Ch., D. 882). The M. W. P., 1882, severed the relation between husband and wife to this extent, that they are no longer one person in law for the purpose of acquiring and holding property.

Sec. 12 enacts that :—

"Every woman, whether married before or after this Act, shall have in her own name against all persons whomsoever, *including her husband*, the same civil remedies . . . for the protection and security of her own separate property, as if such property belonged to her as a *feme sole*."

There seems to be no doubt that, taking this section together with secs. 1 and 2, they may mutually enter into almost every class of contract, and sue one another, as freely as though the marriage relation did not exist. (*Butler v. Butler*, 1885, 14 Q. B. D., 831; *McGregor v. McGregor*, 1888, 21 Q. B. D., 424.) In the earlier case it was held that a husband and wife can contract with respect to a loan advanced by the wife to her husband out of her separate property, and that the remedy is mutual, and also that if the money is paid after marriage by the wife to the use of her husband in pursuance of a request made before marriage, an action for money paid may be brought after the marriage. We qualified the statement as to the universality of contracting power a *feme covert* now has by using the word "almost." There may be contracts which, if made between husband and wife, would be held to be contrary to public policy, and which would be held void on that ground. (*Lush*, p. 398.) We appreciate the difficulties clustering round the term "public policy." Contracts to do what is illegal, what is *contra bonos mores*, what is contrary to public policy are all alike unenforceable. The line of demarcation between these classes is at times hard to trace. Sir William Anson makes the second class a branch of the first. Mr. Justice Burrough in *Richardson v. Mellish*, 1831, 2 Bing., 229, said "Public policy is a very unruly horse, and when once you get astride it you never know where it will carry you." Another English Judge more than half-a-century later said that public policy does not admit of definition, and is not easily explained; it is a variable quantity, which must

vary, and does vary, with the habits, capacities, and opportunities of the public (per Kekewich, J., *Davies v. Davies*, 1887, 36 Ch., D. p. 364). As between husband and wife the element of "public policy" comes in chiefly in executory contracts for separation and separation deeds. A contract providing for mutual rights and liabilities in the event of a subsequent divorce would doubtless be held to be void on this ground. But with regard to agreements for separation there has been a gradual change of judicial opinion upon the policy of recognizing their validity. This branch of the law has not been regulated to any extent by statutory provision, consequently its detailed treatment is outside the scope of this Thesis. We will therefore only state that until last century the Courts, both of Law and Equity refused to recognize any agreement between husband and wife, by which they sought mutually to release one another from the observance of the duties which the marriage relation imposed. It was considered that the Ecclesiastical Courts had sole cognizance over such matters. In 1766, we find the Courts of Law cautiously recognizing such contracts as valid. (*Rex v. Mead*, 1 Bun, 542.) The Courts of Equity commenced by holding as valid the "property provisions" of such contracts, though the main part of the contract containing the provisions relating to separation they refused to enforce. (*Lush*, p. 438 and cases there cited.) Even when Courts of Equity had arrived at the stage of sanctioning and giving legal effect to executed contracts, *i.e.*, contracts which were embodied in a final separation deed, they still refused to enforce a merely executory contract to live apart, *i.e.*,

a contract which contemplated the execution of a future final deed, as "articles of separation." This distinction was, however, finally disposed of by the House of Lords in *Wilson v. Wilson*, 1848 (1 H. L. Ca., 538), where it was held that an executory contract for separation is valid and binding on the parties, and will be specifically enforced by the Court if founded on good and valuable consideration. (*Lush*, p. 408.)

It used to be a common form in a separation deed to recite that the parties have agreed to live apart from one another for the remainder of their joint lives; and the deed frequently contained a covenant by the husband, that if, during the life of the wife he shall become possessed of any property in her right, she shall enjoy it to her separate use. Statute Law has now rendered this clause unnecessary; the M. W. P., 1882, would secure the property against the marital right of the husband. (See *post*, p. .)

By 36 Vict., c. 12, sec. 2, it is provided that:—

"No agreement contained in any separation deed made between the father and mother of an infant or infants shall be held to be invalid by reason only of its providing that the father of such infant or infants shall give up the custody or control thereof to the mother; provided always that 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 or infants to give effect thereto." [In this Act an "infant" is a child under 16. (Sec. 1.)]

Although the terms of the section refer to separation *deeds* only, it is most probable that a similar

provision contained in an *executory contract* for separation would be enforced by the Courts, for if the clause is valid in the deed it would be valid in the agreement. An agreement, therefore, for separation, by which the custody of infant children is to be given to the wife, is now in every case to be construed as being subject to the power of the Court to deal with it according as the Court may consider the interests of the children require.

The Statute referred to has altered the old law. By a well known legal rule the duty of maintaining his children and directing their education is cast upon the husband, and he is not allowed to relieve himself from his responsibilities towards them by entering into any agreement inconsistent with the due performance of those duties. Hence many clauses contained in separation deeds and agreements for separation, providing for the custody and control of the infant children being given to the mother, were held unenforceable. In the former case the illegal clause alone would be rejected; in the case of the executory contract the whole would be vitiated. The Court would, however, give effect to the agreement if it could be shown that the father was morally unfit to retain control of the children. (See cases cited by *Lush*, p. 451.) Previous to the 1873 Act, an Act was passed in 1839, known as Talfourd's Act (2 and 3 Vict., c. 54), which enabled the Court in its discretion to give the control of an infant child under seven to the mother upon her application. This Act contained no express reference to agreements between the parties, by separation deed or otherwise. It was repealed by the later Statute.

In *Hart v. Hart*, 1881 (18 Ch., D. 682), Kay, J., held that the Chancery Division has power to specifically enforce an agreement for the compromise of a matrimonial suit in the Divorce Court, *without infringing the Judicature Act* prohibiting any one Division of the High Court of Justice from interference with proceedings pending in any other Division.

Before the M. W. P. Act, 1882, a wife who had lent money to her husband could claim in the administration of her husband's estate after his death if there were no other creditors "to contend with." (*Slanning v. Style*, 1734, 3 P. Wms., 337), but apparently not otherwise. If, however, she were administratrix of the husband's estate, she might retain out of his estate, though insolvent, the amount of a loan which she had made for the purposes of his trade or business, and this right she still possesses. (*In re May*, 1890, 45 Ch., D. 490.) Apart from this right of retainer which is not affected by the 1882 Act, the legal position has been regulated by sec. 3 of the said Statute. It runs thus:—

- (3.) "Any money or other estate of the wife lent or entrusted by her to her husband for the purpose of any trade or business carried on by him, or otherwise, shall be treated as assets of her husband's estate in case of his bankruptcy, under reservation of the wife's claim to a dividend as a creditor for the amount or value of such money or other estate after, but not before, all claims of the other creditors of the husband for valuable consideration in money or money's worth have been satisfied."

The reason for this enactment has been thus stated by Mr. Justice Cave.

“Previous to the passing of the M. W. P. Acts, the property of a married woman went to her husband, and what she earned or acquired, unless her separate property in equity, also became the property of her husband, who might deal with it as he pleased. When the legislature, therefore, gave to a woman a property in her own earnings, or in other money which came to her during the marriage and which was not settled to her separate use, it had to consider what was to happen if the wife lent such money to her husband for the purpose of his trade or business, and following out the principle which obtains in some of the cases, as, for instance, in the assessment. Under the Income Tax Acts, it identified the wife with the husband to this extent, that if she chose to make use of this power which was given her and to say that the money was hers and must be treated as a loan to her husband, then that she, at all events, should be identified with him to such an extent that she should not be able to claim a dividend until the other creditors had received twenty shillings in the pound.” (In *re Tuff*, 1887, 19 Q. B. D., 88.)

The combined effect of this section, and sec. 10 of the Judicature Act, 1875, is that in the administration of an insolvent estate by the Court the claim of the widow for money lent for the purposes of deceased's trade is postponed to the claims of his other creditors. (In *re Leng*, 1895, 1 Ch., 652.) The section extends to the case of a wife the principle of sec. 3 of the Partnership Act, 1890, in case of the husband's bankruptcy the wife taking the place of a person advancing money to the husband in consideration of receiving a share of the profits of a business. (*Exp. District Bank*, 1885, 16 Q. B. D., 700.) A husband who makes a loan to his wife for the purposes of her separate trade will, it is submitted, be postponed to her trade creditors by the operation of the same Act. There is no provision applicable to such a case in the M. W. P., 1882.

The section only applies where the husband is a sole trader. Accordingly, where the wife lends her money to a trading partnership of which her husband is a member, she is, notwithstanding the section, entitled to prove in the bankruptcy of the partnership against the joint estate in competition with other creditors. The section is not retrospective. (*Lush*, p. 400, and cases there cited.)

Sec. 3 of the 1882 Act has no application to a loan by a wife for purposes other than her husband's trade or business (*Exp. Tidswell*, 1887, 56 L. J. Q. B., 548; *Mackintosh v. Pogose*, 1895, 1 Ch., 505). The burden of proving that the loan was not for the purposes of trade is on the wife if the husband is a trader (*Exp. District Bank*, 1885, 16 Q. B. D., 700). But if she discharges this burden, she may prove in his bankruptcy in competition with other creditors.

The Act has not affected the power of a married woman to bind by her contracts such real estate as she may have become possessed of before the Act came into operation, not settled to her separate use. And therefore, a contract between husband and wife relating to such property will still be ineffectual to the same extent as it was before the Statute. (*Williams v. Walker*, 9 Q. B. D., 576.)

## Procedure.

In addition to what has already been said relative to proceedings by and against married women (see pages 3, 9, 11-14, 17, 18, 20, 21, 25, 26, 29-31, 36-39, 50), a few more remarks on this branch of the subject are here submitted. We will confine ourselves to such procedure as appears to arise (*inter alia*), out of contract and its breach. At Common Law a married woman could not sue as a *feme sole* unless she carried on a trade within the custom of the City of London, or her husband was *civiliter mortuus*. (Pages 2 and 3.) She could only sue as co-plaintiff with her husband. In Chancery she could not sue either by herself or her next friend without her husband, except by leave of the Court on giving such security for costs as the Court might require. If sued at Common Law she could by pleading an abatement insist on her husband being joined as defendant. In Chancery, also, he was regularly made a defendant, unless by leave of the Court. (*Daniell Chancery Practice*, 6th edit, pp. 119, 185.) We omitted to mention sec. 11 of the M. W. P., 1870, which runs as follows:—

11. "A married woman may maintain an action in her own name for the recovery of any wages, earnings, money, and property by this Act declared to be her separate property, or of any property belonging to her before marriage, and which her husband shall, by writing under his hand, have agreed with her shall belong to her after marriage as her separate property, and she shall have in her own name the same remedies, both civil and criminal, against all persons whomsoever for the protection and security of such wages, earnings, money, and property, and of any chattels, or other property purchased or obtained by means thereof for her own use, as if such wages,

earnings, moneys, chattels, and property belonged to her as an unmarried woman; and in any indictment or other proceeding it shall be sufficient to allege such wages, earnings, money, chattels, and property to be her property."

It has been held since 1882, that a married woman may now sue alone without giving security for costs, even though she has no separate property available for costs. (In *re Isaac*, 1885, 30 Ch., D. 418.) But she may be ordered to secure the costs of an appeal. (*Whittaker v. Kershaw*, 1890, 44 Ch., D. 296.) Suing for an injunction she must give the ordinary undertaking in damages; and her undertaking is sufficient even though she does not possess separate property free from restraint on anticipation (*Pike v. Cave*, 1893, 62 L. J., Ch. 937). Where a married woman pays a sum into Court as a condition of having leave to defend under Order 14, a successful plaintiff is entitled to have the sum paid out and need not await an inquiry whether the married woman has separate estate liable to execution (*Bird v. Barstow*, 1892, 1 Q. B., 94).

Before the M. W. P., 1893, costs could only be obtained from the property of a *feme covert* not subject to restraint on anticipation. (In *re Glanville*, 31 Ch., D. 532.) This, however, is now altered. Sec. 2 of the said Act enacts:—

2. "In any action or proceeding now or hereafter instituted by a woman or by a next friend on her behalf, the Court before which such action or proceeding is pending shall have jurisdiction by judgment or order from time to time to order payment of the costs of the opposite party out of property which is subject to a restraint on anticipation, and may enforce such payment by the appointment of a receiver and the sale of the property or otherwise as may be just."

The term "action instituted" does not apply to an order made before the Act came into operation; nor does it include motions or appeals by the defendant. (*Hood-Barrs v. Cathcart*, 1894, 3 Ch., 376.) It means some action or proceeding in the nature of an action initiated by a married woman (*ibid*). It applies to an action brought by a married woman, and pending when the Act came into operation so as to enable the Court to direct that separate estate subject to restraint be resorted to for the payment of the costs of the action. The presentation of a petition in an action by a married woman is not a "proceeding instituted" within the section (*Hollington v. Dear*, 1895, W. N. (95), 35, nor is the lodging of a "caveat" in a probate suit. (*Moran v. Place*, 1896, P. 214.) But a counter-claim is an action or proceeding within it. (*Hood-Barrs v. Cathcart*, 1895, 1 Q. B., 873.) The section has been recently held by the House of Lords only to apply to an *action* brought by a married woman, and not to an *appeal* instituted by her. (*Hood-Barrs v. Crossman, &c.*, 1897, T. L. R. xiii., 291.)

"*With Costs.*"—An order dismissing the action of married women "with costs" should make them payable out of her separate estate. (*Galmoye v. Cowan*, 58 L. J. Ch., 769.) The form should run thus: "That the defendant recover against the plaintiff his costs in this action, such costs to be taxed by the taxing master and to be payable out of her separate property," or "with liberty to apply for payment out of any property which is subject to restraint on anticipation." (*Davies v. Treharris Co.*, 1894, W. N., 198.) The costs ordered to be paid by a married woman may be set off

against costs ordered to be paid to her. (*Pelton v. Harrison*, 1891, 1 Q. B., 118.)

By R. S. C., Order 9 and 3, a husband and wife, if sued together, must both be served with writs, when suing together they must make discovery by separate affidavits. (*Fendall v. O'Connell*, 1885, 29 Ch., D. 899.) As we have seen (p. 64), husband and wife can now take civil proceedings against each other. This right though qualified as regards tort is almost absolute in the case of contract. Sec. 17 of the M. W. P., 1882, deals fully with the determination of questions between husband and wife. We conclude this section by quoting the following summary of the judgments of Lopes, L. J., and Smith, L. J., in *re Lynes*, 1893 (2 Q. B., 113).

Lopes, L. J. :—

“The bankruptcy notice must be in accordance with the terms of the judgment, and must be in the form given in Form No. 6 in the Appendix to the Bankruptcy Rules, 1886. That form was not applicable to a judgment against a married woman. The present decision did not interfere with what this Court said in *Pelton Brothers v. Harrison*, 1892, (1 Q. B., 118), and their decision now only went to this—that sub-sec. 1 (*g*) of sec. 4 of the Bankruptcy Act, 1883, was not applicable to a married woman. Sec. 1, sub-sec. 5, of the Married Women's Property Act, 1882, was not, therefore, rendered useless, as other sub-secs. of sec. 4 might be made available against a married woman trading separately.”

A. L. Smith, L. J. :—

“In the case of *Ex parte Hughes*, 1892 (1 Q. B., 628), this Court held that a bankruptcy notice must follow the terms of the judgment. Here the judgment was for payment out of the married woman's separate estate. The bankruptcy notice, which alone the Act entitled the creditor to issue, was

a notice requiring her to pay personally. Such a notice was not applicable to this case."

An important question of bankruptcy law has lately come before the Court of Appeal in the case of *in re Frances Handford & Co.*, 1899, T. L. R. xv., 197. Is a married woman trading separately from her husband under a firm name to be made bankrupt for non-compliance with a bankruptcy notice founded upon a judgment against the firm? The Court decided she could not be made a bankrupt. The judgment of Lindley, M. R., illustrates the present legal position of a married woman with regard to bankruptcy so clearly we give it in full as reported in the "Times" Law Reports.

"The Master of the Rolls said that this appeal raised a new and interesting point. Here was a married woman trading under the name of Frances Handford and Co., and he assumed for the purposes of his judgment that she was trading separately from her husband. Some persons supplied the firm with goods in the ordinary way of business and, as was common enough, did not take the trouble to find out of whom the firm consisted. They then issued a writ against the firm for the price of the goods and obtained judgment quite regularly under Order 14 against Frances Handford and Co. Having obtained that judgment they issued a bankruptcy notice and sought to have this lady made a bankrupt. Upon the assumption that this lady was trading apart from her husband, it was plain that she was liable to be adjudicated a bankrupt, because the Married Women's Property Act, 1882, by sec. 1, sub-sec. 5, provided that every married woman carrying on a trade separately from her husband should, in respect of her separate property, be subject to the bankruptcy laws in the same way as if she were a *feme sole*. What was the legal effect of that? In *Scott v. Morley* (20 Q. B. D., 120), the

form in which a judgment ought to be entered against a married woman was settled by the Court of Appeal. That form provided that the sum recoverable should be payable out of her separate property as thereafter mentioned, and not otherwise, and it was ordered that execution thereon should be limited to the separate property of the defendant not subject to any restriction against anticipation unless, by reason of sec. 19 of the Married Women's Property Act, 1882, the property should be liable to execution notwithstanding such restriction. It had been decided more than once that a married woman, although she might be made a bankrupt for other causes, could not be made a bankrupt upon a judgment in that form. What then was the effect of a judgment against a married woman in the name of a trading firm? Upon looking at Order 48a, rule 11, coupled with rules 4, 5, and 8, it was not very difficult to see what it was. The effect was that the judgment concealed the truth but did not alter it. If it were a question of setting this judgment aside his Lordship would not do so without consideration. But although Order 48a as a matter of convenience allowed an action to be brought against a firm in the firm name and allowed judgment to be obtained against the firm, in truth and in fact the action and the judgment were against the individuals who constituted the firm. His Lordship was therefore of opinion that the married woman could not be made a bankrupt upon a judgment in this form."

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## Section 24 of 1882 Act.

This section enacts :—

“The word ‘contract’ in this Act shall include the acceptance of any trust, or of the office of executrix or administratrix, and the provisions of this Act as to liabilities of married women shall extend to all liabilities by reason of any breach of trust

or devastavit committed by any married woman being a trustee or executrix or administratrix either before or after her marriage, and her husband shall not be subject to such liabilities unless he has acted or intermeddled in the trust or administration.”

Previous to this enactment a married woman could not accept the office of trustee or executor without her husband's consent. If he consented to her acceptance of the trust he was liable for the breaches of trust, (*Bahin and Hughes*, 1886, 31 Ch., D., 390) and was entitled to exercise control over, and his concurrence was necessary to, the execution of the trust. The husband was the owner of the trust estate almost as completely as if the wife were entitled to it beneficially. The wife could not dispose of it without the husband's concurrence, but the estate was not liable to satisfy the husband's debts. (*Farr v. Newman*, 1792, 4 T. R., 621.) The wife could continue the representation of a testator's estate by will without her husband's concurrence. (*Willock v. Noble*, 1875, L. R. 7, H. C. 580.) The husband, on the other hand, could dispose of the testator's estate without the wife's concurrence. (*In re Wood*, 1861, 3 De G. F. and J., 126; *Soady v. Turnbull*, 1866, L. R., 1 Ch., 494.) He could release debts owing to the estate, but could not sue without joining the wife.

By virtue of the above-quoted sec. 24 of the Act, a married woman may now accept a trust, or the office of executrix or administratrix, and her husband need not join in the administration bond. (*In the goods of Harriet Ayres*, 1883, 8 P. D., 168.)

Sec. 18 of the Act reads as follows :—

“A married woman who is an executrix or administratrix alone or jointly with any other person or persons of the estate of any deceased person, or a trustee alone or jointly, as aforesaid, of property subject to any trust, may sue or be sued, and may transfer or join in transferring any such annuity or deposit, as aforesaid, (*i.e.*, as mentioned in sec. 6), or any sum forming part of the public stocks or funds, or of any other stocks or funds transferable, as aforesaid, or any share, stock, debenture, debenture stock, or other benefit, right, claim, or other interest of or in any such corporation, company, public body, or society in that character, without her husband, as if she were a *feme sole*.

It is not easy to construe the two sections together.

There is no power given to a married woman who is a trustee of real estate to convey the same, she can only do so by an acknowledged deed and with the concurrence of her husband, and with the other formalities of the Fines and Recoveries Act, 1833, as slightly modified by the Conveyancing Act, 1882. Sec. 18 gives a somewhat particular account of the Trust personalty which a *feme covert* may transfer as a *feme sole*, but it is silent as to the transfer of land. By sec. 6 of the Vendor and Purchaser Act indeed she can convey such property as a “bare trustee,” and sec. 16 of the Trustee Act, 1893, enacts that “when any freehold or copyhold hereditament is vested in a married woman as a bare trustee she may convey or surrender it as if she were a *feme sole*.” But it has been clearly laid down in a recent case that where a married woman is trustee of real estate (and not a bare trustee), she cannot convey the same without the formalities of an acknowledged deed, and the concurrence of her husband. (*In re Harkness and Allsopp*,

1896, 2 Ch., 358.) The result of this decision is a strange contradiction. By sec. 24, the husband is not to be liable for breaches of trust committed by the wife, unless he intermeddles, but under the decision just mentioned he is, when real property is the subject of the trust, made to intermeddle. This disability, however, does not attach to a married woman who is a mortgagee in respect of separate property, and who, not having entered into possession of the mortgaged land, is in no sense a trustee of it for the mortgagor. (In *re Brooke and Fremion*, 1898, 1 Ch., 647.)

Mr. Lush (*Lush*, p. 158-9), considers that sec. 18 is retrospective; its object being to enable married women who are *already trustees* to sue for monies, transfer stock, &c., although assets or trust property reduced into possession before the Act would not be divested from the husband's possession. She may therefore get in outstanding assets, &c., and give a valid discharge for them as if she were a *feme sole*; and may sue without joining her husband. As regards her own acts and defaults she may also be sued without her husband.

Where a married woman is a trustee, it appears that in view of the important decision previously quoted (In *re Harkness, &c.*), it is doubtful whether she can *disclaim* otherwise than under the provisions of 8 and 9 Vict., c. 106, sec. 7 (extending the provisions of the Fines and Recoveries Act, 1833).

## APPENDIX.

## Contracts under the Matrimonial Causes Acts, &c.

(REFERRED TO AS "THE DIVORCE ACTS.")

Before the M. W. P. Acts, 1870-93 became law a group of exceptions to the contractual powerlessness of a married woman was created by the Divorce Acts, 1857 and 1858. Under these Acts a woman divorced from her husband is restored to the position of a *feme sole*. We are only concerned, however, with the changes in the legal status where the matrimonial bond is unbroken. Sec. 26 of the Divorce Act, 1857 (20 and 21 Vict., c. 85), provides :—

“In every case of a judicial separation the wife shall, whilst so separated, be considered as a *feme sole* for the purposes of contract and wrongs and injuries, and suing and being sued in any civil proceeding, and her husband shall not be liable in respect of any engagement or contract she may have entered into, or for any wrongful act or omission by her or for any costs she may incur as plaintiff or defendant; provided that where, upon any such judicial separation, alimony has been decreed or ordered to be paid to the wife and the same shall not be duly paid by the husband, he shall be liable for necessaries supplied for her use: provided also, that nothing shall prevent the wife from joining at any time during such separation, in the exercise of any joint power given to herself and her husband.”

And by sec. 21 a wife deserted by her husband, and having obtained a protection order from a

Magistrate or from the Court is "in the like position with regard to property and contracts," and suing and being sued, as she would be under this Act if she had obtained a judicial separation.

By the Act of 1858 (21 and 22 Vict., c. 108), it was provided (sec. 8) that property of or to which the wife was possessed or entitled for an estate in remainder or reversion at the time of the desertion should be deemed to be included in the protection given by the order. And by way of forerunner to sec. 24 of the M. W. P., 1882, the 7th sec. enacted that the protection order was to be deemed to extend to any property to which the wife should become entitled as trustee, executrix, or administratrix since the commencement of the desertion, the death of her testator or testatrix being deemed to be the time at which she became entitled.

By the same sections a married woman is enabled to act in a trust as a *feme sole* while a judicial separation or protection order is in force, and can transfer stock, for example, standing in a testator's name, without her husband's concurrence. (*Bathe v. Bank of England*, 1858, 4 *Kay and J.*, 564.)

These Divorce Acts are still in force as regards the proprietary and contractual rights of married women judicially separated, and who, deserted by their husbands, have obtained protection orders. But since January 1st, 1883, the provisions of the Divorce Acts and the M. W. P., 1882, are construed together.

The property specifically mentioned in the Divorce Acts as protected by the order is of a limited character

and in this respect differs from the comprehensive ownership under the M. W. P., 1882. On the other hand her contractual power is made absolute, for the 1857 Act unlike the 1882 Act, did not say she could only contract with respect to her separate property. Consequently under the former Act the *feme covert* can probably *in every case* be made a bankrupt. But the Divorce Acts dealt with a state of circumstances which might arise *whilst a woman was* married. They did not deal with a state of circumstances which might exist before she was or after she ceased to be a married woman. Consequently the intention of the legislature is that property which a *feme covert* has become entitled to before the commencement of a desertion or judicial separation shall not be interfered with. It has therefore been held in a recent case that the property of a married woman for her separate use, with a restraint against anticipation, *is still subject to the restraint* after she has obtained a protection order in consequence of her husband's desertion. (*Hill v. Cooper*, 1893, T. L. R., ix., 457.)

A protection order only protects money or property acquired by a married woman in lawful industry, so that where a wife who has been deserted by her husband and had obtained a protection order kept a brothel, it was held that the profits she made were not protected. (*Mason v. Mitchell*, 3, H. and C., 528.)

A protection order is *retrospective* in its operation, and dates back to the desertion, so that property acquired by the wife during the desertion, but before the order granted, is within the protection. But although it enables the wife to sue in contract, or in tort, as though she were

a *feme sole*, it is not retrospective so as to enable her to maintain an action as a *feme sole* which she could not maintain alone at the time it was commenced.

A question might arise as to the right of a married woman who had obtained a protection order before the operation of the M. W. P., 1882, and had acquired property in possession under it, to retain it as her separate property if the order was discharged, or if the parties returned to cohabitation, after that Act had come into operation. For the discussion of this question, which involves the co-construe of sec. 5 of the later Act, we would refer to *Lush*, p. 125.

The Statute of 1857 in effect enacts that a wife who has obtained a protection order shall not pledge her husband's credit for necessaries; for sec. 21 provides that she shall be in the same position as a wife who is judicially separated from her husband; and by sec. 26 a wife who is judicially separated from her husband has no authority to pledge his credit for necessaries except when alimony may be decreed and not paid. From the Act also is evolved a recognition of a contract between husband and wife, for, according to Mr. Lush, "If the judicially separated parties return to cohabitation all the property which the *feme covert* may be entitled to at the time the cohabitation takes place belongs to her for her separate use, *subject to any agreement in writing made between them whilst separate.*" (p. 122.)

Various remedies have from time to time been passed to give a more summary remedy to a deserted wife than those under the Divorce Acts. These have

now all been repealed and superseded by the Summary Jurisdiction (Married Women) Act, 1895 (before referred to). The Act empowers a Court of Summary Jurisdiction for a district in which the complaint has wholly or partially arisen, to intervene on the application of a wife who (1) has been deserted by her husband, or (2) has been caused to live separately and apart from him by his persistent cruelty to her, or his wilful neglect to provide reasonable maintenance for her and her infant children, whom he is reasonably bound to maintain. If satisfied of the truth and justice of the wife's complaint, the Court may make an order containing (*inter alia*) the following provision:—That the wife need no longer cohabit with her husband,—which, while in force has the same effect as a decree of judicial separation by the High Court, including that of putting her in a position of a *feme sole*. The legal environment of a *feme sole* includes proprietary and contractual ability to the extent enunciated in the Divorce Acts.

It does not appear to be certain that the position of the wife who has obtained a protection order is *in all respects* precisely the same as that of the judicially separated wife. The Divorce Acts do not seem to have provided that if the former party returns to cohabitation, such property as she has acquired during the desertion shall belong to her as her separate property. They provide (as we have seen) for such a consequence in case of cohabitation after judicial separation. The Act of 1857 only states that “*during the continuance*” of such order the wife shall be deemed to have been *during such desertion* of her in the like position in all respects with regard to property, &c., as

she would be in if she had obtained a decree of judicial separation. (See in *re Emery's Trusts*, 1884, 50 L. T., 197; *Ewart v. Chubb*, 1875, L. R., 20 Eq., 454.)

The trading and industrial profits of a married woman separated from her husband under the Divorce Acts and the S. J. Act, 1895, are, we have seen, now fully protected by law. This protection, however, is not altogether a novelty in English law. "If a wife was deserted by her husband, and during the desertion she carried on a separate trade and acquired property thereby, the Court would protect her earnings against her husband if he afterwards endeavoured to possess himself of them." (*Lush*, p. 161.)