

**The Contracts Notes of Timothy Merwin:
Earliest Evidence of Instruction at Yale Law School**

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Abstract

This paper discusses the contracts notes of one of the first students at the Yale Law School. The notes were taken in 1828, making them the earliest known evidence of the method of instruction employed by the law school's founders.

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Introduction and Background

This paper discusses a student notebook that is currently stored in the Manuscripts and Archives division of Yale University's Sterling Memorial Library. The notes were taken by Timothy Merwin, a student at what is now Yale Law School, between January 7, 1828 and March 5, 1828.¹ They are notes from a course on contracts taught by Professor Samuel J. Hitchcock, as the inside front cover of the notebook indicates. The notes were taken only four years after the names of the students at the law school were first included in the Yale College catalog and two years after a statement describing the law school first appeared therein.² Merwin's notes are both the earliest known notes by a student at Yale Law School and the only reliable evidence of the pedagogical approach employed by an instructor in the school's formative years.

Professor Hitchcock began teaching at the law school in New Haven in 1820, when he became the law partner of Seth P. Staples, the founder of the school and Hitchcock's own teacher through apprenticeship. In 1824, Staples left the law school to pursue his law career in New York City. He was replaced by David Daggett,

¹See Notes, inside front cover and *84. The star (*) paging in Merwin's notes refers to the actual page numbers in Merwin's notebook.

²See generally Frederick C. Hicks, Yale Law School: The Founders and the Founders' Collection 1-20 (Yale Law Library Publications No. 1, June 1935).

Staples' teacher through apprenticeship, who joined Hitchcock in the teaching of law classes in 1826, although Hitchcock continued to shoulder most of the burden of teaching and administration. Hitchcock directed the school until his death at age 60 in 1845.

Only one volume of Merwin's notes has been preserved. The only mention of this volume of which I am aware appears in Frederick Hicks' pamphlets on the history of Yale Law School. There, Hicks notes that "[a] volume of eighty-four pages which has been preserved, containing notes on Hitchcock's lectures taken down by Timothy Merwin, from January 7 to March 5, 1828, shows them to be unlikely to cause students to burst into song."³ Yet if any of Hitchcock's classes were likely to cause such felicity, contracts would be the one, since he had a special interest in the subject. Although Hitchcock was never published, Hicks states that "[f]or some years before his death he was engaged in the preparation of a work on contracts, but despite the desire of Little & Brown to publish it, it never saw the light."⁴

Timothy Merwin

Biographies of Graduates of the Yale Law School, 1824-1899

(1911) has this to say about Timothy Merwin:

Timothy Taylor Merwin (1827-28), B.A. 1827, M.A., was born at New Haven, Conn., August 22, 1807. He was the son of the Rev. Samuel Merwin (B.A. 1802) and Clarina B. (Taylor) Merwin.

³Id. at 23.

⁴Id. at 24.

Merwin was admitted to the bar in 1829, and practiced his profession at Norwalk, Conn., until 1843, when he removed to New York City. He was a member of the lower house of the General Assembly in 1838 and clerk of the County Court for several years. He was also for a time owner and editor of the *Norwalk Gazette*.

On removing to New York City he engaged in mercantile pursuits, was for several years manager of a railroad and later became a member of the New York Stock Exchange. In 1862 he with others organized the North American Life Insurance Company, of which he was the first secretary and for many years (and at his death) the vice president.

He was married, in September 1830, to Miss. Hannah B. White, daughter of Colonel E. Moss White of Danbury, Conn., by whom he had two sons and one daughter. She died in 1843.

He died at his home in Brooklyn, N.Y., January 15, 1885.

Thus, Merwin was twenty-year-old, second year law student at the time he took his contracts notes. According to the *Biographies*, Merwin was one of sixteen students in the class of 1828.

Content

Merwin's notes are based on the first American edition of an English contracts treatise that is now known as *Chitty on Contracts*. Joseph Chitty Jr.'s *A Practical Treatise on the Law of Contracts, Not Under Seal; and Upon the Usual Defences to Actions Thereon* (1826), was the fifth contracts treatise to be published in England and the United States.⁵ It was written in

⁵The earlier contracts treatises were John Joseph Powell, *Essay upon the Law of Contracts and Agreements* (1790), Samuel Comyn, *The Law of Contracts and Agreements Not Under Seal* (1807), Edward Hobson Vitruvius Lawes, *A Practical Treatise on Pleading in Assumpsit* (1810), and Henry Thomas Colebrooke, *Treatise on Obligations and Contracts* (1818). For a discussion of the explosion of treatise writing that occurred in the nineteenth century, see generally A.W.B. Simpson, *The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature*, 48 U. Chi. L. Rev. 632 (1981).

England during the period in which "the treatise came to be the typical form of creative legal literature."⁶

Joseph Chitty Jr. was the son of the most prolific legal treatise writer of the time, Joseph Chitty Sr. (1776-1841). Joseph Chitty Sr. wrote 21 legal titles, which appeared in many more editions. According to the Dictionary of National Biography, Joseph Chitty Sr. also "trained in succession in his pupil room at 1 Pump Court [in London] a great number of the most eminent lawyers, and . . . did more than perhaps any man of his time to facilitate the study of the law."⁷

Next to his father's 21 titles, the four works Joseph Chitty Jr. wrote before his early death in 1838 seem a small output. *Chitty on Contracts* was no small achievement, however. After its initial publication in England in 1826, *Chitty on Contracts* was reprinted in numerous editions and remained the most widely used contracts treatise throughout the next few decades. Indeed, the treatise is still employed by English practitioners today, its twenty-seventh English edition having been printed in 1994. *Chitty on Contracts* was imported to the United States and published in Boston by Wells and Lilly and in Philadelphia by John Grigg in 1827, "with corrections and additional references by a member of the Massachusetts bar." The treatise was adopted by Hitchcock immediately after its release, since Merwin's contracts notes begin

For a discussion of contracts treatises in particular, see generally A.W.B. Simpson, *Innovation in Nineteenth Century Contract Law*, 91 Law Q. Rev. 247 (1975).

⁶A.W.B. Simpson, *The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature*, 48 U. Chi. L. Rev. 632, 662 (1981).

⁷4 Dictionary of National Biography 266-267 (1993).

on January 7, 1828, the year after Chitty's treatise was introduced into the United States and within two years of its initial publication in England. It seems that the treatise was immediately adopted by the instructors at Harvard Law School as well, as the Advertisement to the Second American Edition of *Chitty on Contracts*, published in 1831, begins: "The following Treatise has obtained a high character amongst the profession throughout the Union, and has been selected as a text book in the 'regular course' of law studies at Harvard University"

Although Merwin's notes do not mention Chitty's treatise at all, approximately two-thirds of the notebook is devoted to paraphrasing or copying Chitty's text and citations. Sometimes, Merwin's notes are exact copies of Chitty. More often, Merwin's notes are a slightly condensed paraphrase. Take the following example, representative of most of the notes:

*Merwin *10*

The contracts of idiots and lunatics are not binding; as they are unable to judge accurately, and cannot give a free, fair, and serious assent to any engagement. A question was formerly much agitated whether a man in his right mind could allege his precedent incapacity, "because he could not know what he did in such a situation." And it was held in some decisions that he should not disable or stultify himself. 39 Hen. VI. 42; 4 Co. 124; Cro. Eliz. 398.⁸

Chitty 29

The contracts of idiots and lunatics are not binding; as they are unable, from mental infirmity, to form any accurate judgment of their actions, and, consequently, cannot give a serious and sufficient assent to any engagement. The ancient common lawyers endeavoured, indeed, to establish the validity of the contracts of such persons, by arguing that a man shall not be allowed to

⁸The sources referred to are the English Reports from the time of Henry VI, *Coke on Littleton*, and *Croke's Reports tempore Elizabeth*.

disable or stultify himself, by pleading his own incapacity; "because he cannot know what he did in such a situation." [Footnote: 39 Hen. VI 42; 4 Co. 124; Cro. Eliz. 398.]

For the most part, Merwin's notebook is a loose transcription of the text in Chitty.

It appears from an 1831 letter by David Daggett to a prospective law student that Merwin's contracts notes were representative of all his classes. In the letter, Daggett describes all the classes at the law school (except contracts, inexplicably) in terms of the text on which they were based: "Classes are occupied at present thus. First class are commencing 3d. Vol. of Black. Com. & will next begin Cruise Digest. Second class are finishing Cruise Dig. and about to enter on the law of Contracts, & after that Chitty Pleadings. The third class is half through Selwinski Prius, & will then enter on Phill. Ev. or Starkie."⁹ Merwin's legal education can perhaps best be characterized as a period of "supervised transcription" of the definitive legal treatises, citations and all.

Note, however, that Merwin's notes do not provide a true copy of Chitty's text. This is no accident, nor is it the result of laziness on Merwin's part. The second sentence quoted above from Chitty has been condensed and digested. Although the first sentence from Chitty is shorter in Merwin's version, it has been critically amplified, with the word "sufficient" being replaced by the phrase "free and fair." The differences between Merwin's

⁹Hicks, supra note 2 at 51 (Yale Law Library Publications No. 2, June 1935).

notes and Chitty's treatise appear to represent Hitchcock's influence. For this reason, they are the focus of the remainder of this paper.

The Notebook's Departures from *Chitty on Contracts*

Although Merwin's notes owe their greatest debt to *Chitty on Contracts*, approximately one third of the material in the notebook has no basis in *Chitty*. The source of much of this material is a mystery, making it impossible to isolate with certainty Professor Hitchcock's personal influence on Merwin's product. Nevertheless, it is likely that most of the unidentified material in the notebook is attributable to Hitchcock either directly, through his formal lectures, or indirectly, through the assignment to his students of materials other than *Chitty*.

The notebook's departures from *Chitty* can be categorized under the following six headings: clarification, explanation, amplification, condensation, reorganization, and Americanization.

I. Clarification

Hitchcock must have explained to his students what key terms in *Chitty on Contracts* meant, as in the example above, where the word "sufficient" is replaced by the more useful phrase "free and fair." Absent some instruction by Hitchcock, no student would take the liberty of substituting words of substance for the word

"sufficient" in this instance. Similar instances of clarification appear throughout Merwin's notes.

II. Explanation

At times, Hitchcock must have provided extremely practical assistance to his students. For example, Merwin's notes contain what amounts to a device for sorting cases, which comes at the conclusion of a lengthy and confusing discussion of a husband's liability for the contracts of his wife:

To determine whether the husband is liable for things furnished as to his wife, five questions must be put.

1. Did the woman stand to him in the relation of wife at the time?
2. Was he, when they were furnished, bound to supply her with them?
3. Was she, by misconduct on his part, then in want of them?
4. Were the articles furnished necessities?
5. Was the credit given to the husband when the wife was known to be a married woman?

If these are all answered affirmatively, the husband is liable. If any one except the last is answered in the negative, then it must be asked whether he has adopted or ratified the contract. If he has, he is liable. If he has not, he is not chargeable.¹⁰

In this example, the notebook departs for a moment from the convoluted legal principles in *Chitty on Contracts* (which also appear in Merwin's notes), instead providing a mere summary of the cases. Pedestrian as it may appear, a guide like this one is probably what inspired another student of Hitchcock to make the following remarks:

I was a great admirer of Judge Hitchcock. He was a model teacher. He was so clear, you could not fail to understand him fully; so copious in instruction and il-

¹⁰Notes *68.

lustration, that he seemed to exhaust the subject, and you felt that he was master of the principles of law, and of their application and analogies; and yet so compact in style that he never used a word too much.¹¹

III. Amplification

The notebook sometimes expands Chitty's descriptions of the law. Take the following example. Merwin *18: "The word necessities as applied to infants is a relative term, and to be construed with reference to circumstances such as rank, fortune, age, health, employment, residence, and interests of the infant."

Chitty 31. "[T]he term 'necessaries' . . . is a relative term, depending upon, and to be construed with reference to, [an infant's] actual rank, fortune, and age." The notebook adds the words "health, employment, residence, and interests" in the discussion of Chitty and the relevant cases.

The notebook frequently introduces cases and holdings that are not included in Chitty. These additional cases often appear toward the end of discussions that have previously adhered closely to Chitty. For example the end of the introductory section of Merwin's notes states:

An implied assent may be shown from the mere silence of the party bound. For example, if one man stands by and sees another make sale of his property without forbidding it or making known his claim, he assents to the sale and is bound thereby. Where a prior mortgagee is cognizant of a loan and mortgage to a second mortgagee, and does not make known his situation, he is supposed tacitly to have assented to be postponed. 2 Vent. 151; 1 Ves.6.¹²

¹¹Hicks, supra note 2, at 22 (quoting Woolsey's Historical Discourse 19-20).

¹²Notes *9. The sources referred to are the American *Ventris' Reports* and the British *Vesey's Reports*.

This statement does not appear in *Chitty* at all; nor do the cases cited.

Expanded coverage is sometimes derived from contracts treatises besides *Chitty*. Consider the following phrases, the first from Merwin's notes, the second from *Powell on Contracts* (1790): "A man of weak intellect only, or a harassed and uneasy state of mind";¹³ "if a man were of a weak understanding, and were harassed or rendered uneasy at the time of contracting."¹⁴ Neither the notebook nor *Powell* is quoting or paraphrasing a case here (Merwin's notes do not cite *Powell on Contracts* in this discussion). Perhaps Hitchcock consulted *Powell* in preparing for this lecture.¹⁵

On two occasions, the notebook explicitly discusses works that are not mentioned in *Chitty* but that touch on the field of contracts, namely the treatises *Bingham on Infancy and Coverture* and Tapping Reeve's *Baron and Feme*.¹⁶ Notably, these two discus-

¹³Hicks, *supra* note 2, at 11-12.

¹⁴*Powell* 20.

¹⁵It is possible that Hitchcock had relied on *Powell on Contracts* as his contracts textbook in the years prior to the publication of *Chitty on Contracts*. If so, Hitchcock would have had little difficulty in making the transition to *Chitty on Contracts*, since *Chitty on Contracts* proceeds through the various areas of contract law in nearly the same sequence as *Powell on Contracts*.

¹⁶Tapping Reeve was founder of the nearby Litchfield Law School, which was still in operation in 1828, by then under the direction of Judge Gould. Reeve himself delivered a lengthy course on contracts to his students while he was teaching at Litchfield. *See* Notes of Aaron Burr Reeve (Vol. 3 (1803), Contracts), transcribed by Tracy L. Thompson (unedited draft on file with author of this paper).

Aaron Burr Reeve's notes of his father's lectures are believed to be a particularly accurate transcription, as they were later employed by Tapping Reeve as lecture notes and contain numerous comments in Tapping Reeve's hand. Reeve's contracts notes are similar to Merwin's in style, but the resemblance ends there, probably due to the separation of 25 years between Reeve's and Merwin's notes.

sions contain the only policy debates that appear in Merwin's notebook, and all the arguments in these sections are clearly attributed to Bingham and Reeve rather than to Hitchcock. Both discussions are offered to help sort out legal doctrines that appeared to be unsettled. The first is the notebook's treatment of whether the contracts of infants are void or merely voidable. Merwin's notes state that "there is great confusion on the subject . . . and no rule can be laid down to ascertain the line of distinction."¹⁷ In attempting to sort out the cases, the notes set forth at length the policy arguments made by Bingham in his treatise:

He contends, first, that the only object of this rule of law regarding infants is to protect them from their own weakness. And, that if this protection can be afforded, by any means short of inflicting detriment on innocent persons, such infliction is unnecessary and unjust. But, if the contract is held absolutely void, it may protect the infant in some cases and in others injure him. And it may be seriously detrimental to the rights of others, not implicated in his transactions. Therefore, it would be better to give him this power, on obtaining his age, to rectify and affirm all his acts or contracts, or break through and avoid them. If this privilege is confined only to acts attended with advantages, it is worse than nugatory; and if denied to acts, apparently or really prejudicial, it would be no privilege at all, or an empty and idle one. If the other party was always entirely in the power of the infant, there would be little or no temptation to impose on him; and if imposed on, he would always rescue himself by avoiding the injurious contract. . . . Bing. Inf. 15-16.¹⁸

After patiently explaining what Bingham has to say on the subject, Merwin's notes return to their normal pattern of listing holdings

¹⁷Notes *24.

¹⁸Notes *24-*26. The source referred to is Bingham, Peregrine, The Law of Infancy and Coverture (G. Lamson, 1824).

and providing citations for those holdings. The notes add nothing to Bingham's policy discussion.

The second policy discussion appears in the notebook's refutation of Tapping Reeve's theory, set forth in his treatise on domestic relations known as *Baron and Feme* (1816), that "in case of a mutual agreement of husband and wife to live separate . . . with a separate maintenance secured to the wife adequate to her wants, that she could contract as feme sole and bind herself."¹⁹ The notebook proceeds to simply list Reeve's policy arguments and then dismisses the theory with nothing more than a citation that appears in *Chitty on Contracts*. "In opposition to the opinion so ingeniously supported, it is now fully established that a husband and wife cannot . . . so dissolve the relation of marriage as to enable the wife while living apart from her husband to contract as a feme sole. . . . 2 B.&C. 547."²⁰

Finally, the notebook sometimes discusses points of general interest that bear little relation to contracts and that have no identifiable source besides Hitchcock's own learning. Perhaps the most interesting section of the notebook appears in a three page digression on the origins of the age of majority. This discussion begins with a profession of interest in the subject: "It is a matter of some curiosity to ascertain how this precise age came to be the period when the reasoning powers became sufficiently rigorous to guide the man, or rather, why a youth becomes a man at twenty-

¹⁹Notes *46.

²⁰Notes *47-*48. The source referred to is *Barnewall and Cresswell's Reports*.

one."²¹ The notebook proceeds to compare the ages of majority in the Roman Empire, Naples, Holland, medieval Europe, medieval England, and contemporary England, explaining that the age of majority is correlated with the nature of a man's work, particularly with the weight of his armor and his agricultural implements. For instance, "In after times, when suits of complete steel were generally worn, the age of bearing such unwieldy armor or of knight-hood was postponed, and consequently minority protracted until 21."²² This digression seems less a consequence of legal necessity and more a concession to the curiosity of Hitchcock's students, many of whom were probably close to the age of majority themselves.

A similar discussion of the historical background for the law appears in a brief discussion of the treatment of aliens in England.²³ These two historical discussions are the only sections of Merwin's notes that support the following recollection attributed to an individual who studied with Hitchcock in 1838-39:

You are aware there are some chapters relating to subjects which are obsolete or have no possible application to this country. On that account they are not made the subject of recitation in most law schools; but Judge Hitchcock made us [study] them all, as he said that we . . . would better understand some of the influences which had built up the common law. . . . It was amazing, indeed, to see what stores of illustrations from history, fiction, poetry and the classics were treasured up in the brain of this man, who appeared to the world as nothing but a dry lawyer.²⁴

²¹Notes *14-*16.

²²Notes *15.

²³Notes *70-*71.

²⁴Hicks, supra note 2, at 23 (alteration in original) (quoting Woolsey's Historical Discourse).

IV. Condensation

Merwin's notes frequently leave out a sentence or even a paragraph from *Chitty*. In addition, some citations from *Chitty* are omitted, although not many. It is possible that Hitchcock skipped over some of the material in *Chitty* and encouraged his students to do so as well.

A unique example of condensation appears in the outline on Illegal Contracts that appears on two pages in the middle of Merwin's notebook, an outline that is reminiscent of a modern law student's exam preparation (roman numerals and all). In this two page long outline, which appears out of context in Merwin's notebook and out of the order in *Chitty*, Merwin summarizes pages *216-*250 of *Chitty's* treatise. Here is what the beginning of that outline looks like:

- Illegal contracts are those which are void,
- I. By the Common Law.
- II. By Statute.
 - I. By the common law, all contracts are void, which have for their object,
 - 1. The violation of the laws of God.
 - 2. The corruption of public morals.
 - a. By inciting to a breach of peace.
 - b. By inciting to a violation of chastity.
 - c. By corrupting the public teachers of religion.²⁵

Perhaps Hitchcock instructed his students that illegal contracts was a simple subject and not subject to debate, and that they need only summarize *Chitty* rather than laboriously copy his text. Even here, however, an influence outside *Chitty* is evident, as one point is included that does not appear in *Chitty* at all: *Chitty*

²⁵Notes *37.

mentions nothing about contracts being void on account of their "violation of the laws of God."

V. Reorganization

Frequently, Merwin's notes appear in a different order from the presentation in *Chitty*. For example, the section on Assent to Contracts by Married Women²⁶ (beginning on page *39 of Merwin's notes) opens with a short outline that does not appear in *Chitty*. The remainder of the discussion of this subject follows the order in the outline rather than the sequence in *Chitty*. Perhaps Hitchcock provided this outline as a framework through which *Chitty* could be understood.

VI. Americanization

Merwin's notes frequently contain references to, or discussions of, American cases that are not cited in the American edition of *Chitty on Contracts*. Note, however, that these American citations appear in addition to the English sources cited in *Chitty on Contracts*, and not instead of those citations. In most sections of the notebook, the added cases are from Massachusetts or Connecticut. For example, at the end of the discussion of minors' capacity to contract, Merwin's notes contain a short discussion of a series of holdings in the Massachusetts reports and of comments in Swift's *Digest of the Laws of*

²⁶See Notes *39.

Connecticut.²⁷ At one point, the notebook appends a local citation, even identifying the judges, with whom the students may have been acquainted by reason of their proximity to the courthouse: "New Haven City Ct., *Twining v. Shephard*, Judges Bristol, Baldwin, and Edwards."²⁸

One of the notebook's lengthiest departures from Chitty appears in the discussion of contracts by aliens.²⁹ There the notes focus on nineteen opinions by the United States Supreme Court, none of which are cited in *Chitty on Contracts*, which was still an English treatise despite an editor's addition of some citations to American sources. The notebook's departure from Chitty in this discussion was undoubtedly necessitated by the particularly national character of the law concerning aliens.

Coverage

Merwin's notebook is divided into four sections, with a brief interlude on "Illegal Contracts." The first section is an introduction containing general principles of contracts. The second section, comprising well over half the notes, is "Assent to Contracts: I. By Idiots and Lunatics. II. By Drunkards. III. By Infants." This is interrupted by the outline on illegal contracts, followed by "Assent to Contracts: IV. By Married Women." The third section is "Assent to Contracts by Aliens." The fourth,

²⁷See Notes *34-*35.

²⁸Notes *19.

²⁹See Notes *75-*78.

final, and shortest section, is "Contracts by Persons Under Duress."

The First American edition of Chitty on Contracts is 345 pages long (plus an index), and is divided into seven chapters. These are:

- I. Introduction
- II. Contracts With Particular Persons
- III. The Subject Matter of Contracts
- IV. The Statute of Frauds
- V. Illegal Contracts
- VI. Defenses and Pleading
- VII. Damages

The 84 pages of Merwin's notebook begin on page one of Chitty's treatise. The first section of Merwin's notes correspond to the first six pages of Chitty's Chapter I (of a total of 28 pages in Chitty). The remaining sections correspond to the first 27 pages of Chapter II (of a total of 62 pages in Chitty). The outline on illegal contracts summarizes the material in Chitty's Chapter V (which occupies 36 pages in Chitty). Thus, Merwin's notes, which took almost two months to compile, cover only 69 pages of Chitty, counting the outline. At that rate, Merwin must have taken about five volumes of notes on Chitty on Contracts alone.

The 22 pages of Chitty's Chapter I that Merwin's notes do not touch upon introduce the subject of consideration, a topic that Hitchcock probably gave full treatment to later in the course in teaching Chitty's Chapter III. The 27 pages of Chitty's Chapter II that Merwin's notes do cover focus on various individuals' capacity to contract. The notebook's extensive treatment of individuals' capacity to contract follows *Chitty on Contracts'* lengthy

exposition on the subject, which comprised 62 of *Chitty's* 345 pages. (Even today, *Chitty* devotes an entire *Part*, comprising over 100 pages of its volume devoted to "General Principles," to "Capacity of Parties."³⁰)

Chitty's interest in the status of the people contracting, rather than their transaction, is a remnant of the ancient institutional writing tradition, which organized legal thinking into three categories: persons, things, and acts. This organizational scheme is exemplified by Roman works such as Gaius' *Institutes* and Justinian's *Institutes*, maintained in derivative works such as the thirteenth-century Bracton's *De Legibus*, and memorialized as late as Blackstone's *Commentaries on the Laws of England*, which devotes its first Book to the law of persons. The early contracts treatises maintained this mode of organization: *Powell on Contracts* (1790), the first contracts treatise, devoted its first part after the introduction to people's capacity to contract, as did the many nineteenth-century editions of *Chitty on Contracts* and *Pollock on Contracts* (1876). Not until *Anson on Contracts* (1879) and the publication of the modern treatises (by Corbin, Williston, and Farnsworth), did the presentation of contracts take on its current transactional cast, relegating capacity to contract to a subsidiary role.

Like *Chitty on Contracts*, Merwin's notes are almost single-mindedly focused on the rules of contracts, what we commonly call the black letter law. This was probably what Hitchcock's students

³⁰See, e.g., 1 *Chitty on Contracts* [297]-[398] (25th edition, 1983).

were paying for. This was certainly the view of Hitchcock's contemporary, Henry St. George Tucker, lecturer at the Winchester Law School beginning in 1825, who attributed the success of his school to "the singleness of his object; his earnest desire to be useful, without permitting himself to be seduced from that object by any anxiety for display, or by a disposition to sacrifice what is advantageous because it might not be ornamental."³¹

It is worth noting at this point that Hitchcock's lectures bore no resemblance to the contracts lectures that were offered contemporaneously by St. George Tucker. Tucker based all his lectures on Blackstone's *Commentaries on the Laws of England*, which devotes only forty "extraordinarily confused"³² pages to contracts ideas. Consequently, Tucker's coverage of contracts was brief, comprising only three pages in the published version of his lectures, which were given in the late 1820s and 1830s.³³ Despite the revolution that had taken place in contract law in the early decades of the 19th century,³⁴ Tucker's thought remained firmly rooted in the 18th century. In contrast, and to their credit, Hitchcock and his contemporaries at the Harvard Law School stayed abreast of the latest sources, as is evident from their reliance on *Chitty on Contracts* rather than the thirty-year-old *Powell on Contracts* or the even older Blackstone.

³¹Henry St. George Tucker, *Commentaries on the Laws of Virginia* ii (Winchester Virginian 1831).

³²Morton Horwitz, *The Historical Foundations of Modern Contract Law*, 87 Harv. L. Rev. 917, 920 (1974).

³³Henry St. George Tucker, *Commentaries on the Laws of Virginia* 340-43 (Winchester Virginian 1831).

³⁴See generally A.W.B. Simpson, *Innovation in Nineteenth Century Contract Law*, 61 Law Q. Rev. 247 (1975).

Appendix A: Physical Characteristics

Merwin's Contracts notebook is small, measuring approximately five by eight inches and one third of an inch thick. The cover is made of cardboard, painted an uneven brown on the outside to look like leather. The pages, of which there are approximately 90, are lightly ruled from edge to edge and are bound into the cover. This binding is of high quality, for it has held fast for 169 years and shows no signs of wear. Similarly, the inner pages are of fine quality, not at all opaque. While they are somewhat yellowed, like the binding they have weathered the years quite well and barely show their age. There are no tears or other obliterations on any of the pages. Merwin filled these pages, front and back, edge to edge, and from top to bottom, ordinarily leaving no margin at all, although he luxuriously left an entire page between two of the sections³⁵ and, thanks to his miserliness, had a few pages to spare at the end.

The notation "Book III" in the inside front cover indicates that Merwin thought of his notes archivally. Merwin was saving his notes from law school for later use, presumably as a reference work for use in the practice of law. This is borne out by the quality of the notebook's materials, by the neatness of Merwin's penmanship, and by his conscientious and standardized use of citations (over 485 citations appear in the 84 pages of the notebook). Moreover, the work contains few crossouts or erasures. The note-

³⁵See Notes *36-*37.

book contains almost no spelling errors, although abbreviations abound.

Merwin's writing is neat, for the most part. He employed an ink-dipped pen, yet stray ink not once appears on his notebook. His capital letters proudly fill the rules from top to bottom—and then some—while his lower case letters cling to the bottom of the rules in an often indistinguishable huddle. Nevertheless, the idiosyncrasies of Merwin's writing are easily overcome and the writing is almost always decipherable after some effort and with the assistance of context. As I was able to tease out all but one word and one name, Merwin himself would have had no difficulty at all in referring to the notebook frequently.

Merwin clearly took pride in the reference work he was creating: He began section headings with a flourish, surrounding the word "Contracts" at the start of the book and the various section headings (e.g., "Assent to Contracts by Minors") with calligraphic curves and underlines. Headings on many pages remind the reader of the section being covered. Page numbers appear conscientiously on every page on the outside, top corner.

Besides the occasional division into "Lectures," Merwin's writing appears to be continuous; he does not mark off the dates on which lectures were delivered other than indicating a starting date at the beginning (January 7, 1828) and an ending date at the end (March 5, 1828) of his notebook (the ending date surrounded by adornments befitting the solemnity of the moment).

Appendix B: Note on Methodology

Although they were produced with great care, Merwin's class notes were not written with the intention of publication. In my transcription I have tried to remain as faithful as is reasonable to Merwin's original. I have made the following changes to the text to facilitate reading:

- Modernized punctuation, adding and deleting commas, dashes, semicolons, and colons where necessary to accord with modern usage (without changing the meaning of the text).
- Changed the paragraph breaks, which are haphazard in the original.
- Changed ampersands (&) not appearing in citations to the word "and" and the symbol "&c." to "etc."
- Eliminated Merwin's use of underlining for emphasis, which appears rarely and does not assist in understanding the text.
- Altered the beginnings of sentences where Merwin uses "As," as a shorthand for "For example" or "Similarly" or for some other transition phrase.
- Modernized and Americanized spelling.
- Changed "holden" to "held."
- Changed "till" to "until."
- Wrote out abbreviations and words written partly in superscript where doing so aids comprehension.

I have been considerably more draconian in my treatment of the citations. These I have standardized to accord with the system of abbreviations set forth in Marvin's Legal Bibliography (1845) and with the sources set forth in *Chitty on Contracts*.

Appendix C.

A transcription of the contracts notes of Timothy Merwin is attached.



Timothy T. Merwin
Jan. 7th 1828.
Book III.
Contracts (S.J. Hitchcock, Esq.)

[*1] A contract in the more general and extensive sense of the term is "an agreement of two or more to do or not to do a particular thing." "An agreement or obligation whereby one party becomes bound to another to pay a sum of money, or perform, or omit to do a certain act." "The consent of two or more to the same thing." Under these general definitions are included all kinds of contracts, such as feoffment, gift, grant, lease, loan, pledge, bargain, covenant, agreement, and promise. 2 Blk. 404-05; Pow. 6; Sw. Dig. 172.

Contracts thus defined consist of three classes.

I. By parol, or in writing—as contracts distinguished from specialties.

II. By specialty, written under seal.

III. Of record.

A simple contract, or parol contract, may be either verbal or written. At common law, verbal and written contracts have the same efficacy, properties and effects. Verbal and written contracts forming one class, are opposed to specialties or obligations under seal, which form another class. 7 T.R. 350 note. [*2] The statute of frauds has made a distinction between different kinds of simple contracts, requiring some to be written and signed by the party to be charged. The rules of evidence also make a distinction between oral or verbal and written contracts, for it is a rule of evidence that no testimony can be admitted to contract, vary, or add to the terms of a written contract. 3 Stark. Ev. 995; 11 East. 312; 4 B.&A. 588.

A specialty is a contract or obligation, in writing, under seal, delivered over by the party bound. The sealing and delivery are a particular form and ceremony which alter the nature of the agreement.

Contracts, or obligations of record, are either judgments, recognizances, or statutes merchant or staple: and these are of superior force, because sanctioned by, and founded upon the authority of a Court of Record.

A specialty has importance and character attached to it from its solemnity, which do not belong to a simple contract.

[*3] 1. No consideration need be expressed to give it validity, even in a court of equity. Plowd. 308; 7 T.R. 477; 4 B.&A. 652; 1 Fonb. Eq. 342; 3 T.R. 438; 3 Bing. 111, 112.

2. A party is estopped to deny what he has admitted by his deed, although what he has so admitted is false; he is estopped to aver the truth. 2 Blk. 295; Com. Dig. Tit. "Estoppel"; 1 Saund. 216 n.2; 3 T.R. 424, 438. But the party bound may show duress, fraud, or illegality, though not apparent upon the face of the deed. 3 T.R. 418; 2 Wils. 344, 350; 9 East. 421.

3. The heir of one who bound himself and his heirs having assets by descent, and the devise of a covenantor or obligor by deed, are bound by the terms, and liable thereon. 2 Saund. 137 n.4; Bac. Abr. "Heir & Covnt." E.

4. The assignee of the lessee is liable on a lease under seal, on covenants running with the land.

5. A debt by specialty is entitled to preference in the payment of a testator's or intestate's debts. 2 Blk. 465.

[*4] 6. Specialty debts are not included in the statutes of limitations. Tid. Pr. 17, 18.

7. In pleading a deed it is necessary to make a profert thereof, or to allege excuse for not making a profert. 1 Ch. P. 313; 3 T.R. 151; 4 East. 585.

8. A deed is a security of a higher nature than a simple contract, therefore merges all simple contracts between the parties on the same subject. Bac. Abr. "Debt." G; 3 East. 258; 2 Mo. 277; 2 B.&B. 38.

9. A liability by deed cannot be varied, released or discharged, but by an instrument of equal force and solemnity. Co. Litt. 222 B; 3 T.R. 590; 8 East. 346; 2 Pick. 612.

A simple contract is thus defined, or described. "A mutual assent of two or more persons, competent to contract, founded on a sufficient and legal motive, inducement, or consideration, to

perform some legal act, or omit to do anything the performance whereof is not enjoined by law." Com. Dig. "Agreement" 1 A; Plowd. 17a, 5a, 6a; 5 East 16. [*5] This definition consists of three essential parts. I. The reciprocal or mutual assent of two or more persons, competent to contract. II. A good and valid consideration. III. A thing to be done which is not forbidden, or a matter to be omitted, the performance of which is not enjoined by law. Some writers make a contract consist of five essential parts. 1. Persons able to contract. 2. A thing to be contracted for. 3. A good and sufficient consideration. 4. Clear and explicit words to express the meaning of the parties. 5. A mutual assent. Sw. Dig. 173.

A simple contract may also be: I. Executed or executory. Absolute or conditional. III. Express or implied. IV. Joint or several.

In a contract both parties must give their assent to all its terms. It must therefore, be certain and complete, and obligatory on both parties, or it binds neither. Peake's R. 227; 3 T.R. 653. To this rule there are some exceptions, viz. 1. An infant may sue on a contract, though he cannot be sued. Str. 937. [*6] 2. A contract may be void against one party who has not signed it according to the Statute of Frauds, and yet he may sue the other party who has signed. 6 East. 307; 3 Taunt. 169; 5 *id.* 788. 3. A contract may be void as against a tradesman who sells on Sunday; though the buyer, not knowing the vendor was acting in the course of his trade, may sue thereon. 3 B.&C. 232.

If a contract is complete in other respects, but one party has the power of rescinding, it will be valid until rescinded. 16 East. 45.

No mere overture, or offer to enter into an agreement not definitely and expressly assented to by both parties, will make a contract. 1 M.&S. 557; 1 Stark. N.P. 10.

In order to assent to a contract, there must be a free, fair, and serious exercise of the reason, or will; both a physical and moral power of deliberating and deciding, choosing and refusing—both the thing to be done, and the supposed advantages and disadvantages. If, therefore, the parties, in fact, have not these powers, or, in law, are presumed not to have these powers, there can be no binding contract. [*7] Hence, persons of non-sane minds, drunkards, persons deceived by fraud and chicanery, depressed by unlawful imprisonment, threatened and in fear of unlawful violence, and under legal age, cannot assent, and therefore cannot contract.

The law implies the assent of a party to a promise, so as to constitute a sufficient agreement. These are called implied promises, in opposition to express agreements. This implication arises from certain things done by the party, or from the situation and circumstances in which he has placed himself. If one man employs another, the law infers that he intends to pay him, and implies a promise to pay by the employer, and a promise to use due care and skill by the person employed. 5 Taunt. 302; 1 Hen. Black. 158-62.

If in the absence of a husband or parent, one should bury his deceased wife, or child, in a suitable manner, the law implies a promise to repay the expense. 1 Hen. Black. 90.

Where there is an invariable usage or custom of trade, the law will imply a promise in conform- [*8] ity with such usage or custom. 4 Camp. 149; 2 Mass. 141; 2 B.&A. 131; 1 Holt. N.P.C. 197; 1 Mer. 15; 2 B.&A. 746.

In some cases, where the party does not mean to contract, but intends only to commit a tort, the law will not allow his express intention to have effect, but will imply a promise in opposition to that intent. For example, if a person seduce away and harbors an apprentice, the master may sue in assumpsit for the work and labor of his apprentice. 3 M.&S. 191; 1 Taunt. 112; 1 Ch. P. 96.

A promise cannot be implied from a mere moral obligation. Cro. Eliz. 756; 3 B.&P. 249; 3 Pick. 211.

A promise will be implied to perform a decree of the court of Chancery, so as to support an action of assumpsit. 3 B.&A. 52; 8 Wheat. 697; 2 B.&P. 482; 1 Camp. 253; 3 Ca. R. 22-37.

A promise in law can only be inferred or implied where there is no express promise between the parties. "Expressum facit cessare tacitum." 2 T.R. 104, 105; 6 T.R. 320; 7 T.R. 568, 384; 3 East. 85; 2 M.&S. 316.

[*9] An implied assent may be shown from the mere silence of the party bound. For example, if one man stands by and sees another make sale of his property without forbidding it

or making known his claim, he assents to the sale and is bound thereby. Where a prior mortgagee is cognizant of a loan and mortgage to a second mortgagee, and does not make known his situation, he is supposed tacitly to have assented to be postponed. 2 Vent. 151; 1 Ves. 6. If a lessee holds over his term, and the lessor makes no objection, he is considered a tenant for a year. The lessor's silence is a presumed assent, and a continuation of the tenancy on the original terms. If a man holds himself out as the partner of another, with his knowledge, and he does not contradict the acts and declamations of the former, the silent party will be held to have assented to a partnership and be liable as a partner to a creditor. If a man knows that another is making and endorsing bills and notes in his name to obtain a credit, asserting that he has authority to do so, [*10] if the party whose name is used does nothing to prevent the other, or to expose the fraud, his assent is implied and he is held to have authorized the making and endorsing of the bills and notes. Sw. Dig. 1740.

Lecture II.

Assent to Contracts.

I. By Idiots and Lunatics.

The contracts of idiots and lunatics are not binding; as they are unable to judge accurately, and cannot give a free, fair, and serious assent to any engagement.

A question was formerly much agitated whether a man in his right mind could allege his precedent incapacity, "because he could not know what he did in such a situation." And it was held in some decisions that he should not disable or stultify himself. 39 Hen. VI. 42; 4 Co. 124; Cro. Eliz. 398.

Idiots and lunatics are competent to receive property from others; for upon a grant to them, the law presumes their assent. To prevent impositions and burdensome gifts or conveyances [*11] they may, however, disagree and avoid them on recovery; or, dying incapable, their heirs may avoid such implied acceptance. 1 Sw. Dig. 173.

In Connecticut it has been decided that a man may stultify himself, by his own plea, if he then has his senses; if not, his committee or conservator may do it for him. 3 Day 90. So also in New York. 15 John. 503.

In England, it has been decided that a person of unsound mind was liable on simple contract for necessities furnished by one ignorant of the insanity, or articles suitable to his degree. 5 B.&C. 170. The court, however, seems to insinuate that their decision does not extend to contracts by specialty, nor to unexecuted contracts.

If the party was sane when the contract was made, previous or subsequent insanity is no defense. If it is doubtful whether he was sane or not, then his state of mind a short time before and after may be shown, by way of presumptive proof of the state of mind at the time of the contract.

A man of weak intellect only, or a harassed and uneasy state of mind, is as much bound [*12] by his contracts, whether in court of law or in Chancery, as the wisest man in community. 3 Wms. Rep. 129; 1 Fonb. Eq. 61 n. Perhaps a jury would require less proof to show the contract of such a person void for fraud or imposition. Potier 2, 25.

In case of partial derangement confined to one subject only, while the mind appears bound on all other subjects, perhaps the rule should be that the party is able to assent to a contract which has no connection with the subject of the delusion. Strong proof should, however, be required of a free, sound, discriminating judgment, provided such partial derangement is shown to exist. Potier on oblig. app. 24.

In a late case, a man became insane through fear produced by fire in his house, and was ever after confined in a house kept for lunatics. While there, he made his will. Before his insanity, he had told his confidential friend what disposition he should make of his property; and his will carried those views which he had thus declared into full effect. Lord Eldon held the will valid. Albion, newspaper (7th Sept. 1822), In re Parkinson - a lunatic.

[*13] II. By Drunkards.

Formerly, a drunkard was considered capable of assenting to a contract and his contracts

were valid, unless the party who claimed under them procured the drunkenness, or some positive fraud was practiced. 3 Chan. Ca. 107; 1 Ves. 19; 3 Wms. Rep. 130; Co. Litt. 247; Fonb. Eq. 67; 1 V.&B. 30. In Bull. N.P. 172, it is laid down that the defendant may give in evidence that they made him sign the bond when he was so drunk, he did not know what he did. Lord Ellenborough decided, that an agreement signed by a person completely intoxicated was void; because such person had no agreeing mind. 3 Camp. 33-34 n.; 1 Stark. 126. In Virginia, it was decided that drunkenness was a sufficient cause for setting aside a contract, though not produced by the opposite party. 1 Hen. & Munf. 69; 1 South. 361; 2 Hayward 394.

[*14] III. By Infants.

The contract of an infant, however fair and conducive to his interest, is not binding on him unless for necessities. He is held by law unable to assent to an agreement for any other purpose.

It is a matter of some curiosity to ascertain how this precise age came to be the period when the reasoning powers became sufficiently rigorous to guide the man; or rather, why a youth becomes a man at twenty-one.

Some have supposed that it was the result of careful observation, that at this age the bodily strength became sufficient to enable the ward in chivalry to attend the lord in his wars, and that therefore the age of pupilage ceased. But in the Roman empire, full age was 25, and it is well known that in Italy, the seat of that empire, the young arrive to maturity earlier than in the more northern latitudes. Besides, in Naples, minority ceases at 18, and in Holland at 25. In most of the nations of Europe, the age at which a youth was considered capable of bearing arms was [*15] fixed at 15 years. Montesq. Sp. Laws. Lib. 18.26; b. 28; c. 25. But this was in the earlier periods, when a pole pointed with iron and an osier shield were the usual armor in those nations.

In after times, when suits of complete steel were generally worn, the age of bearing such unwieldy armor or of knighthood was postponed, and consequently minority protracted until 21. Sul. Lect. 12 at 123; Stuart's view, b. 1, c. 2, s. 5 n.2 at 296. If the lord caused his tenant to be knighted at an earlier age than 21, he thereby immediately terminated his minority. The lord was considered as having declared that his arm was strong, and his mind skilled to war, and being capable of manly employ, he was no longer to be detained in ward. 2 Inst. 11-12; Mag. Carta c. 3; Sul. Lect. 124.

As a proof that the change of armor was the cause of the change of the period of full age, it may also be mentioned that in socage tenures where the services were agricultural, the ward was out of guardianship at 14 or 15; and in Kent, by the custom of the county, 15 is still as to many purposes the age of majority. Robins Guard. 185-222. [*16] Glanvil states the age to be 15 in his day. 7. 9. Bracton says the male heir in socage is to be out of ward as soon as he is capable of attending to husbandry, which he says is at 14 or 15. Brac. 86. G. 422 c. The tenant in burgage was to be out of ward as soon as he was capable of following his father's profession. Glanv. de Leg. b. 7, c. 4.; Brac. 866.

The criterion of ability having become vague and uncertain, the courts in the reign of Edward II insisted on the personal presence of the infant, to satisfy themselves of his discretion, and finally, a certain age was fixed upon. In Normandy, the period fixed for the heir in chivalry to be out of ward was 20 years; and, as he had one year to sue out his livery, 21 came to be considered there the period when he came to the full possession of his estate. And this period came to be adopted in England, and the rule finally made uniform. Gilb. Ten. intro. 18 n.1.

Accidental circumstances have probably fixed the age of majority at different periods in other countries. According to Blackstone, it is arbitrary and "jurispositive," merely. 1 Blk. 464. If the above view is correct, there is some foundation in reason and custom and legal analogy for the English rule.

[*17] The subject of infants' contracts may be thus divided. I. What are necessities. II. What are not. III. The confirmation of their contracts after attaining their age. IV. The liability of others contracting with infants.

Such necessary articles as relate immediately to the person of the infant, as his meat, drink, apparel, lodgings, medicine, and education at fair and reasonable prices, and with due

regard to the degree and estate of the infant, are clearly necessities for which he is liable. Bac. Abr. Infancy. I; 3 Com. Dig. Infant B. 5.

The word necessities as applied to infants is a relative term, and to be construed with reference to circumstances such as the rank, fortune, age, health, employment, residence, and interests of the infant. Hence, a livery for the servant of an infant who was captain in the army was considered necessary. 8 T.R. 578; 1 Esp. 211. So were regimentals for a member of the militia corps. 5 Esp. 152. So horses may be necessary for an infant, and if so, work done in keeping and taking care of them. [*18] But it would be held that the necessity for the horses should be shown, for the presumption would be that they are not necessary. Str. 1101; 2 Stark. Ev. 726 n.

So if an infant makes a lease which is for his benefit, it is valid. 2 T.R. 161. So if a copyhold descends to him, he is liable for a reasonable fine; the law raises an implied promise against him. 3 Bur. M. 1717. So if an infant has a wife and children, he is liable for necessary provisions, housement, servants' wages, etc. for their support. 1 Str. 168; Ld. Bacon's Max. Reg. 18; 1 Fonb. Eq. 73 n. But it is not necessary that an infant should have a wife, and therefore he is not liable for things supplied which are necessary to the celebration of his marriage. 1 Str. 168. As, however, he is capable of contracting marriage, when he has taken upon himself that relation, the law enables him to make such subordinate contracts as the relation makes necessary to the family.

[*19] II. What are not necessities. Courts of law regard the real rank and actual, not apparent, circumstances of the infant. Therefore, if an infant is provided with sufficient necessities by the parents or by other tradesmen, he is under no necessity, and therefore not responsible. 2 Stark. R. 501. It is the duty of one who deals with an infant to ascertain his real situation, not to trust merely to his representations. 2 Blk. Rep. 1325; 2 Esp. 471; Peake N.P.C. 229.

An infant placed at school by his relations is not liable to the teacher of his instruction. Aleyn 94. (N. H. City Ct., Twining v. Shephard, Judges Bristol, Baldwin, and Edwards.)

An infant has not discretion to trade, therefore is not liable for goods supplied, or work done for him as a trader. He cannot therefore be a bankrupt. Nor is he liable on the customs of the realm, or an innkeeper. Carthew 161.

He cannot become partner with an adult. 1 Stark. R. 26; 5 B.&A. 147. [*20] If, however, he is partner in fact, he must notify (after he comes of age) persons who trust the firm that he has disaffirmed the copartnership, else it continues and becomes a legal connection. 5 B.&A. 147.

If articles are furnished him to trade with and he consumes them in his family, he is liable for them as necessities. 1 Car. & P. 94. An infant is not liable on an account stated even for necessities previously furnished, nor on a bill of exchange given by him as party thereto, for necessities. 1 T.R. 40; 2 Stark. 36; 1 Camp. 552; 10 John. 33. Other adult persons, parties to such a bill, will be liable thereon. 4 Esp. 187; 15 Mass. 273.

If a bill is drawn upon an infant and is presented and accepted after he comes of age, he will be bound. 4 Camp. 164. An infant is not liable on a bond with a penalty, or on which interest is payable, although for necessities. 1 Lev. 86, 87; Cro. Eliz. 920; 1 Inst. 172a; 8 East. 330; 3 M.&S. 477. Where goods, not necessities, are delivered to a carrier for an infant which do not reach him till of age, he is not liable for them. [*21] 3 Camp. 254; 8 T.R. 330.

An infant is not capable of assenting to a warranty of a horse. 4 Camp. 118; 2 Stark. Ev. 724 n. And a lieutenant in the English navy, under age, was held not liable for a chronometer. Holt N.P.C. 77.

An infant wants discretion to use and dispose of the money of others, and therefore cannot assent to an appointment to such duties. Hence he cannot be the clerk of a court of requests, where he must receive the money of the suitors. 5 B.&A. 81. And he is not liable for money lent him to buy necessities, and which he so applies. 1 Salk. 279, 386; 5 Mod. 368; Bull N.P. 154; 2 Esp. 472. A court of chancery will, however, give relief by considering the lender as a cestui qui trust of the creditor, where a credit is subsisting. 1 Wms. Rep. 558.

If an infant is indebted for necessities, and one pays that debt for him on request, he is liable, for example, if he is arrested for necessities, and money is paid on his request for his

liberation. 5 Esp. 28. So if an infant embezzles money, he may be sued for money had and received. 1 Esp. 172.

An infant shall not however, be made liable [*22] by a mere change of the form in which the remedy against him is pursued. If he make a contract for which he is not liable, the party has no election but to treat the infant as guilty of a wrong. 1 Sid. 129; 8 T.R. 335; 6 Cranch 226; 3 Pick. 492; 2 Stark. Ev. 724.

If an infant is sued for necessities, it is a question for the jury to say whether the articles are all, or any of them, necessary. 1 M&S. 738. If the jury find that it was necessary that the infant should be furnished with clothing, but that the clothing was too costly for the infant's situation, they should give in damages the price of suitable clothing and no more.

If an infant is the owner of a house, it has been holden that he is not liable on a contract for repairs. 2 Rol. Rep. 271.

An infant is not liable for instruction in a trade, or business. 1 T.R. 40.

If an infant make a false warranty of a horse from disability, he is not liable. 2 Marsh. 485; 2 Camp. 118. He is liable in an action of deceit on a warranty, 1 N. & McC. 197, and to an action for a malicious prosecution. 3 Day 411. So, if he falsely represents a horse to be his property. 1 Keb. 1778; 1 Lev. 169.

If an infant prosecutes a suit unjustly and is enjoined he must pay costs. 1 Ruff. 87.

In Chancery, infancy will not protect an infant from an assent which appears dishonest [*23] and the contract is voidable only. If void, equity cannot give it validity. 9 Mod. 38; 2 Eq. Ca. 489; Brown Rep. 353; 1 Hen. Black. 75; Bing Inf. 96-97, 112, 113.

Lecture III.

Assent to Contracts by Infants.

III. The confirmation of his contracts at full age by the infant.

There has been much discussion in courts whether certain contracts attempted to be made by infants are void or voidable.

A void act or contract never is, and never can be binding on either the party with whom it originates, or on others. All who claim through or under it must fail; and it never can, at any time, by any means, be confirmed or rendered valid. For example, a will of lands, testator being dead, not attested according to the Statute of Frauds.

A voidable act or contract is binding on others, until disaffirmed by the party with whom it originates. It can, at a proper time and by proper means, be confirmed or rendered valid.

The rule laid down by Perkins Lec. 12, is that all gifts, grants, or deeds made by an infant which [*24] do not take effect by delivery of his hand are void. But if they do take effect by delivery of his hand, they are voidable by himself, by his heirs, and by those who have his estate. Other writers state the rule to be that those acts are void in which there is no semblance of benefit to the infant; those for which he may receive benefit are voidable only.

Judge Swift says there is great confusion on the subject when the contracts of infants are void and when voidable, and no rule can be laid down to ascertain the line of distinction. 1 Sw. Dig. 55. He therefore states cases but does not maintain that they afford any general rule. 1 Sw. Dig. 13.

Bingham, in his treatise on infancy, says, "Perhaps it may not, even at this day, be unsuccessfully contended, that few, if any of an infant's contracts are absolutely void." He contends, first, that the only object of this rule of law regarding infants is to protect them from their own weakness. And, that if this protection can be afforded, by any means short of inflicting detriment on innocent persons, such infliction is unnecessary and unjust. But, if the contract is held absolutely void, [*25] it may protect the infant in some cases and in others injure him. And it may be seriously detrimental to the rights of others, not implicated in his transactions. Therefore, it would be better to give him this power, on obtaining his age, to rectify and affirm all his acts or contracts, or break through and avoid them. If this privilege is confined only to acts attended with advantages, it is worse than nugatory; and if denied to acts, apparently or really prejudicial, it would be no privilege at all, or an empty and idle one. If the other party was always entirely in the power of the infant, there would be little or no temptation to impose on him; and if

imposed on, he would always rescue himself by avoiding the injurious contract.

He argues, secondly, from the rules of pleading, that an infant's deed is only voidable. If a deed of an adult is absolutely void, as by erasure, interlineation, alteration, coverture, lunacy, etc., the defendant may plead generally non est factum, not my act or deed, and show the facts in evidence. But infancy must be pleaded specially and cannot be given in evidence under the general issue, non est factum, [*26] for the deed does exist to some purposes, and therefore is not void, but only voidable. Bing. Inf. 15-16.

In a case, 14 Mass. 482, the court said all simple contracts made by infants not founded on an illegal consideration are not void, but voidable, and may be made good by ratifications; they remain a legal substratum for a future assent until avoided by the infant.

It has been decided, that an infant's warrant of attorney is void. 1 Hen. Black. 75. That he cannot state an account, and if he does, that statement of the account is void. 1 T.R. 40. That a will of lands by an infant is void. 1 Sid. 162; Dy. 143. An infant executor's release of debts is void, though he may receive the pay and give a valid receipt therefor. 5 Rep. 28.

Now in all these cases, the act done, or contract attempted, is such that a subsequent notification could not give effect to the past attempt, but would operate, if at all, in a new act or contract—a new warrant of attorney, a new account stated, a new will, and [*27] a new release—all to take effect and operate, not retrospectively, but in future.

It is generally considered, that the bond of an infant is void, and such seems to have been the decision in 1 John. Ca. 127. It is said the English cases do not directly so decide, and that they can be reconciled by supposing that the term void is used loosely and merely to signify nonbinding or capable of being avoided. 3 Mod. 310; Noy. 85; Com. Dig. "Enfant" C 2.

The bond of an infant for goods, not necessities, has been held capable of ratification, therefore voidable only. 2 T.R. 776; 3 Leon. 164; 4 Leon. 5.

It was held, 3 Keb. 798 and Moore Pl. 132, that the bond of an infant is only voidable. Littleton says the bond of an infant is voidable. Rolle used the same language, and in 1 Salk. 274, the court hold the same language.

But in Cro. Eliz. 920, the court held a bond with penalty insufficient to bind the infant and used language which might imply that it could not be ratified. And in 3 M.&S. 477, a bond with penalty and for the payment of interest was held not the subject of ratification, by parol only.

[*28] A lease for years, reserving rent and acceptance of such lease by him, are voidable, not void acts. As to a lease without reservation of rent, an old case by a divided court decides that it is void. 2 Leon. 216; Mo. 105. But 3 Bur. M. 1806 and Noy 130 seem contradictory. And a rent charge granted by an infant is voidable. 3 Mod. 310. A security given for another by an infant is voidable. Co. Litt. 308 a. and Lord Mansfield held that the deed of an infant, taking effect by livery, was voidable. 3 Bur. M. 1806. And in Noy. 130, the court held a lease without rent made to try a title by an infant good enough.

A feoffment with livery in person is voidable, though with no consideration. Co. Litt. 380; Dy. 104; 2 Rol. Abr. 572; 4 Rep. 125 a.; 8 Rep. 42. And the lessee can in no case avoid the lease or account of the infancy of the lessor, which shows it voidable only.

The surrender of an infant is voidable, and an exchange with possession taken, which is tantamount to livery, is also voidable. Co. Litt. 51 b.

[*29] The fine, recovery, statute, or recognizance of an infant are only voidable, and that during his nonage. 2 Rep. 58 a. Fine; 2 Inst. 483; 10 Rep. 43.

From all these cases and decisions it appears that those acts of an infant which operate or take effect from livery are not void, but voidable. That all acts or deeds which are beneficial to the infant are at most only voidable. But the converse of these two propositions does not follow, viz., that all acts are void which do not take effect from livery. Nor are all those acts void which are apparently or really not attended with benefit to the infant, or are even detrimental to him. But, that where the nature of the act or contract is such that it can be the subject of ratification, it is only voidable: and where it is not capable of ratification, it is void, or, if the ratification would be a new rather than a validating act, then the first act is void: when the ratification can, however, operate retrospectively to validate a former act, then the former act is voidable.

It is accordingly held that a minor cannot be a petitioning creditor against a bankrupt [*30] because he cannot give a bond, which is required by statute. 3 Ves. Jun. 554. Hence a recognizance, or a writ of attachment by a minor would be also nugatory. In these cases, the bond, or recognizance are of the nature of a condition precedent and therefore, if voidable, are not in compliance with the law. And should they afterwards be ratified, they would be rather new, than old obligations. The ratification would not make the man a bondsman from the time of the bond given, but from the time of the ratification, which, of course, comes too late.

The ratification by the adult of the contract made in infancy must be entirely voluntary on his part, not obtained by circumvention, not extorted by the terms of an arrest, not made under a manifest ignorance of his legal privilege. 2 Atk. 34; 5 Esp. 102.

The voidable contract by the infant is a sufficient consideration for the new promise by him when an adult. Co. Litt. 33 a.; 2 Vent. 203; Str. 690; Bac. Abr. Inf. I. 8.

[*31] The ratification may be either express or implied. It must be express if it merely revives and gives effect to the contract as made in infancy, for a bare acknowledgment or recognition of having made a contract in infancy which is not discharged will not create a new liability or revive the voidable contract. An express promise, or express act, will alone confirm the contract and waive the privilege. It has even been held that a part payment made in court will not amount to confirmation of the veridice of the demand. 2 Esp. 482-628; 14 Mass. 440; 18 id. 202; 11 id. 147; 4 Pick. 48.

14 T.R. 124. If an infant conveys and after age merely acknowledges that he granted, he does not ratify the grant. So a will ordering all just debts paid by one who made a note in infancy does not ratify the note. 9 Mass. 62; 11 id. 147. If, however, the contract is a continuing agreement, and the infant acts under it after his nonage, he has given an implied ratification. 8 Taunt. 35; 5 B.&A. 147. Similarly, if an infant make a partnership connection and after his nonage does not deny or disaffirm the connection, it is ratified and continued.

[*32] So if an infant make a lease reserving rent and accepts rent after he comes of full age, this ratifies and confirms the lease. W. Jones 157; 4 Leon. 4; 3 M.&S. 481; 1 Pick. 224. So if an infant lessee continues to occupy a house after he is of age, he affirms the lease, and is bound for past rent accrued during infancy, as well as for future. Cro. Ja. 320; 2 Buls. 69; 3 Bur. M. 1714. So where an infant made a mortgage, and when of age made a conveyance subject to the mortgage, he was held to have ratified the mortgage. 15 Mass. 220.

If the contract was for the apparent benefit of the infant, slight proof of the ratification will be required, and an implied recognition will be sufficient. If, however, it was manifestly to his prejudice, strict proof of express ratification should be demanded, and even of a formal and technical recognition. For example, in the case of a bond with penalty and to pay interest it was held that a confirmation by parol created no liability. 3 M.&S. 477.

As the confirmation must be entirely voluntary, the party confirming may do it with [*33] any condition or qualification he pleases, for example, to pay when able, to pay upon drawing a prize in a lottery, upon the successful termination of a voyage, etc. And the other party must show the ability, or the happening of the event stipulated. 3 Esp. 160; 2 Hen. Black. 116; 16 East. 423; 1 Pick. 370; 3 Pick. 4; 2 Stark. N.P. 88; 10 Mass. 137; 18 Mass. 221.

The confirmation in all cases must be before action brought. 2 B.&C. 824; 1 T.R. 548. The reason is that until confirmation, there is no good cause of action. But only a consideration or cause for a new promise or ratification, which when made, gives a cause of action. 18 Mass. 202.

IV. Of the liability of persons contracting with Infants, or Mutuality of assent. Infancy is a personal privilege, and no one but the infant can take advantage of it. 2 T.R. 279; 5 id. 160; 13 Mass. 237; 15 id. 220; 14 id. 457; 15 id. 272. Therefore, his voidable contract or act is a sufficient consideration for the adult's contract with him. There is a sufficient mutual assent to constitute a valid engagement against the man [*34] of full age. 6 Taunt. 118; 4 Taunt. 469. An infant may therefore sue an adult for a breach of promise of marriage though the infant could not be made liable to the suit of the adult. 2 Str. 937.

If an infant lose money at play, he may recover it back in an action of trover, for illegally taking the money. But if the infant had won, he might have kept the money with liability to

refund. Sw. Dig. 57.

An infant is not liable on any mercantile contract, for he cannot be a trader; still he may maintain a suit on such a contract. 2 M.&S. 205. So, an adult cannot defend himself in a suit on a note or bill on the ground that the maker or acceptor is an infant. 4 Esp. 187; 15 Mass. 273.

In Massachusetts it was decided that if an infant buys goods and then avoids payment for infancy, the seller might retain the property as having never parted with it. 15 Mass. 359. This is controverted by Judge Swift, Sw. Dig. 57., and seems to be a departure from principle. [*35] It would be converting the contract into a tort or wrong and avoiding the rule which protects infants from all liability upon voidable contracts.

It seems to be held that infancy is not a general disqualification to contract, which when shown is presumed to be the law of every contract: but it must be shown, that if the contract is made and to be performed abroad, that by the "lex loci contractus" infants cannot contract. 3 Esp. 163.

If an infant sustains a personal injury and receives a compensation by way of compromise, and after sues for the injury, he shall recover only nominal damages. 6 Mass. 78.

[*36] [*37] Illegal Contracts are those which are void,

I. By the Common Law.

II. By Statute.

I. By the common law, all contracts are void, which have for their object,

1. The violation of the laws of God.
2. The corruption of public morals.
 - a. By inciting to a breach of peace.
 - b. By inciting to a violation of chastity.
 - c. By corrupting the public teachers of religion.
3. The injury of the body politic.
 - a. By restraining trade.
 - b. By restraining marriage.
 - c. By producing unhappy marriages.
 - d. By inciting lawsuits.
 - e. By preventing the due course of justice.
 1. In the case of bankrupts.
 2. In the case of sheriffs.
 - f. By uselessly wounding the feelings of third persons.
 - g. By trading with the enemies of the state.

[*38] 4. The defrauding of the parties to the contract.

- a. By false declarations.
- b. By fraudulent concealment.

II. By Statute, all contracts are void, which

1. Are directly declared to be void.
2. When the subject matter of the contract is prohibited by penalty.

[*39] Assent to Contracts by Married women.

The power of a feme covert to assent to contracts may be considered as depending upon the condition in which husband and wife may have placed themselves while sustaining that relation.

I. They may be living together under the ordinary circumstances which attend the married state, mutually fulfilling their duties to each other and the community.

II. They may be living separate from each other by mutual consent, and upon a separate maintenance for the wife.

III. The husband may have deserted the wife, or driven her from his society.

IV. The wife may have eloped from her husband, remaining virtuous in every other respect, or have joined herself with an adulterer.

V. The law may have effected a separation of the parties, by the banishment or imprisonment of one or both of them.

A married woman while she and her husband are living to- [*40] gether under ordinary circumstances has no power to assent to any contract which shall create any obligation upon herself. She has, in legal contemplation, no separate existence. Her husband and herself are one person in law. She has no means of satisfying any engagements, for her husband has all her rights and property vested in himself. Com. Dig. Bar. & Feme. W.; 1 Ch. P. 19, 45; 1 Taunt. 112; 1 B.&C. 248.

And this disability is not merely for the benefit of the husband, and therefore one that he can remove by relinquishing his claim to take advantage by it, for it is not in the power of the husband to give authority to the wife to contract so as to bind herself. The wife is therefore under an absolute and entire disability which cannot be removed.

Judge Reeve in his treatise on the Domestic Relations has labored to prove [*41] that this doctrine is founded upon two principles.

1. The right of the husband to the person of the wife, which, he says, is a right grounded by the law with the utmost solicitude. If she could bind herself by her contracts she would be liable to be arrested in execution and confined in prison, when the husband would be deprived of her company, which the law will not suffer.

2. The law considers the wife in the power of the husband. It would not therefore be reasonable that she should be bound by any contract which she makes during coverture, as it might be the effect of coercion.

On the first ground, she is privileged for the sake of her husband, on the last for her own sake. He therefore thinks that if a case can be found where the husband's right to the wife's person, or as he calls it, the husband's marital right is not defeated, or in any way affected, and where every presumption of any possible coercion is removed out of the way, the wife may then be bound by her contract. [*42] But these positions, however ingeniously maintained, are unsound and contrary to decisions made previous to his adopting them, and followed up by other adjudications still more recent, as will presently be shown.

Although the wife cannot bind herself in a contract, yet she may obligate her husband. This she does, not by virtue of any original power or authority derived from the marital tie, to bind her husband by any of her contracts, but simply and only as his authorized agent. If therefore his assent does not appear by express evidence or by proof of circumstances from which it may be reasonably inferred, he is not liable.

When, therefore, the wife makes contracts for necessities to be used in her husband's family, she is regarded as his general agent, possessed of a general and presumed authority arising from the duty and liability of the husband to provide for his family necessities [*43] for their support. It is presumed that he assents to arrangements for their benefit. But when the wife attempts any other contract, she is not regarded as his general or authorized agent, and her authority to bind him must be fully and expressly proved. Even where circumstances are proved from which the law would, in general presume that his wife had power to contract for him, yet if that presumption be rebutted and negated by express evidence, no responsibility attaches, he is not bound. 1 Sid. 109; 4 Bur. M. 2177; 2 Str. 1214 n.1; 1 Camp. 121; 4 B.&A. 255; 3 B.&C. 631.

Where a husband is living in the same house with his wife, he is liable to any extent for goods which he permits her to receive there. 1 Camp. 121. This liability does not depend strictly on the real circumstances of the husband, but on the appearance which he allows his wife [*44] to assume in society. Id. This presumed assent is not overthrown even by the adultery of the wife, while parties continue to live together. 1 Salk. 119; Bac. Abr. Bar. & Feme. H. But this presumed assent is destroyed if the proof establishes the fact that the credit was given solely to the wife by him who furnished articles for the husband's family. 3 Camp. 22; 5 Taunt. 356. But if goods not necessary and suitable for the wife's station in life are furnished to the wife's orders, it is incumbent on the tradesman to inquire fully and ascertain the wife's authority, and have the husband's assent. Com. Dig. B.&F. Q; 3 B.&C. 633, 638.

If the husband gives express notice to the trader not to trust his wife, he is not liable for goods furnished her, and notice to the trader's servant is sufficient. 1 Salk. 118; 2 Ld. 1006; 2

Str. 1214. [*45] But a general prohibition will not put an end to the wife's implied power to bind her husband for actual necessities. 1 Sid. 127; 1 Ld. 444; 2 Str. 875; 3 B.&C. 635. So incontrovertible is the authority to bind the husband for actual necessities for the family, that the man who cohabits with a woman is liable for them to a trader who furnishes them on the woman's request, and who knew that the parties were not married. 2 Esp. 637; 1 Camp. 245. This presumption, however, is overthrown simply by a separation of the parties thus cohabiting, however necessary to the woman the articles subsequently supplied may have been. And the man after separation may prove that he was not lawfully married. 4 Camp. 216.

The husband is not liable for money borrowed by the wife and by her expended for necessities. 1 Mo. 126. If the wife has contracted a debt for necessities, and one pays money upon the wife's request to discharge that debt, the husband is liable for the money paid. And, it is said, that in equity he is liable for money lent and by her laid out in the purchase of necessities. 1 Salk. 387; 1 Wms. Rep. 482, 483; 3 Wils. 388.

II. How are the parties affected by a mutual separation.

It has formerly been contended that in case of a mutual agreement of husband and wife to live separate, and articles made to that effect, with a separate maintenance secured to the wife adequate to her wants, that she could contract as a feme sole and bind herself. Under such circumstances, the Court of King's Bench in the case of Corbett and Poelnitz, 1 T. R., held the wife liable on her contract. They held the wife liable on [*47] the ground of her separate maintenance.

This also is the case supposed by Judge Reeve, in which the husband has 1. waived his marital rights, and 2. the wife cannot be supposed to be under any coercion: and therefore the wife may bind herself by her contract. He therefore adopts the decision in Corbett and Poelnitz as law, and attempts to support it by his theory about marital rights and coercion and goes into an examination of the cases which appear to contradict it, and to show that they can all be reconciled by his new theory. The cases on which he comments are Hatchett vs. Baddely, 2 Bl. 1074, the second, Len vs. Shultz, 2 Bl. 1995, the third, Gilchrist vs. Brown, 4 T.R. 76, the fourth, [blank] vs. Leigh, 5 T.R. 676, the fifth, 6 T.R. 76, the last, 8 T.R. 545. Reeve Dom. Rel. 100-07.

In opposition to the opinion so ingeniously supported, it is now fully established that a husband and wife cannot by a deed securing a separate and sufficient maintenance to the wife so dissolve the relation of marriage as to enable the wife while living apart from her husband to contract as a feme sole. The marriage and its legal consequences still subsist. The separation is held to be valid. 2 B.&C. 547.

The husband is not liable for her debts, or in other words, not bound by her contracts, if the separate fund secured to her be adequate to her support and duly paid. 5 B.&P. 148. But still the wife cannot bind herself by her contract even for necessities—and she cannot bind her husband. Therefore the contract is entirely void and he who trusts her must rely upon her honor only. 8 John.; 10 id. 38.

The separation need not be by deed, nor need there be any written agreement, [*49] provided there is a separation in fact and the husband allows and pays her a sufficient sum for her support. 1 Ld. 444; 1 Salk. 116; 5 B.&A. 148; 8 John. 72. It is not necessary to show that the trader who trusted the wife had notice of the separate maintenance, unless he had trusted her before and was not aware of the separation. The fact of the separation is sufficient to put him upon inquiry, and he trusts her at his peril. Selw. N.P. 273, 274; 3 Esp. 250; 12 John. 293.

The husband, upon a separation and or conveyance to trustees for the wife's separate maintenance, must, if sued for her contract, show that the trustees accepted the trust and took possession of the property. 8 Taunt. 343. If the husband makes such sufficient allowance for the wife, still his subsequent promise to pay the debt she may have contracted will bind him. 2 Stark. R. 177. [*50] It seems also, that if a married woman being separate from her husband is amply provided with permanent funds and resources of her own, though not supplied by him, he will not be liable for necessities furnished her. 2 Stark. R. 86; 12 John. 248.

III. What are the powers of the feme covert deserted by her husband or driven from his society.

In the absence of the husband, our Supreme Court held that a wife might take an appeal from probate for herself and husband, where she was interested in a devise, though the husband had no knowledge of the appeal and she had no power of attorney from him. Sw. Dig. 31.

In case of a long continued absence of the husband, the wife is presumed to be his general agent to manage all the concerns of the family.

Where a husband deserted his [*51] wife and children, and left her keeping a boarding house, without furnishing her means for her support, and did not return nor make any provision for them, it was held that he was liable for her contracts made in the course of such business, including the rent of such house. *Rotch vs. Miles*, 2 Conn. Rep. 638. Where a husband wrongfully turns away his wife, he gives her a letter of credit to all the world, and is liable for her contracts for necessaries. If he publishes her in the newspapers and forbids all persons to trust her, or even gives particular notice to an individual, still his obligation remains the same, and the person specially prohibited may sustain a suit against him. 1 Ld. 444; 1 Salk. 118; Selw. N.P. 281; 3 Esp. 251; 4 *id.* 41; 3 B.&C. 635; 4 Bur. M. 2177; 11 John. 281; 12 *id.* 293.

If the husband causelessly refuse to receive back his wife who had before absented herself, [*52] his liability is the same. But if she has committed adultery, it is a good cause to refuse to receive her. 6 T.R. 603.

If the husband by personal cruelty and ill treatment compels the wife to leave him, this is equivalent to a desertion or expulsion of the wife by the husband, and his liabilities continue for her support. 1 Esp. 441. No ill treatment short of actual terror and violence will enable the wife to leave the husband and carry with her the power to bind him for her support. 3 Taunt. 421. In accordance with this principle it has been held that where the husband had treated the wife with cruelty—had taken another woman into his house with whom he cohabited, had placed her at the head of his table, and had confined his wife in her chamber under pretense that she was insane, and she escaped—[*53] still the husband was not bound for her necessaries in her absence, as the husband told her if she did not like to dine with him at his table she might be supplied in her own chamber and the wife did not prove that she was under apprehensions for her safety.

It has been held that if the husband turn away his wife and it is necessary for her safety to exhibit articles of the peace against him, that he is liable to an attorney whom she employ for that purpose. Also that when she is indicted for keeping a disorderly house, which she has done with her husband's concurrence, that he was liable to an attorney whom she employed to defend her, and by whom he knew that she was defended without expressing any dissent thereto. 3 Camp. 326.

A married woman whose husband de- [*54] serted her in a foreign country and who had ever after maintained herself as a single woman, and for 5 years had lived in Massachusetts, the husband being a foreigner and never having been in U.S.A., was held competent to contract as a feme sole and to give a valid discharge to a judgment recovered by her. 15 Mass. 31. A woman married to a foreigner who had never been in England and had no intention of coming thither or of aiding his wife in obtaining a subsistence, and who had conducted business as a feme sole was held bound by her contracts. 2 Esp. 554; 3 Camp. 124. If the husband had been a British subject, she would not have been bound and her husband would have been liable. 1 B.&P. 357; 2 *id.* 226; 11 East. 301.

If the wife dies in the absence of the husband, he is liable to one who defrays her funeral expenses in a manner suitable to the husband's rank and condition in life. 1 Hen. Black. 90.

[*55] IV. What power has a wife, who has voluntarily left her husband, to make contracts.

1. Suppose she remains chaste.
2. Suppose she commits adultery.

Judge Swift, in his Dig. 34, maintains that "If the wife elope from the husband, he is not bound to provide for necessary support, and will not be liable on her contracts for necessaries, though the person furnishing them had no notice of the elopement." He does not cite authorities to support this dictum.

There is a case, *Child v. Hardaman*, in which the wife had lived in a lewd manner before elopement, but not afterwards, in which Lord Raymond held at Nisi Prius that the husband was

not liable, and said that the husband was not liable where wife elopes from him, though she does not go away with an adulterer or in an adulterous manner. 2 Str. 875.

There is also a manuscript note of a case in Selwyn's *Nisi Prius* in which the court is reported to have said, "If a wife leaves her husband, he is not in that case answerable [*56] for her contract." And as the Judge did not qualify the position, it is taken as an authority to prove the proposition as advanced by Judge Swift. But this dictum was not called for by the case, as the husband turned his wife away and expressly prohibited the plaintiff from dealing with her, and the question was whether such express prohibition was revoked by turning her away; and it was held that it was revoked.

But in the case of *Manby v. Scott*, the whole Court held that if the wife leaves the husband against his consent, without actual criminality on her part or ill usage proved on his, the husband could not by a general prohibition to supply his wife avoid a liability, though by a particular prohibition to an individual he would be exonerated. 1 Sid. 127. And as a husband may specially prohibit an individual from dealing with the wife while they live together, this case would seem to contradict the position of Judge Swift.

[*57] Judge Reeve states the rule to be: "If the wife departs without reasonable cause, the husband is not liable for necessities unless he refuse to receive her back into the house again, and there maintain her." He cites Str. 875 and says nothing on the subject of either a general or a special notice to the tradesman. But he afterwards says that it is unreasonable to hold that when the wife elopes with an adulterer, the tradesman who furnishes the wife without notice of the elopement should not recover. If his argument is valid to prove the latter position, much more will it overthrow the former, as he advances it wholly without qualification, and will also contract Judge Swift's proposition.

Chitty in his notes on Blk. I. 443, states the rule thus: "This liability for necessities does not arise when the wife voluntarily leaves her husband without his consent, and where he gave her no sufficient cause for leaving him, provided the tradesman has notice of her husband's dissent to her absence." 2 Str. 1214 n.; 2 Ld. 1006; 1 Sid. 109; 1 Lev. 4; 2 Stark. N.P. 87; Str. 875.

[*58] This would seem to be in analogy to the rules in other cases, such as those of master and servant and general partners: when the master will be bound by the act of the servant who has been accustomed to contract for him, and the partner by the acts of the copartner until the tradesman is notified of the limitation of the connection between the parties, which confers the power.

The Supreme Court in St. N.Y. Law decided that the tradesman is not entitled to notice of the wife's elopement, but must inquire and take notice at his peril. 11 John. 25.

When the wife offers to return to the husband, he is bound to receive her; and if he refuses to do so for any reason except her adultery, it is well settled that he must support her. Vid. ante page 51.

2. All the books agree that if the wife commits adultery at the time or after the elopement, the husband's liability to support her ceases. If for this cause he turns her away, [*59] she is left to her own resources, or to starve, although the husband himself has been ever so guilty in committing the like offense. If he drives her from the house by the greatest cruelty, still if she afterwards commits adultery he is discharged from his obligations to provide for her. And the husband is not obliged to give either general or special notice to tradesmen not to deal with her. Str. 647-706.

If, however, the husband receives back the wife to his bed for one night only, he passes an act of oblivion upon her conduct, and becomes immediately bound with all his original liability. 1 Salk. 119; 6 Mod. 172; 4 Esp. 41; 11 Ves. 536.

Where the husband left his own house and his children in the care of an adulterous wife, and a tradesman without notice of the adultery furnished necessities, the husband was held liable. 1 B.&P. 226; 6 T.R. 603.

Is not this a much stronger case in favor of the husband's exoneration, than that of the wife's secret elopement: [*60] If the wife has a separate maintenance and is formally separated from the husband by deed, her adultery will not bar her right to recover the arrears of this

maintenance, even if the adultery is fully proved in the ecclesiastical court. 2 B.&C. 547; 3 B.&C. 291.

V. How is the wife's power to assent to contracts affected by a legal separation of the parties.

1. By divorce "or vinculo matrimonii," her power to bind the husband ceases. She becomes a feme sole. 1 Gow's N.P.C. 10.

2. By a divorce "a mensa et thoro." A woman thus divorced is not liable on any contract she makes, though she lives apart from her husband and in a state of adultery. 3 B.&C. 291; 5 M.&S. 73.

As the separation in this case is by the act of the court which grants the divorce, and usually attended with alimony, all implied power in the wife to bind the husband must cease. And therefore, as in the case of a mutual separation or a separate maintenance, [*61] the tradesman must rely only on the honor of the woman and is without legal remedy.

3. By the civil death of the husband. If the husband is transported for life, he is civilly dead; the wife is without husband and contracts as a feme sole. So also, if his transportation is for a limited time. Yr. B. 2 Hen. IV 7 a; 2 Blk. Rep. 1197; 1 T.R. 7; 2 B.&P. 231; 2 Stark. Ev. 691.

It has been decided at Nisi Prius that the wife, even after the limited time of transportation had elapsed but the husband had not returned, that she might contract as a feme sole. 4 Esp. 27; 2 B.&P. 231. Upon the same principle it would seem that imprisonment in any of the public prisons of the U.S. for crimes would amount to such a civil death as would enable the wife to make contracts as a feme sole. It has often been held good ground for a divorce. Sw. Dig. 36. By abjuring the realm the husband ceases to have legal existence, and the same consequences follow. [*62] If the husband is an alien enemy, he is incapable of coming into the country or making any contract with its citizens, and the wife may contract as a feme sole.

5. By the custom of London, a feme covert being a sole trader, may make a contract so as to sue or be sued in the city for her transactions as a trader in London. 4 T.R. 361; 2 B.&P. 93.

6. In case the husband has been absent unheard of seven years or more, he is by law presumed to be actually dead, and the woman is deemed a feme sole, and may make any contract as such. 18 John. 141.

7. If the wife is sentenced to a temporary confinement as a punishment for some crime, the husband has been held not liable even for necessities, if the jailer grants her any improper indulgences as to the mode and place of her confinement. 2 Str. 1122. But if the wife be imprisoned for felony, and the jailer properly provides her with food, the husband may be charged for it. 1 Sid. 118.

[*63] Judge Reeve lays down the rule thus: "If the wife be committed to prison for a crime it seems the husband is not bound to pay for necessities furnished her." Reeve Dom. Rel. 85, citing 1 Mod. 128; 2 Vent. 155; 1 Lev. 445; 1 Ld. Raym. 1000; 2 Str. 1122; 2 Lev. 16. In 2 Lev. 16., it is ruled that the husband is not liable for diet and lodging furnished his wife in prison unless he assented to it. In 2 Stark. Ev. 698, the rule is stated to be that the husband is liable if the wife is imprisoned for felony, for necessities properly furnished for her (adopting the rule in Sid. 118).

Miscellaneous.

1. The covenant of a woman having a power over her separate estate is binding upon her. 1 B.&B. 49; 4 B.C.C. 19.

The wife's bond given jointly with her husband shall bind her separate property. 1. B.C.C. 16. But the wife cannot discharge a bond given to her husband conditioned to pay an annuity to her benefit. 3 East. 331.

[*64] And if she is party to a bill of exchange given in the course of trade, which her husband permits her to carry on as a feme sole, she cannot transfer the bill by endorsement: the right to transfer is in the husband. 1 East. 432.

2. A feme covert with her husband may convey her estate by fine or common recovery, if she is examined as to her consent separately from her husband. Cru. Dig. Titles "Fine and Recovery."

In those states where the wife's right to dower attaches to all the lands of which the husband is seized during coverture, her deed with her husband will bar her right of dower. In some states she must be examined privately as to her consent.

In this state, her deed with her husband is valid without a separate examination. Conn. St. In such deeds the wife is not bound by the covenants of warranty, etc., though the deed may operate by estoppel. Conn. Civ. Ct. Sept. 1827.

The superior courts have held the covenant of warranty binding on the wife. Sw. Dig. 39.

[*65] 3. A wife may take lands by purchase in the limited sense of the term, if the husband assents; otherwise not. Co. Litt. 3 a. But the husband cannot dissent to the wife's right to take as heir by descent, or devisee under a will. Reeve Dom. Rel. 118. The husband is presumed to assent until he makes known his dissent. 1 Sw. Dig. 39.

If the husband should assent to the wife's purchase, she may after coverture is determined disagree to the contract, and if she dies during coverture, her heirs may disagree to the contract or purchase. Id.

If a man lend money and take a mortgage to himself and wife, upon his death the mortgaged premises belong to her, and she is entitled to money due, subject to the payment of the husband's debts. It is in substance a voluntary conveyance to the wife of so much property, by the intervention of a third person. If the mortgage money is paid during coverture, the wife has no claim under the contract of mortgage. Reeve Dom. Rel. 184. She may, after his death, refuse the interest in the mortgage.

[*66] 4. If a feme covert without her husband make a deed during coverture and deliver it, it does not take effect. If she redeliver the deed after coverture, it is said to be valid without reexecution or a new attestation. If this is law, the deed must be considered voidable, not void. Reeve Dom. Rel. 118; 1 Sw. Dig. 39; Camp. 201. The same is true of her lease.

If the wife with the husband makes a grant by deed, she may dissent after his death, and it will then be the deed of the husband only. Sav. 112; 3 Co. 27.

5. The husband may permit the wife to have an interest in a personal contract, where she is, as it is termed, the meritorious cause of action, for example, if one promises the wife money in consideration that she by her personal exertions will cure a wound. Cro. Ja. 77, 205; 2 Sid. 128; 2 Wils. 424, or, if a bond or promissory note is made payable expressly to her, 2 M.&S. 393-96, or, to her and her husband. And if the wife survive [*67] the husband, she is entitled to such a chose in action, or if it is sued in their joint name, the action will survive to her. 16 Mass. 480.

6. A married woman may execute a power or make an appointment under a deed or will authorizing her, notwithstanding coverture, to do these acts. If the power is given her to do these acts, being sole, her marriage will suspend the execution of the power. Cru. Dig. Title "Deed" cap. 13, 33 to 45.

A married woman may also perform a condition, without the concurrence of husband, to save a forfeiture. Jon. 137; Lucas. 139. (So if she be an executrix, she may act without her husband in that capacity, [illegible]). Perk. Grant 7; 1 Sw. Dig. 30.

7. If the wife incur a penalty by the violation of a penal statute, the husband is liable to pay the penalty, in case the proceeding is by action on the ground of a debt incurred, for this is treating the obligation as a contract of the wife to pay the penalty.

[*68] To determine whether the husband is liable for things furnished as to his wife, five questions must be put.

1. Did the woman stand to him in the relation of wife at the time?
2. Was he, when they were furnished, bound to supply her with them?
3. Was she, by misconduct on his part, then in want of them?
4. Were the articles furnished necessities?
5. Was the credit given to the husband when the wife was known to be a married woman?

If these are all answered affirmatively, the husband is liable. If any one except the last is answered in the negative, then it must be asked whether he has adopted or ratified the contract. If he has, he is liable. If he has not, he is not chargeable. And he may ratify the contract by a tacit assent, as when he uses the articles and does not return them or if he makes an express promise to pay. Com. Dig. B.&F. (2) note y.

[*69] [*70] Assent to Contracts by Aliens

An alien is defined to be one who is born out of the dominion, government, or country. This is the common law definition. In England, exceptions are made by statutes. The first enacts that if both the parents were in allegiance at the birth of issue abroad and the mother went abroad by the husband's consent, the issue were not aliens. The other statutes enact that if the father or grandfather by the father's side are natural born, the children are not aliens. But this law is not reciprocal—for the children born in England of alien parents are not aliens. 1 Blk. 373.

Aliens are divided into two classes: 1. Alien Friends. 2. Alien Enemies.

In the early periods of English history, alien friends were treated with jealousy. They were not permitted to reside permanently in the realm, even for commercial purposes. They were obliged to procure a license, [*71] and to employ their English landlords to act as brokers to buy and sell their commodities. They often arrested one stranger for the debt of another, or punished one for the crime of another, regarding all rather as enemies than friends, and classing all together as mutually responsible for each other.

But after Magna Carta, if not before, aliens were treated with less rigor and their rights were better defined and more securely established.

An alien friend can therefore purchase lands so as to divest the title out of the grantor. If he purchases in fee, he takes from the grantor the whole interest. If to himself and the heirs of his body, he takes from the grantor an estate tail, though he cannot have either an heir to take from him the fee, nor an heir of his body to take the estate tail. If he suffer a recovery, he thus turns the estate tail into a fee, and buys the remainder as reversion. But all this is done for the benefit of the king, to whom the purchase will belong, whether [*72] fee simple, fee tail, or fee tail converted into fee simple, whenever the king chooses to assert his claim. The purchase is, however, valid until office found, upon which it vests in the king. And before office found, the alien may sustain actions for injuries to the estate purchased. These rules extended to all interests purchased by an alien, so that he could not by contract take or lease of a farm or any lands for cultivation, but the king should have it. But he might, if a merchant, lease a house as incident to his trade, and hold during his residence as a merchant, and when he left the country, the king should have such lease also. On the death of the alien merchant, the lease would not go to his executor, etc., but to the king. An alien artificer, or handicraftsman is not entitled to these privileges. The courts, however, as if ashamed of the rigor of this law, have said that only an actual lease, on formal terms for years should go to the king, and that an agree- [*73] ment for the occupation of a house or shop not amounting to an actual lease, on term for years, should not be forfeited. And a lease of a barn or stable has been permitted, as the words "house or ship" only are used in the Statute. 32 Hen. VIII; 2 Show. 135; 1 Saund. 8 n.1; 4 East. 103.

A question arose, who are artificers, etc. within this act, and it was claimed that a vintner was in it. But the Chief Justice said the mystery of a vintner was to mingle wines, and this was not an art, but a cheat, and so the lease was valid. 3 Mod. 94.

In the U.S. courts it has been held in a case from Virginia that an alien can take, but not hold against the State. He may take by grant or by devise. Until the lands are seized into the hands of the government, he has complete dominion over them. He may convey the lands to a purchaser, and the purchase from the alien will take all his title, that is, a defeasible estate. He has a title which [*74] he can defend against a stranger in a real action. But he cannot, as seems from Co. Lit. 129, maintain a real action as plaintiff. And the title of the alien could only be divested by office found for the state. 7 Cranch 603-19; 3 Wheat. 594-99.

As alien holds till office in his own right, he cannot be made accountable for the rents and profits to the state. 3 Wheat. 563-89.

In the state of New York, it has been decided that an alien may purchase and hold till office and may maintain an action for the land, which cannot be defeated by the defendant on the claim that the plaintiff is an alien. 1 John. Ch. 399; 3 *id.* 109. 6 *id.* 360.

In Massachusetts, it is decided that an alien can purchase real estate, and hold against all but the Commonwealth, can only be divested by office found, and till then can convey. 1 Mass. 256. 8 *id.* 431. 12 *id.* 143.

By statute in Connecticut, an alien can neither purchase nor hold lands. [*75] Hence, Judge Swift says his purchase is wholly void; nothing vests in him to be divested by office found, and forfeited to the state. Sw. Dig. 120.

An alien friend may legally enter into most personal contracts with a citizen during peace, and enforce the same. Bac. Abr. Alien. D.

A citizen of Virginia made his will, gave his lands to trustees to be sold, and ordered the proceeds to be paid to his brother, an alien. It was decided that this was to be considered a bequest of personal estate which the brother, though an alien, might take. 3 Wheat. 563-89.

A note taken to an alien in the state of New York for arrears of rent of lands purchased by the alien and leased by his agent was held void. 9 John. Ca. 303.

Aliens in Massachusetts are held liable to taxation, but by the payment of taxes they acquire no rights or privileges. 7 Mass. 523.

[*76] By the treaties with Great Britain of 1783 and 1794, the rights vested in British subjects and their heirs, before and at the time of the treaties, are protected and preserved to them in the same manner as if the countries had never separated. 1 Wheat. 500; 4 *id.* 453-462.

The treaties with France of 1778 and 1800 gave to French subjects the right to purchase and hold lands in the U.S. 2 Wheat. 259-269.

Citizens of the U.S. had under the English and French treaties the same rights secured to them. The French treaty expired in 1808. The expiration of the treaty did not divest previous titles acquired under it. 10 Wheat. 181.

The courts in New York have inclined to the opinion that, aside from the treaties, the separation of the two countries would not have divested the titles before vested. 3 John. Ca. 109.

They have also decided that as to all lands acquired by a title commencing since the treaty of 1794, the common law of alienage applies. 11 John. 418.

[*77] The Sup. Ct. U.S. held that the lands of a foreign corporation held before the treaty continued vested in them, and that the Legislature of Vermont could not seize the lands and grant them out to the towns in which they lay. 8 Wheat. 464-480. *Society for Propagating the Gospel vs. N. Haven Vt.*

The treaties of 1783 and 1794 provide for and protect titles existing at the time of those treaties, and not titles subsequently acquired. 7 Wh. 535-44. And one who was a British subject and alien, and died seised after 1783 and before 1794, would not transmit his title to his heir. 2 B.&C. 779.

An alien mortgagee, aside from these treaties, might bring a bill in Chancery to compel a sale of the lands mortgaged, on the ground that his demand is of a personal nature, the debt being the governing thing, and the land only the pledge or incident. 9 Wheat. 479.

2 Blk. 347 says, "If the king grants lands to an alien - it operates nothing." J. Masshale [?] examines this doctrine fully, and concludes the [*78] meaning of the author, taken in the connection in which the words stand, to be that it does not make him a denizen. But if such is not his meaning, he proves from authority cited (*viz.* Y. Yr. B. 7 Ed. IV 29; 4 Leon. 82; Y. Yr. B. 2 Hen. VII 13, etc.) that such is the proper meaning and the law. And the land passes by the grant till the king by office found divests his own grant and takes back the land. 11 Wheat. 351.

An alien is incapable of purchasing or in any way becoming the owner of a vessel which has a national character, or in other words, in an American vessel. *Lex. Merc.* 1. No alien can take upon himself the relation of master of an American vessel. *Id.*

It is enacted by the British Navigation laws - that American vessels trading to Great Britain shall be manned by a master and 2/3 of the crew American citizens. Under this law it has been held that a British subject naturalized here was not an American so as to be capable of commanding. *Vid.* [*79] *Lex. Merc.* 3; 1 B.&P. 440; 8 T.R. 31.

But a naturalized British subject has been since held entitled to the commercial privileges of an American in the East India trade.

Aliens trading with foreign countries in amity, are usually subject to discriminating, or alien duties.

A conveyance to a citizen in trust for an alien will give the alien no indefeasible interest. The king cannot have the lands upon office, for the legal title is in the trustee. But in Chancery

the trustee will be compelled to execute the trust for the benefit of the States. Com. Dig. Alien. C 3.

If an alien and citizen purchase as joint tenants, and the citizen dies, the alien shall take as survivor, and hold until office found. If the alien die, it is questionable whether the king shall not have the whole; for if the king had claimed during the alien's life, he would have taken his moiety, and as the king cannot be joint tenant with a subject, it is said, he would take [*80] the whole. And the alien's death will not affect the king's right. 5 Co. 526; 1 Leon. 47; 4 *id.* 82.

2. The contract of an alien enemy is absolutely void. It cannot be enforced by him, or anyone in trust for him, either at law or in equity. 6 T.R. 23; 2 V.&B. 323. If an alien is resident by license or safe conduct, he may then contract. 1 Salk. 46; 2 Camp. 163. All contracts with an enemy during war are illegal and void. 8 T.R. 548; 3 B.&P. 200. If a contract is made with an alien enemy during war, it cannot be enforced by either party after peace. 7 Taunt. 439.

If the contract is made before the war, it is not annulled by war, but the remedy is suspended until peace is restored, and then the remedy revives. 13 Ves. 71; 15 East. 260;

If recovery is due to two, one of whom is an alien enemy, the other cannot enforce it. 3 M.&S. 533. [*81] A citizen residing permanently abroad and voluntarily domiciled in an enemy's country, cannot sue in the courts of his native country. 3 B.&P. 113; 1 Camp. 482; 3 M.&S. 533; 8 Cranch 278. But if such citizen makes a contract with a neutral, such neutral may enforce the contract in the native country of the citizen. 3 Camp. 303.

A citizen resident and domiciled in a neutral state, may exercise the privilege of a subject of his adopted country, and trade with the citizens of a State at war with his native country. 1 M.&S. 726; 7 Cranch 506-537-542.

An alien friend taken on board a hostile fleet and brought here as a prisoner at war may nevertheless contract and maintain suits. 1 B.&P. 163; 1 Taunt. 28. A citizen, a prisoner of war in an enemy's country, is not disabled to contract. If he therefore draws a bill on his friends at home for his support abroad and this bill is holden by an alien enemy, the contract or bill [*82] is not void, but after hostilities have ceased may be enforced. 6 Taunt. 237; 7 *id.* 447.

If a citizen procures from the enemy by contract a license to navigate his vessel which would afford him protection in the enemy's prize courts, such license is void and the citizen's property is liable to confiscation; and the offense is consummated the moment the vessel sails. 8 Cranch 181-203-444; 2 Wheat. 143-147. The termination of such voyage and return home does not purge the liability to confiscation. 4 Wheat. 100.

An alien cannot insure his property in this country; nor can a citizen insure his voyage to trade with the enemy. But a license obtained from a belligerent power by a public ambassador of a neutral country to protect a voyage by a citizen or neutral to such neutral country will not render the voyage illegal. 1 Com. 571; 16 John. 438.

[*83] Contracts by Persons under Duress.

The old books abound with decisions relative to duress, but in modern times it is rarely set up as a defense.

Duress may be by actual violence, or by a threat thereof. Actual imprisonment, if unlawful, is duress. And if lawful, and undue and illegal force is used, or the prisoner is deprived of food, etc., he is under duress, and his contract may be avoided. 3 B.&P. 69; 6 East. 140; 9 *id.* 417 n.; 3 Ca. R. 168.

If one sue out process in form regular and legal without any probable cause and maliciously, and arrest a person and he gives a bond or other contract to obtain a release, he may avoid it for duress. 6 Mass. 506; 1 Hen. & Munf. 350.

Duress "per minas" is 1. For fear of life, 2. of member, 3. of Maim, 4. of Imprisonment.

Menace of mere battery or trespass to land or goods or to institute a prosecution for penalties, it is said, will not avoid a contract. 6 East. 140; 2 Stark. Ev. 482-504. [*84] A menace to burn one's house, would probably be held sufficient. In South Carolina, duress of goods will avoid a contract. 1 Bay's R. 470; 2 *id.* 211.

The duress must be of the person contracting. An agreement by a third person to relieve one under duress, would be valid. 15 John. 256. —March 5th 1828.