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**THE LEGAL PROPERTY RELATIONS  
OF MARRIED PARTIES**

A STUDY IN COMPARATIVE LEGISLATION

BY

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## PREFACE.

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THIS comparison of legislation was undertaken during the winter of 1894-95. The pressure of other duties delayed the completion of the work. The examination of the law in most of the states has been brought down to the close of the legislative year 1898; in some instances the legislation of 1899 has been examined.

I desire to express my thanks to many persons from whom I have received assistance and suggestions during the progress of this investigation. I am especially indebted to Professor Munroe Smith, of Columbia University, under whose direction my studies in jurisprudence were prosecuted. It is fitting that I make special mention also of my indebtedness to Professor E. R. A. Seligman, of Columbia University, and to my friend and colleague, Professor Frederick C. Hicks.

ISIDOR LOEB.

BERLIN, *February 25, 1900.*

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## THE LEGAL PROPERTY RELATIONS OF MARRIED PARTIES.

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### § 1. *General Introduction.*

The nineteenth century has witnessed great changes in the field of matrimonial property relations. Old systems have been subjected to profound modifications by the introduction of new principles, while, in some instances, local customs and statutes have given place to a common system, thereby reducing the great diversity in the rules of family law. This consolidation of the systems was influenced by the general codification movement in continental Europe, but the change in the case of matrimonial property rights is of especial significance because of the great lack of uniformity that had previously existed in this field of private law.

The changes in the property relations of husband and wife have not, however, been due exclusively to the combination of the systems. The development of new conceptions of the individual and of the family has led to a modification of the old systems and the appearance of new regulations in the field of family relations. With this development there has appeared a tendency to make the new rules general in their character. Universality, however, is not as yet a characteristic of the rules of family law. The interests involved are not as general as those which are affected by the law of obligations and other branches of property law. The peculiar social and religious views and customs of a community determine the family organization and regulate the system of property relations between the married parties. In the earlier

stages only family property exists and there are no true matrimonial property relations. With social development disintegration arises within the family. The religious unity is weakened, and, ultimately, with increased industrial development the economic unity is also impaired. Institutions which have been based upon such unity must likewise become modified, a process illustrated by the history of matrimonial property rights in Roman law. Modern codes are passing through a similar development, as is evidenced by the results of the legislative activity of the nineteenth century.

In England and the United States the legal economic relations of married parties have been revolutionized. The fundamental rules of the common law respecting the property and capacity of married women have been abrogated or greatly modified. The changes in the industrial system had affected the economic organization of the family, and it was inevitable that the legal relations should accommodate themselves to the new conditions. At a time when women were acquiring an independent activity it was natural that particular attention should be called to the inequalities to which the law subjected them. Among the arguments advanced against the old system was the charge that that it was based upon the principle of natural inequality of the sexes and of masculine superiority. The reformers demanded not only the restriction of the husband's extensive rights in his wife's property, but also the removal of the disabilities which were imposed upon married women. In general, no account was taken of the fact that some of these disabilities had their historical justification in the desire to preserve the unity of the family, and had not necessarily been influenced by considerations of the natural incapacity of the woman. Moreover, the fact that the same motive had led to the imposition of duties and disabilities upon the husband was frequently disregarded. The personality of the woman and not the

relation into which she had entered was considered the true source of her disabilities.

In the early acts no attempt was made at a general revision and codification of the law governing the economic relations of married parties. The legislatures were without models by which to form the new measures, and the full effects of the modifications were not appreciated. The married women's acts confined themselves to the removal of the disabilities of the wife. They did not, in general, deprive her of the exemptions and privileges which she had enjoyed on account of these disabilities, nor was the husband relieved of his previous duties and burdens. As a result, the matrimonial property systems became characterized by gross inequalities and inconsistencies. The husband, though he received no property from the wife, might be held liable for her ante-nuptial debts. His creditors could not obtain satisfaction out of the wife's property, even though, as a matter of fact, the debts had been contracted for the support of the wife. Under the new conditions it was possible for a woman possessing considerable property in her own right to obtain a divorce on the ground of lack of support. A married woman who had been accorded full capacity for carrying on legal proceedings might still be able to plead the fact of coverture as a bar to the running of the period of the limitation of actions. Moreover, while the husband had been deprived of rights in the property of his wife, the latter retained the privileges which she had possessed in his real property.

In undertaking to grant equal rights to the wife the legislature had produced a new inequality, which threatened to destroy the ethical unity of the family. The Roman law, under the influence of similar conditions of economic and social development, came to recognize the equality of married parties in respect to property rights. The regulation of the relations of the parties, however, was determined more

logically in accordance with such principle of equality. The later legislation in the United States has removed many of the inconsistencies of the earlier statutes. In general, there is exhibited a marked tendency to carry out the strict principle of equality in defining the legal economic relations of the married parties.

The legislations of continental Europe have felt the influence of the new ideas and conditions. The modifications of matrimonial property law have not, however, been as radical as in the case of England and the United States. The explanation is to be found in the fact that the property rights of the wife in continental countries were, in general, superior to those recognized by the English common law. Some modifications have been made in connection with the adoption of the modern codes which have taken the place of the particular laws of local communities. This is particularly true of the civil code of the German Empire, which received legislative approval in 1896 and went into effect on January 1, 1900. A draft code which has been prepared for Switzerland will, if enacted, produce similar results. In some of the older codes important modifications of matrimonial property rights have been made by subsequent statutes, and movements directed to like ends are in active operation in a number of states.

The writer proposes to consider the general principles of the matrimonial property systems which obtain at present in the United States and in the chief states of Europe. Particular attention will be given to recent legislative changes. All of the systems have certain common aims, and there appears an increasing tendency towards the development of common regulations for the realization of these ends. The extent to which this tendency has been realized will appear in this comparison of existing legislation.

The consideration of this subject falls under three divi-

sions. In the first will be presented the general effects of marriage upon the capacities and relations of the parties, independent of the particular system of property rights which may obtain. In the second, the chief forms which have been developed for the regulation of matrimonial property relations will be considered. And, finally, the relations of succession between married parties, as essential to an adequate appreciation of matrimonial property rights, will be discussed.

## PART I.

### EFFECTS OF MARRIAGE UPON LEGAL CAPACITY.

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#### § 2. *General Legal Capacity of Acting.*

THE personal status of married parties in their relation to each other and to third parties is closely connected with the system of matrimonial property rights. Thus, the capacity for performing legal acts is affected by the character of the property relations existing between the married parties. For example, where the law accords the husband extensive privileges in his wife's property, provisions will generally be found by which the married woman's capacity of acting is so restricted as to preserve the rights of the husband. In like manner, the rules governing the property relations of husband and wife may be influenced by the prevailing conception of personal capacity of the parties.

The marriage is not regarded as imposing any general incapacity of acting upon the man. On the other hand, all legislations have, at some time, recognized the general legal incapacity of the married woman. The early Roman and Teutonic laws take this position and consider the incapacity as flowing from the husband's power over the wife. Force is a cardinal element in all primitive legislation, and affects family as well as economic relations. This is illustrated by

the fact that the marriage is regarded as resting upon a forcible seizure or sale.<sup>1</sup>

The incapacity of the married woman was similar to that which affected her as a child. At Roman law she passed from the *patria potestas* to the *manus mariti*. Under Teutonic law the *Mund* of her father or guardian was exchanged for that of her husband. The former emphasized the power and right of the man, the latter placed stress upon the element of guardianship. In both systems, however, the complete unity of the family, under the authority of its head, excluded any general independent activity of the other members.

The Roman law developed an informal free marriage without *manus* and, by the last century of the Republic, this had become the normal system. As a result of the absence of *manus mariti*, the legal personality of the wife was no longer merged in that of the husband. Personal relations arose between the husband and wife. The marriage, as such, was not regarded as affecting the woman's general capacity of performing legal acts.<sup>2</sup> This is the position of the modern Roman law.<sup>3</sup>

Primitive Teutonic law developed into a number of different systems. As a rule, however, the general incapacity of the married woman was continued. The reception of the Roman law was limited in the field of family relations and the principle of the general legal capacity of the wife found but slight application. The guardianship of unmarried women gradually disappeared. In the case of the married woman, however, the husband appeared as a sort of permanent natural guardian and the existing matrimonial property relations strengthened this conception.

<sup>1</sup> Sohm, *Inst.*, § 92; Schröder, *Lehrbuch*, p. 67 *seq.*; Heusler, *Inst.*, vol. ii, § 130.

<sup>2</sup> Sohm, *Inst.*, § 93.

<sup>3</sup> Windscheid, *Pandekten*, vol. ii, §§ 490, 491.

In the present century there has been a tendency to regard the general capacity of the woman as remaining unaffected by the marriage. This principle, which is at the basis of the Austrian and Russian codes, has been accepted by the new code of Germany<sup>4</sup> and by the Norwegian statute of 1888 which regulates the property relations between married parties.<sup>5</sup> The other continental countries have, in general, preserved the principle that the wife, as such, is under a general disability in respect to her legal capacity of acting. It must not be assumed, however, that the married woman's activity is entirely unrestricted in the one case or that it is completely subject to control in the other. The two classes are distinguished by the fact that in the former the wife has perfect freedom of activity in so far as she is not limited by positive provisions, while in the latter class she has legal capacity of acting only to the extent that this is specifically accorded to her.

England and many of the American states have practically taken the former position. In so far, however, as the common law disabilities of coverture have not been expressly abrogated, it is the rule of interpretation to regard the married woman as restricted in her legal activity to the extent that the law has not accorded her positive privileges. Accordingly, most of the legislations contain specific grants of power to the married woman.<sup>6</sup>

The disabilities to which married women are subjected are explained on various grounds. Some consider the control as the survival of the guardianship of the family or the clan. According to this view it is exercised on account of the weakness and inexperience of the sex. Others reject the assump-

<sup>4</sup> *Motive*, vol. iv, pp. 112, 113; *Denkschrift*, p. 268.

<sup>5</sup> Stat. June 29, 1888, arts. 11, 19, *An. étran.*, vol. 18, p. 766.

<sup>6</sup> For examples of total abrogation of common law, see in Appendix, note A, *Miss. Const.*, § 94, *An. Code*, §2289.

tion of natural incapacity and regard the legal disabilities of the wife as justified by considerations of the unity of the family. The legislations have not logically followed either of the above conceptions. It is true that in some states some one principle may have exercised a predominant influence. At the same time disabilities exist which can be explained only by reference to other considerations. Thus the prevailing system of matrimonial property relations, including the liability of the husband for the obligations of the wife, has generally exercised considerable influence upon the conception of the legal capacity of the married woman. Recent legislation, however, clearly indicates a tendency to impose restrictions upon the legal activity of married parties only so far as these may be necessary to promote the ethical unity of the marriage. Specific limitations will then arise according to the particular system which the parties select for the determination of their property relations.

### § 3. *General Contractual Capacity of the Married Woman.*

The absence of any single, uniform principle as the basis of the legal incapacity of the married woman is clearly indicated by the provisions of the French Civil Code which limit the wife's general contractual capacity. The married woman cannot give, alienate, pledge or acquire unless the husband joins in the act or accords his written authorization of the same.<sup>1</sup> Upon the refusal of the husband to grant the necessary consent, the wife may be authorized by the court to perform the act.<sup>2</sup> These provisions may be justified from considerations of conjugal unity, though the power of the wife to appeal from the decision of the head of the family is a departure from the strict principle.

It is provided, however, that the husband cannot grant the wife any general authority to act in these matters. A

<sup>1</sup> C. C., 217.

<sup>2</sup> *Ibid.*, 219.

special authorization is essential for each act.<sup>3</sup> Moreover, if the husband is incapacitated by reason of disappearance, minority, interdiction or criminal punishment, the wife requires a judicial authorization before she can enter into contracts.<sup>4</sup> These requirements cannot be explained upon the principle of unity of family administration. Under such a principle, where the husband is disqualified the wife must appear as the proper administrator if she is recognized as possessing the natural capacity to fulfill these functions. Upon the same assumption the husband would not be prevented from granting the wife a general power of acting with respect to certain matters. Having satisfied himself respecting the wife's ability, he would delegate the administration to her in the same manner as a party might authorize an agent to represent him generally in certain relations.

On the other hand, the inexperience and natural incapacity of the woman cannot be accepted as the uniform principle, since the code does not impose any general restrictions upon dispositions between the husband and wife. Marriage agreements cannot be contracted or altered after the celebration of the marriage, but it does not appear that this restriction limits ordinary dispositions between the parties, and, in any event, the wife, with the marital authorization, may make contracts with third parties, from which benefits will accrue to the husband.

The combination of different principles is manifested finally in the recognition of acts of the wife, performed without the marital authorization, as *negotia claudicantia* and hence voidable and not void. Third parties cannot take advantage of the defect of authority, but such plea may be advanced not only by the husband and his heirs, but also by the wife and her representatives.<sup>5</sup>

<sup>3</sup> C. C., 223.

<sup>4</sup> *Ibid.*, 221, 222, 224.

<sup>5</sup> *Ibid.*, 225.

It is worthy of note that the French legislature has in recent years enacted statutes similar in nature to those which marked the beginning of the contractual capacity of married women in English and American law.<sup>6</sup> Thus, a married woman has been given the right to make deposits in savings banks, etc., though she cannot withdraw the same if the husband objects to such disposition.<sup>7</sup> An act of 1899 provides that a married woman may become a member of mutual benefit associations, but she must obtain the marital authorization before she can participate in the administration of such societies.<sup>8</sup>

Reference to the prevailing matrimonial property system is essential to a due appreciation of the regulations concerning marital authorization. The system of community of property which obtains in France has had great influence in determining the general contractual capacity of the married woman. Where the wife has separate property a more or less extensive power of contracting with reference to the same is accorded her by the French, as well as other systems that require the marital authorization.<sup>9</sup>

The European legislations which have been most directly influenced by the French code have, in general, retained the principle of marital authorization, but have defined it more consistently and have introduced modifications in the direction of a greater freedom of activity for the wife. This is particularly true of the Italian and Spanish codes. The draft code of Italy, submitted in 1862, proposed to accord general legal capacity to the married woman.<sup>10</sup> While this principle was not accepted, the marital authorization was con-

<sup>6</sup> *Cf. post*, § 37.

<sup>7</sup> Stat., Apl. 9, 1881, art. 6, *Bull. des lois*, xii Sér., vol. 22, p. 666; Stat. July 20, 1886, art. 13, *ibid.*, vol. 33, p. 279.

<sup>8</sup> Stat., Apl. 1, 1899, art. 3, Sirey, *Recueil*, 1899, p. 729.

<sup>9</sup> See *post*, § 42.

<sup>10</sup> Huc, *Code Civil Italien*, p. 66.

siderably limited. Thus, the husband may grant the wife a general authorization to enter into contracts.<sup>11</sup> Moreover, if the husband is incapacitated by reason of minority, judicially declared disappearance, *etc.*, the marital authorization is not required.<sup>12</sup> As in the French code, the court may always supply the consent of the husband.<sup>13</sup>

The Italian code protects the wife against the undue influence of her husband by requiring the authorization of the court for acts of the wife in cases where her interests are opposed to those of her husband.<sup>14</sup> The Spanish code, on the contrary, does not regard the married woman as subject to undue influence or any natural incapacity. No particular provisions are made for her protection in ordinary contracts with her husband. Moreover, the wife cannot plead incapacity or defect of authority, such privilege being accorded only to the husband and his heirs, and existing solely in the interests of the marital administration.<sup>15</sup>

The code of Louisiana<sup>16</sup> has followed the provisions of the French legislation, but has given a clearer recognition to the natural incapacity of the woman by the requirement for judicial authorization of acts by which the wife undertakes to bind her individual property.<sup>17</sup> It is considered necessary to protect the wife against the husband as well as against third parties. On the other hand, the influence of the legislation in other American states is to be seen in recent statutes according the married woman the right to subscribe for stock in building and loan associations, to make deposits in

<sup>11</sup> Italy, C. C., 134; the Spanish code does not prohibit such grants of authority

<sup>12</sup> Italy, C. C., 135; Spain, C. C., 188. *Cf. ibid.*, 1441.

<sup>13</sup> Italy, C. C., 136; Spain, C. C., 60, 61.

<sup>14</sup> C. C., 136.

<sup>15</sup> C. C., 65.

<sup>16</sup> C. C., 122, 125, 132-134.

<sup>17</sup> C. C., 126-128. *Cf. ibid.*, 129.

banks and to withdraw and to transfer the same, without the intervention of her husband, as if she were a *femme sole*.<sup>18</sup>

The Swiss cantons, in general, limit the contractual capacity of married women. Some of the cantons still retain the guardianship of women, and others, in providing for the emancipation of women in general, except the married woman from the benefit of such acts. The interests of the family administration have been the chief cause for the continuation of such disability. Separate property of the married woman is recognized in a number of the cantons, and, where this exists the wife is accorded a certain power of contracting in reference to such property.<sup>19</sup> Most of the legislations, however, do not relieve the wife from her disabilities in case the husband is incapacitated from acting. She continues under guardianship, her acts requiring the consent of the husband's curator or of some other authorized party. In the majority of the cantons it is likewise considered necessary to protect the wife against the undue influence of the husband. Accordingly it is required that she shall be assisted by a guardian *ad hoc* in order to conclude certain kinds of contracts, particularly those in which the husband has an interest in the matter concerning which the agreement is made.<sup>20</sup>

The draft Swiss code represents an attempt to harmonize and combine the conflicting rules. The modern principle is followed in that the contractual capacity of the married wo-

<sup>18</sup> Acts, 1894, no. 74; *ibid.*, 1896, no. 63.

<sup>19</sup> Basle, Stat. Mch. 10, 1884, art. 30 *seq.*, *An. étran.*, vol. 14, p. 552; Glaris, L. B., ii, 174, 175, *ibid.*, vol. 4, p. 518; Lucerne, Stat. Nov. 26, 1880, arts. 11, 16, 22, *ibid.*, vol. 10, pp. 487, 488; Zürich, P. R. G., § 597; Lardy, *Législations Suisses*, pp. 65, 125, 160, 239, 263. *Cf. post*, § 42.

<sup>20</sup> Lucerne, Stat. Nov. 26, 1880, art. 16; Zürich, P. R. G., §§ 599, 600; Lardy, *Législations Suisses*, pp. 28, 67, 125, 126, 190, 225, 278, 303, 333, 348; *contra*, Basle, Stat. Oct. 16, 1876, art. 5, *An. étran.*, vol. 6, p. 571, where the old rule is partially abrogated.

man is made to depend upon the particular system of matrimonial property relations which obtains between the parties. Following the majority of the cantonal legislations, however, the draft code starts with the principle of general incapacity. The wife, aside from her functions of household administration,<sup>21</sup> has contractual capacity only to the extent that this is recognized by the system which governs the economic relations of the married parties.<sup>22</sup> An exception arises with respect to the separate property of the wife. Under all of the systems she possesses the power of contracting generally with reference to such property.<sup>23</sup> Under the draft code the wife possesses the right of exercising an industry or occupation, but the husband in the interest of the conjugal unity is given the right of forbidding the same. The prohibition of the husband may be rescinded by the court if the wife shows that just cause does not exist for such action.<sup>24</sup> The possibility of undue influence by the husband is also recognized, and hence the authorization of the court is required for certain acts of the wife.<sup>25</sup>

The Prussian and Saxon codes<sup>26</sup> require the marital authorization for the contracts of the wife which may affect the unity of the family or the matrimonial property.<sup>27</sup> Such authorization, however, is not necessary for ordinary contracts respecting the separate property of married women.<sup>28</sup> Moreover, the wife is recognized as having the first right to the matrimonial administration in case the husband is inca-

<sup>21</sup> *Post*, § 8.

<sup>22</sup> *Switz, Vorentwurf*, 212.    <sup>23</sup> *Ibid.*, 215, 269.    <sup>24</sup> *Ibid.*, 186.    <sup>25</sup> *Ibid.*, 214.

<sup>26</sup> These codes, as well as the other legislations obtaining among the members of the German federal union, were displaced by the national code on Jan. 1, 1900. For the purposes of the present comparison they will be treated as existing legislations.

<sup>27</sup> Prussia, A. L. R., ii, 1, §§ 196, 320, 377; Saxony, B. G., § 1638.

<sup>28</sup> Prussia, A. L. R., ii, 1, §§ 221, 222, 318; Saxony, B. G., §§ 1640, 1693.

pacitated from acting.<sup>29</sup> The Prussian legislation, however, places particular limitations upon contracts between married parties. These must be executed before a judge whose duty it is to see that advantage is not taken of the wife. If this requirement is not observed, the wife may acquire rights but will not become subject to any obligation as a result of the agreement with the husband.<sup>30</sup>

The new code of Germany starts with the principle that the contractual capacity of a woman is not affected by her marriage.<sup>31</sup> This general principle is modified in the interests of the conjugal unity by the provision that the husband, unless he has consented to the same, may secure the rescission, for the future, of such agreements as require personal service on the part of the wife.<sup>32</sup> Before the act will be abrogated the authorization of the court must be obtained. Such authorization must be accorded if the act injuriously affects the marital interests. The same authority may supply the consent of the husband if the latter, by reason of illness or absence, is unable to assent to the act or if his refusal appears unwarranted. The fact that this control over the contracts of the married woman is based upon the desire to preserve the conjugal unity is further indicated by the provision that it may be exercised by a husband who has not attained his majority, but cannot be employed by the latter's guardian or representative.<sup>33</sup>

An interesting development may be noted by comparing the provisions of the three preliminary drafts of the code with those indicated above. The first draft made all contracts whereby the wife obligated herself for personal service

<sup>29</sup> Prussia, A. L. R., ii, 1, §§ 202-204, 261, 325-327; Saxony, B. G., §§ 1684, 1700.

<sup>30</sup> A. L. R., ii, 1, §§ 198-201.

<sup>31</sup> See *ante*, § 2, note 4.

<sup>32</sup> Germany, B. G., § 1358.

<sup>33</sup> *Ibid.*

absolutely dependent upon the consent of the husband, but provided that the husband alone could attack the validity of agreements that lacked the proper authorization.<sup>34</sup> The second and third drafts recognized the principle, established in the code as adopted, that such acts of the wife are valid without marital authorization, and that the court could supply the husband's consent under the circumstances above noted. But the husband was given the unrestricted right of abrogating such acts for the future, even if he had consented to the same or if his consent had been supplied by the proper authority.<sup>35</sup> Starting with such acts of the wife dependent upon the will of the husband, the close of the development finds the married woman free to enter into such contracts. The husband, with the previous authorization of the court, is enabled to revoke the agreements for the future, provided his consent to the same has not been accorded directly or through the agency of the judge.

Aside from this limitation, the general contractual capacity of the married woman is limited only as regards her power of affecting the matrimonial property.<sup>36</sup> Acts of the wife affecting her separate property are subject to no particular limitations, and the same is true of contracts between the husband and wife.<sup>37</sup>

The compilers of the German code were influenced by the Roman conception of the wife's contractual capacity. The Roman law contains no particular provisions respecting the

<sup>34</sup> I. *Entwurf*, § 1277.

<sup>35</sup> II. *Entwurf*, § 1258; III. *Entwurf*, § 1341.

<sup>36</sup> See *post*, §§ 20, 21, 27, 42.

<sup>37</sup> In case of the bankruptcy of a married party, the contracts made with his spouse in the preceding year, whether before or after the marriage, are attackable by the creditors so far as they are damaged thereby and the other party does not prove that he did not know of the intention of the common debtor to damage his creditor's interests. Germany, *Konkursordnung*, § 31, R. G. Bl., 1898, pp. 618, 619.

ordinary contracts of married women. It was not found necessary to limit her capacity of affecting the matrimonial property. The husband's rights in the dowry were originally those of an owner, and even after the legislation of the Empire he continued to be regarded as the formal owner during the marriage.<sup>38</sup> The Roman law likewise imposed no limitations upon ordinary contracts between the husband and wife.<sup>39</sup>

The Austrian<sup>40</sup> and Russian<sup>41</sup> codes accept the general principles of the Roman law respecting the contracts of married women, and in Norway, practically the same condition obtains, the power of the wife to conclude ordinary contracts being unrestricted except with reference to her capacity of binding the matrimonial property.<sup>42</sup>

Under the English common law system marriage destroys the general contractual capacity of the woman. She cannot contract even with the consent or joinder of her husband. Different explanations of the origin and basis of this rule have been advanced. The conception that marriage unites the man and woman in one person has exercised a great influence upon the development of the law governing the relations of husband and wife.<sup>43</sup> This legal fiction, however, will not serve to explain the disabilities of married women. Recent investigations tend to prove that the early law did not regard the contractual capacity of the woman as destroyed by the marriage, but that such incapacity developed as a result of the fact that she ceased to possess property

<sup>38</sup> See *post*, § 32.

<sup>39</sup> Sohm, *Inst.*, § 94; Windscheid, *Pandekten*, vol. ii, § 491.

<sup>40</sup> Certain contracts between husband and wife must be concluded before a notary. Stat. July 25, 1871, R. G. Bl., no. 76.

<sup>41</sup> Leuthold, *R. R.*, pp. 59, 60.

<sup>42</sup> See *post*, §§ 20, 21.

<sup>43</sup> Black, *Comm.*, vol. i, p. 442; Kent, *Comm.*, vol. ii, p. 129.

which could be bound by her contracts.<sup>44</sup> The general principle governing the incapacity of the married woman appears to be the desire to preserve the unity of the family and the administration of the matrimonial property. Hence, if the husband is banished or is regarded as dead in the eyes of the law, as in the case of imprisonment for life, the wife possesses general contractual capacity.<sup>45</sup> There are, however, exceptions to the general principle. For example, abandonment of the wife by the husband, which is not accompanied by his departure from and loss of residence in the state, does not have the effect of removing her disabilities.<sup>46</sup> This constituted one of the greatest hardships of the common law, and was largely instrumental in bringing about the statutory modifications. The fact that the married woman cannot contract with her husband nor enter into engagements with third parties, even if the marital authorization has been obtained, represents another departure from the general principle. Such limitations cannot be explained from considerations of family unity. On the contrary, they develop serious obstacles to the efficient administration of the matrimonial property, and cumbrous processes were invented in order to evade their provisions.

The rules established under the equitable jurisdiction of the courts are, however, based upon the general principle indicated above. Contracts, affecting the wife personally, which might impair the conjugal unity, are not valid in equity any more than at common law. But the English chancery courts recognized the power of the married woman to possess a separate estate, free from the common law rights of the

<sup>44</sup> Pol. and Mait., *Hist.*, vol. ii, p. 432; Florence G. Buckstaff, "Married Women's Property in Anglo-Saxon Law" *Am. Amer. Acad.*, vol. iv, p. 247 *seq.*; Ernest Young, "The Anglo-Saxon Family Law," *Essays in Anglo-Saxon Law*, p. 176 *seq.*

<sup>45</sup> Kent, *Comm.*, vol. ii, p. 155 *seq.*

<sup>46</sup> *Ibid.*

husband. With respect to such property the wife could contract as if she were a *femme sole*, subject to such limitations upon her capacity as were contained in the act of settlement.<sup>47</sup> The fear of undue influence on the part of the husband led to the recognition of certain limitations which would not bind the unmarried woman. The most famous of these limitations is the restraint upon anticipation, intended to prevent the woman, under marital influence, from destroying or disposing of the capital of her separate estate.<sup>48</sup>

The effect of the married women's property acts has been to extend the general contractual capacity of the wife. In England, as early as 1856, an attempt was made to accord to the married woman a general power of making contracts, but it was not until 1868 that a bill passed the House of Commons granting her the general right to contract as if unmarried, subject to limitations with respect to particular matters.<sup>49</sup> The bill encountered severe opposition in the House of Lords, as a result of which important modifications were made. As finally enacted the wife was not accorded general contractual capacity. The married woman was given a limited statutory separate estate with power of disposition over the same.<sup>50</sup> The Married Woman's Property Act of 1882 extended the scope of the separate estate of the wife and accorded her a general power of contracting in respect of and to the extent of the same, as if she were a *femme sole*.<sup>51</sup> It was provided that every contract of a married woman should be deemed to have been entered into with reference to her separate property unless the contrary be shown.<sup>52</sup> Finally, an act of

<sup>47</sup> *Ibid.*, p. 163 *seq.* This is the view generally accepted in England and the United States. An opposing view is that she has only such capacity as is granted under the terms upon which the estate was settled.

<sup>48</sup> Schouler, *H. & W.*, § 202; *cf. post*, note 53.

<sup>49</sup> *Bull. Leg. comp.*, 1871, p. 15.

<sup>50</sup> Act 33 & 34 Vict., c. 93.

<sup>51</sup> Act 45 & 46 Vict., c. 75, § 1 (1), (2).

<sup>52</sup> *Ibid.*, § 1 (3).

1893 completed the development by repealing the above clause and raising an absolute presumption that the contracts of the married woman are made in respect to her separate property, whether she is or is not entitled to any such estate at the time when she enters into the agreement.<sup>53</sup> Such contracts, moreover, bind all of her property after discovery.<sup>54</sup>

In the United States the movement to give validity to the contracts of married women commenced at an earlier date than in England. In the first part of the nineteenth century acts were passed conferring contractual capacity upon married women who were abandoned by their husbands. Later, married women in general were granted power to contract in relation to certain property to which was given the character of a statutory separate estate.<sup>55</sup> These specific grants have been gradually enlarged, until the close of the century finds many of the states recognizing that married women have general contractual capacity, while those that still maintain the general common law rule have nullified it, to a great extent, by numerous exceptions. The legislation has been so extensive and, at times, so inconsistent and contradictory, that it becomes a difficult matter to indicate the exact position of each state. A general classification will be sufficient to indicate the prevailing tendency. The individual legislations will fall into one of two divisions according as they have or have not accorded general contractual capacity to the married woman. In the first class, limitations may be placed upon certain kinds of contracts, while in the second class more or less extensive specific grants

<sup>53</sup> Act 56 & 57 Vict., c. 63, §§ 1 (a), 4. It was expressly provided, however, that no such contract should be binding upon separate property which the wife is restrained from anticipating, though such property may be bound by the costs of judicial proceedings which she institutes (*ibid.*, §§ 1 (c), 2).

<sup>54</sup> *Ibid.*, § 1 (c).

<sup>55</sup> See *post*, § 37.

of capacity are made. In the following states and territories the married woman is recognized as possessing general contractual capacity:<sup>56</sup> Alabama,<sup>57</sup> Arizona,<sup>58</sup> California,<sup>59</sup> Colorado,<sup>60</sup> Connecticut,<sup>61</sup> Delaware,<sup>62</sup> Idaho,<sup>63</sup> Illinois,<sup>64</sup> Indiana,<sup>65</sup> Iowa,<sup>66</sup> Kansas,<sup>67</sup> Kentucky,<sup>68</sup> Maine,<sup>69</sup> Maryland,<sup>70</sup> Massachusetts,<sup>71</sup> Minnesota,<sup>72</sup> Mississippi,<sup>73</sup> Missouri,<sup>74</sup> Montana,<sup>75</sup> Nebraska,<sup>76</sup> Nevada,<sup>77</sup> New Hampshire,<sup>78</sup>

<sup>56</sup> For limitations upon capacity to make particular contracts, see *post*, §§ 4, 5, 20, 21, 42.

<sup>57</sup> Code, 1896, § 2526. The Code of 1886 limited this capacity to contracts in writing entered into with the written consent of the husband.

<sup>58</sup> R. S., 1887, §§ 2103, 2104.

<sup>59</sup> Subject in contracts with husband to general rules respecting contracts between persons occupying confidential relations. C. C., 158. *Cf.* Stat. & Amend., 1891, p. 137; *ibid.*, 1895, p. 53.

<sup>60</sup> An. St., 1891, § 3021.

<sup>61</sup> So far as regards third persons. G. S., 1888, § 2796.

<sup>62</sup> Laws, vol. 14, c. 550, §§ 2-4, in R. C., 1893, p. 600.

<sup>63</sup> R. S., 1887, §§ 2504, 2508.

<sup>64</sup> An. St., 1885, c. 68, ¶ 6. But transfers between husband and wife to be valid as against third persons must be publicly recorded (*ibid.*, ¶ 9).

<sup>65</sup> An. St., 1894, § 6960.

<sup>66</sup> Code, 1897, § 3164.

<sup>67</sup> G. S., 1889, § 3759.

<sup>68</sup> Stat., 1894, § 2128. Same qualification as in Illinois. See *ante*, note 64.

<sup>69</sup> R. S., 1883, c. 61, §§ 1, 2, 4.

<sup>70</sup> Laws, 1898, c. 457, §§ 4, 5.

<sup>71</sup> But she is not authorized to contract with husband. P. S., 1882, c. 147, § 2.

<sup>72</sup> G. S., 1894, §§ 5530, 5532.

<sup>73</sup> An. Code, 1892, § 2289. Limitations exist upon certain contracts between husband and wife. *Ibid.*, §§ 2293, 2294.

<sup>74</sup> R. S., 1899, § 4335.

<sup>75</sup> C. C., 1895, §§ 214, 256. Same qualification as in Cal. See *ante*, note 59.

<sup>76</sup> To same extent as a married man. C. S., 1891, § 1412.

<sup>77</sup> G. S., 1885, § 517. Same qualification as in Cal. See *ante*, note 59.

<sup>78</sup> P. S., 1891, c. 176, § 2.

New Jersey,<sup>79</sup> New York,<sup>80</sup> North Dakota,<sup>81</sup> Ohio,<sup>82</sup> Oklahoma,<sup>83</sup> Oregon,<sup>84</sup> Pennsylvania,<sup>85</sup> Rhode Island,<sup>86</sup> South Carolina,<sup>87</sup> South Dakota,<sup>88</sup> Utah,<sup>89</sup> Vermont,<sup>90</sup> Washington,<sup>91</sup> Wyoming<sup>92</sup> and Hawaii.<sup>93</sup>

The following legislations have not entirely abrogated the general incapacity of the married woman to enter into con-

<sup>79</sup> Act Mch. 27, 1874, § 5, Rev., 1877, p. 637; but not authorized thereby to contract with husband (*ibid.*, § 14), though she may assign policies of life insurance to him (*ibid.*, § 19).

<sup>80</sup> Laws, 1896, c. 272, § 21.

<sup>81</sup> R. C., 1895, § 2767.

<sup>82</sup> R. S., 1891, §§ 3112, 4107. Same qualification as in Cal. See *ante*, note 59.

<sup>83</sup> R. S., 1893, § 2968. Same qualification as in Cal. See *ante*, note 59.

<sup>84</sup> An. St., 1887, § 2997.

<sup>85</sup> Laws, 1893, p. 344, §§ 1, 2.

<sup>86</sup> An act of 1893 provided that a married woman could make any contract the same as if she were single (Acts, 1892-93, c. 1204). The Revision of 1896 returned to the common law rule of incapacity with numerous positive grants of capacity (G. L., 1896, c. 194, §§ 3, 4). In the same year an act of the legislature repealed the positive grants of power to contract and restored the general principle of act of 1893 (Acts, 1896-97, c. 335).

<sup>87</sup> The new constitution of 1895, art. xvii, § 9, introduces this rule. Before its enactment the married woman could make contracts with reference to her separate estate as if unmarried. C. S. L., 1893, § 2167.

<sup>88</sup> C. L., 1887, § 2590. Same qualification as in Cal. See *ante*, note 59.

<sup>89</sup> R. S., 1898, §§ 1199, 1200.

<sup>90</sup> Except in agreements with her husband. Stat., 1894, § 2644.

<sup>91</sup> G. S., 1891, § 1409.

<sup>92</sup> Laws, 1888, c. 59, § 1. Before this act her capacity was limited to contracts entered into with reference to her property. R. S., 1887, § 1559.

<sup>93</sup> Except that contracts for personal services require the written consent of her husband and she is not authorized to contract with her husband. Laws, 1888, c. xi, § 2.

tracts: Arkansas,<sup>94</sup> Florida,<sup>95</sup> Georgia,<sup>96</sup> Michigan,<sup>97</sup> New Mexico,<sup>98</sup> North Carolina,<sup>99</sup> Tennessee,<sup>100</sup> Texas,<sup>101</sup> Virginia,<sup>102</sup>

<sup>94</sup> She may make contracts respecting her separate estate and services, and may effect insurance policies upon the life of her husband. Dig. Stat., 1894, §§ 4944-4946.

<sup>95</sup> She may charge her estate in equity for purchase price and for agreements made for its benefit (Const., art. xi, § 2); dispose of her earnings (R. S., 1892, § 2075); control her deposits in banks (*ibid.*, § 2119); and subscribe for stock in building and loan associations (*ibid.*, § 2208).

<sup>96</sup> She may contract with reference to her separate estate (Code, 1895, § 2488), but the consent of the court is essential to the validity of contracts that she may make with her husband or trustee (*ibid.*, § 2490).

<sup>97</sup> She may contract respecting her separate property. An. St., 1882, § 6295.

<sup>98</sup> With consent of husband she may make any contract which she might make if unmarried (C. L., 1897, § 1510). She may contract with her husband as if unmarried (*ibid.*, § 1511).

<sup>99</sup> Husband's written authorization is essential to validity of all contracts affecting her property except those made for personal expenses, support of family or to pay ante-nuptial debts (Code, 1883, § 1826). Contracts between husband and wife which affect latter's property for a longer period than three years, require special form (*ibid.*, § 1835), but other contracts between them, not contrary to good morals, are valid (*ibid.*, § 1836).

<sup>100</sup> No statutory separate estate exists. The married woman may freely dispose of such property as is settled upon her for her separate use (Code, 1884, § 3350). She may contract in writing so as to bind her property with mechanics' lien (*ibid.*, § 2741); may effect insurance on husband's life (*ibid.*, § 3336); may make deposits in banks (*ibid.*, § 1729); and may hold stock in building and loan associations (*ibid.*, § 1757).

<sup>101</sup> She may contract for necessities for herself and children and for expenses for benefit of her separate property (R. S., 1895, art. 2970). She may contract so as to bind benevolent associations of which she is a member (*ibid.*, art. 644), and where appointed executrix, *etc.*, may give bond which shall bind her separate property (*ibid.*, arts. 1947, 2604).

<sup>102</sup> She may make contracts with respect to her labor or separate estate as if she were a *femme sole*. Code, 1887, §§ 2286, 2288.









































































family,<sup>2</sup> and he may be liable for debts which the wife contracts for this purpose.<sup>3</sup>

While the husband is under no general liability for the debts of the wife, the dotal property, of which he has the usufruct, is subject to such charges.<sup>4</sup> This liability does not extend to obligations arising from post-nuptial contracts of the wife, made without the necessary consent of the husband,<sup>5</sup> or which have been incurred in the administration of her separate property.<sup>6</sup> The creditors, in such cases, can hold the dotal property, during the continuance of the marital usufruct, only to the extent to which such property has been enriched by the act.<sup>7</sup>

As between the married parties, compensation is due from the separate property to the dotal property, when the latter is diminished by reason of the payments of obligations arising from torts or unlawful acts committed by the wife.<sup>8</sup> The same is true when the wife's expenses in a judicial pro-

<sup>2</sup> Germany, B. G., § 1389; Prussia, A. L. R., ii, 1, §§ 185 *seq.*, 321; Saxony, B. G., §§ 1634, 1635; France, C. C., 1530; Lucerne, Stat., Nov. 26, 1880, art. 2; Glaris, L. B., ii, arts. 169, 170.

<sup>3</sup> *Ante*, § 8. In the German code it is provided that the wife may demand that the net income of the dotal property, so far as it may be necessary for the support of the family, shall be applied to that purpose without regard to the other obligations of the husband, B. G., § 1389; *cf.* Zürich, P. R. G., § 594.

<sup>4</sup> Germany, B. G., § 1411; Prussia, A. L. R., ii, 1, § 338; Saxony, B. G., § 1679; Glaris, L. B., ii, art. 176; Lucerne, Stat., Nov. 26, 1880, art. 13; Switz., *Vorentwurf*, 233, 235.

<sup>5</sup> *Ante*, § 27.

<sup>6</sup> Germany, unless they arise out of an independent business which she carries on with husband's consent, B. G., §§ 1413, 1414; Prussia, A. L. R., ii, 1, § 229; Saxony, B. G., § 1640.

<sup>7</sup> Germany, B. G., § 1399; Lucerne, Stat., Nov. 26, 1880, art. 13; Glaris, L. B., ii, art. 175.

<sup>8</sup> Germany, B. G., § 1415; Saxony, B. G., § 1680; *cf.* Prussia, A. L. R., ii, 1, §§ 339, 340.

ceeding with her husband are defrayed out of the dotal property.<sup>9</sup>

### § 29. Protection of the Wife's Property.

In addition to the limitations placed upon the administration of the husband, the legislations generally provide special means for the protection of the property rights of the married woman. The presumption, which is raised in favor of creditors, that existing movables belong to the husband,<sup>1</sup> may be rebutted by an inventory.<sup>2</sup> It is also recognized that the wife may demand that the husband shall furnish particular security for the property of which he has the administration.<sup>3</sup> While the states generally give the wife all the rights of an ordinary creditor of the husband, some legislations go further, and concede her a right of registering a mortgage in her favor over the immovables of the husband,<sup>4</sup> or accord her special privileges in the latter's bankruptcy.<sup>5</sup> Where these privileges exist, the husband's right

<sup>9</sup> Germany, same principle applies to costs of legal proceedings in general, B. G., § 1416; Saxony, B. G., § 1681.

<sup>1</sup> *Ante*, § 5.

<sup>2</sup> Germany, B. G., § 1372; Glaris, L. B., ii, art. 177; Lucerne, Stat., Nov. 26, 1880, arts. 8-10; Zürich, P. R. G., § 604; *cf.* Prussia, A. L. R., ii, 1, § 544; Saxony, B. G., § 1656; Austria, B. G., § 1237; France, C. C., 1532.

<sup>3</sup> Only when her rights are endangered: Germany, B. G., §§ 1391-1393; Prussia, A. L. R., ii, 1, § 255; Lucerne, Stat., Nov. 26, 1880, art. 18; at any time: Zürich, P. R. G., § 604 *seq.*; Switz., *Vorentwurf*, 213.

<sup>4</sup> Prussia, A. L. R., ii, 1, § 254, limited to one year from beginning of husband's administration, Stat. of May 8, 1855, G. S. S., p. 317; Saxony, B. G., § 390; *cf.* France, C. C., 2135, 1540.

<sup>5</sup> Glaris, L. B., ii, art. 178; Lucerne, Stat., Nov. 26, 1880, art. 23; Zürich, P. R. G., § 611; Lardy, *Législations Suisses*, pp. 9, 27, 40, 66, 176, 217, 292, 303, 348. The Swiss federal law of bankruptcy places the wife, where her privilege is recognized by cantonal law, in the fourth class of creditors, but the privileged share of her property cannot exceed one-half, Alexander, *Konk.-G.*, p. 307. A similar privilege, recognized in Prussia (A. L. R., ii, 1, § 259; *Konk. Ordnung*, § 80, G. S. S., 1855, p. 321), was abrogated when the imperial law of bankruptcy was introduced in 1877 (*Konk. Ordnung*, § 54, R. G. Bl., pp. 351, 362).























































































