Commentaries on the Laws of England (1765-1769)

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BOOK 1, CHAPTER 15

Of Husband And Wife

THE second private relation of persons is that of marriage, which includes the reciprocal duties of husband and wife; or, as most of our elder law books call them, of *baron* and *feme*. In the consideration of which I shall in the first place inquire, how marriages may be contracted or made; shall next point out the manner in which they may be dissolved; and shall, lastly, take a view of the legal effects and consequence of marriage.

I. OUR law considers marriage in no other light than as a civil contract. The Holiness of the matrimonial state is left entirely to the ecclesiastical law: the temporal courts not having jurisdiction to consider unlawful marriages as a sin, but merely as a civil inconvenience. The punishment therefore, or annulling, of incestuous or other unscriptural marriages, is the province of the spiritual courts; which act *pro salute animae* [for the health of their souls].[1] And, taking it in this civil light, the law treats it as it does all other contracts; allowing it to be good and valid in all cases, where the parties at the time of making it were, in the first place, willing to contract; secondly, able to contract; and, lastly, actually did contract, in the proper forms and solemnities required by law.

FIRST, they must be willing to contract. "*Consensus, non concubitus, facit nuptias*" ["Consent, not cohabitation, makes the marriage"], is the maxim of the civil law in this case:[2] and it is adopted by the common lawyers,[3] who indeed have borrowed (especially in ancient times) almost all their notions of the legitimacy of marriage from the canon and civil laws.

SECONDLY, they must be able to contract. In general, all persons are able to contract themselves in marriage, unless they labor under some particular disabilities, and incapacities. What those are, it will here be our business to inquire.

NOW these disabilities are of two sorts: first, such as are canonical, and therefore sufficient by the ecclesiastical laws to avoid the marriage in the spiritual court; but these in our law only make the marriage voidable, and not *ipso facto* [by that fact] void, until sentence of nullity be obtained. Of this nature are pre-contract; consanguinity, or relation by blood; and affinity, or relation by marriage; and some particular corporal infirmities. And these canonical disabilities are either grounded upon the express words of the divine law, or are consequences plainly deducible from thence: it therefore being sinful in the persons, who labor under them, to attempt to contract matrimony together, they are properly the object of the ecclesiastical magistrate's coercion; in order to separate the offenders, and inflict penance for the offense, *pro salute animarum* [for the health of their souls]. But such marriages not being void *ab initio* [from the beginning], but voidable only by sentence of separation, they are esteemed valid to all civil purposes, unless such separation is actually made during the life of the parties. For, after the death of either of them, the courts of common law will not suffer the spiritual court to declare such marriages to have been void; because such declaration cannot now tend to the reformation of the parties.[4] And therefore when a man had married his first wife's sister, and after her death the bishop's court was proceeding to annul the marriage and bastardize the issue, the court of king's bench granted a prohibition *quoad hoc* [as to this]; but permitted them to proceed to punish the husband for incest.[5] These canonical disabilities, being entirely the province of the ecclesiastical courts, our books are perfectly silent concerning them. But there are a few statutes, which serve as directories to those courts, of which it will be proper to take notice. By statute 32 Hen. VIII. c. 38. it is declared, that all persons may lawfully marry, but such as are prohibited by God's law; and that all marriages contracted by lawful persons in the face of the church, and consummate with bodily knowledge, and fruit of children, shall be indissoluble. And (because in the times of popery a great variety of degrees of kindred were made impediments to marriage, which impediments might however be bought off for money) it is declared by the same statute, that nothing (God's law except) shall impeach any marriage, but within the Levitical degrees; the farthest of which is that between uncle and niece.[6] By the same statute all impediments, arising from pre-contracts to other person, were abolished and declared of none effect, unless they had been consummated with bodily knowledge: in which case the canon law holds such contract to be a marriage *de facto* [in fact]. But this branch of the statute was repealed by statute 2 & 3 Edw. VI. c. 23. How far the act of 26 Geo. II. c. 33. (which prohibits all suits in ecclesiastical courts to compel a marriage, in consequence of any contract) may collaterally extend to revive this clause of Henry VIII's statute, and abolish the impediment of pre-contract, I leave to be considered by the canonists.

THE other sort of disabilities are those which are created, or at least enforced, by the municipal laws. And, though some of them may be grounded on natural law, yet they are regarded by the laws of the land, not so much in the light of any

moral offense, as on account of the civil inconveniences they draw after them. These civil disabilities make the contract void *ab initio*, and not merely voidable: not that they dissolve a contract already formed, but they render the parties incapable of forming any contract at all: they do not put asunder those who are joined together, but they previously hinder the junction. And, if any persons under these legal incapacities come together, it is a meretricious, and not a matrimonial, union.

1. THE first of these legal disabilities is a prior marriage, or having another husband or wife living; in which case, besides the penalties consequent upon it as a felony, the second marriage is to all intents and purposes void:[7] polygamy being condemned both by the law of the new testament, and the policy of all prudent states, especially in these northern climates. And Justinian, even in the climate of modern Turkey, is express,[8] that "*duas uxores eodem tempore habere non licet*." ["It is not lawful to have two wives at one time."]

2. THE next legal disability is want of age. This is sufficient to avoid all other contracts, on account of the imbecility of judgment in the parties contracting; *a fortiori* [it follows] therefore it ought to avoid this, the most important contract of any. Therefore if a boy under fourteen, or a girl under twelve years of age, marries, this marriage is only inchoate and imperfect; and, when either of them comes to the age of consent aforesaid, they may disagree and declare the marriage void, without any divorce or sentence in the spiritual court. This is founded on the civil law.[9] But the canon law pays a greater regard to the constitution, than the age, of the parties:[10] for if they are *habiles ad matrimonium* [fit for marriage], it is a good marriage, whatever their age may be. And in our law it is so far a marriage, that, if at the age of consent they agree to continue together, they need not be married again.[11] If the husband be of years of discretion, and the wife under twelve, when she comes to years of discretion he may disagree as well as she may: for in contracts the obligation must be mutual; both must be bound, or neither: and so it is, *vice versa*, when the wife is of years of discretion, and the husband under.[12]

3. ANOTHER incapacity arises from want of consent of parents or guardians. By the common law, if the parties themselves were of the age of consent, there wanted no other concurrence to make the marriage valid: and this was agreeable to the canon law. But, by several statutes,[13] penalties of 100£ are laid on every clergyman who marries a couple either without publication of banns (which may give notice to parents or guardians) or without a license, to obtain which the consent of parents or guardians must be sworn to. And by the statute 4 & 5 Ph. & M. c. 8. whosoever marries any woman child under the age of sixteen years, without consent of parents of guardians, shall be subject to fine, or five years imprisonment: and her estate during the husband's life shall go to and be enjoyed by the next heir. The civil law indeed required the consent of the parent or tutor at all ages; unless the children were emancipated, or out of the parents power:[14] and, if such consent from the father was wanting, the marriage was null, and the children illegitimate;[15] but the consent of the mother or guardians, if unreasonably withheld, might be redressed and supplied by the judge, or the president of the province[16] and if the father was non compos, a similar remedy was given.[17] These provisions are adopted and imitated by the French and Hollanders, with this difference: that in France the sons cannot marry without consent of parents till thirty years of age, nor the daughters till twenty-five;[18] and in Holland, the sons are at their own disposal at twenty-five, and the daughters at twenty.[19] Thus has stood, and thus at present stands, the law in other neighboring countries. And it has been lately thought proper to introduce somewhat of the same policy into our laws, by statute 26 Geo. II. c. 33. whereby it is enacted, that all marriages celebrated by license (for banns suppose notice) where either of the parties is under twenty-one, (not being a widow or widower, who are supposed emancipated) without the consent of the father, or, if he be not living, of the mother or guardians, shall be absolutely void. A like provision is made as in the civil law, where the mother or guardian is *non compos* [of unsound mind], beyond sea, or unreasonably froward, to dispense with such consent at the discretion of the lord chancellor: but no provision is made, in case the father should labor under any mental or other incapacity. Much may be, and much has been said both for and against this innovation upon our ancient laws and constitution. On the one hand, it prevents the clandestine marriages of minors, which are often a terrible inconvenience to those private families wherein they happen. On the other hand, restraints upon marriage, especially among the lower class, are evidently detrimental to the public, by hindering the increase of people; and to religion and morality, by encouraging licentiousness and debauchery among the

single of both sexes; and thereby destroying one end of society and government, which is, *concubitu prohibere vago* [promiscuous intercourse is forbidden]. And of this last inconvenience the Roman laws were so sensible, that at the same time that they forbad marriage without the consent of parents or guardians, they were less rigorous upon that very account with regard to other restraints: for, if a parent did not provide a husband for his daughter, by the time she arrived at the age of twenty-five, and she afterwards made a slip in her conduct, he was not allowed to disinherit her upon that account; "*quia non sua culpa, sed parentum, id commisisse cognoscitur*."[20] ["Because she was considered to have committed it, not through her own fault, but that of her parents."]

4. A FOURTH incapacity is want of reason; without a competent share of which, as no other, so neither can the matrimonial contract, be valid. It was formerly adjudged, that the issue of an idiot was legitimate, and consequently that his marriage was valid. A stranger determination! since consent is absolutely requisite to matrimony, and neither idiots nor lunatics are capable of consenting to anything. And therefore the civil law judged much more sensibly, when it made such deprivation of reason a previous impediment, though not a cause of divorce, if they happened after marriage.[21] And modern resolutions have adhered to the reason of the civil law, by determining[22] that the marriage of a lunatic, not being in a lucid interval, was absolutely void. But as it might be difficult to prove the exact state of the party's mind at the actual celebration of the nuptials, upon this account (concurring with some private family[23] reasons) the stat. 15. Geo. II. c. 30. has provided, that the marriage of lunatics and persons under frenzies (if found lunatics under a commission, or committed to the care of trustees by any act of parliament) before they are declared of sound mind by the lord chancellor or the majority of such trustees, shall be totally void.

LASTLY, the parties must not only be willing, and able, to contract, but actually must contract themselves in due form of law, to make it a good civil marriage. Any contract made, *per verba de praesenti*, or in words of the present tense, and in case of cohabitation *per verba de futuro* [by words of the future tense] also, between persons able to contract, was before the late act deemed a valid marriage to many purposes; and the parties might be compelled in the spiritual courts to celebrate it *in facie ecclesiae* [in sight of the church]. But these verbal contracts are now of no force, to compel a future marriage.[24] Neither is any marriage at present valid, that is not celebrated in some parish church or public chapel, unless by dispensation from the archbishop of Canterbury. It must also be preceded by publication of banns, or by license from the spiritual judge. Many other formalities are likewise prescribed by the act; the neglect of which, though penal, does not invalidate the marriage. It is held to be also essential to a marriage, that it be performed by a person in orders;[25] though the intervention of a priest to solemnize this contract is merely *juris positivi* [of civil law], and not *juris naturalis aut duvini* [of natural or divine law]: it being said that pope Innocent the third was the first who ordained the celebration of marriage in the church;[26] before which it was totally a civil contract. And, in the times of the grand rebellion, all marriages were performed by the justices of the peace; and these marriages were declared valid, without any fresh solemnization, by statute 12 Car. II. c. 33. But, as the law now stands, we may upon the whole collect, that no marriage by the temporal law is *ipso facto* void, that is celebrated by a person in orders, in a parish church or public chapel (or elsewhere, by special dispensation) in pursuance of banns or a license, between single persons, consenting, of sound mind, and of the age of twenty-one years; or of the age of fourteen in males and twelve in females, with consent of parents or guardians, or without it, in case of widowhood. And no marriage is voidable by the ecclesiastical law, after the death of either of the parties; nor during their lives, unless for the canonical impediments of pre-contract, if that indeed still exists; of consaguinity; and of affinity, or corporal imbecility, subsisting previous to the marriage.

II. I AM next to consider the manner in which marriages may be dissolved; and this is either by death, or divorce. There are two kinds of divorce, the one total, the other partial; the one *a vinculo matrimonii* [from matrimonial bonds], the other merely *a mensa et thoro* [from bed and board]. The total divorce, *a vinculo matrimonii*, must be for some of the canonical causes of impediment before-mentioned; and those, existing before the marriage, as is always the case in consanguinity; not supervenient [extraneous], or arising afterwards, as may be the case in affinity or corporal imbecility. For in cases of total divorce, the marriage is declared null, as having been absolutely unlawful *ab initio*; and the parties

are therefore separated *pro salute animarum*: for which reason, as was before observed, no divorce can be obtained, but during the life of the parties. The issue of such marriage, as is thus entirely dissolved, are bastards.[27]

DIVORCE *a mensa et thoro* is when the marriage is just and lawful *ab initio*, and therefore the law is tender of dissolving it; but, for some supervenient cause, it becomes improper or impossible for the parties to live together: as in the case of intolerable ill temper, or adultery, in either of the parties. For the canon law, which the common law follows in this case, deems so highly and with such mysterious reverence of the nuptial tie, that it will not allow it to be unloosed for any cause whatsoever, that arises after the union is made. And this is said to be built on the divine revealed law; though that expressly assigns incontinence as a cause, and indeed the only cause, why a man may put away his wife and marry another.[28] The civil law, which is partly of pagan original, allows many causes of absolute divorce; and some of them pretty severe ones, (as if a wife goes to the theater or the public games, without the knowledge and consent of the husband[29]) but among them adultery is the principal, and with reason named the first.[30] But with us in England adultery is only a cause of separation from bed and board:[31] for which the best reason that can be given, is, that if divorces were allowed to depend upon a matter within the power of either the parties, they would probably be extremely frequent; as was the case when divorces were allowed for canonical disabilities, on the mere confession of the parties,[32] which is now prohibited by the canons.[33] However, divorces *a vinculo matrimonii*, for adultery, have of late years been frequently granted by act of parliament.

IN case of divorce *a mensa et thoro*, the law allows alimony to the wife; which is that allowance, which is made to a woman for her support out of the husband's estate; being settled at the discretion of the ecclesiastical judge, on consideration of all the circumstances of the case. This is sometimes called her estovers; for which, if he refuses payment, there is (besides the ordinary process of excommunication) a writ at common law *de estoveriis habendis* [of recovering estovers], in order to recover it.[34] It is generally proportioned to the rank and quality of the parties. But in case of elopement, and living with an adulterer, the law allows her no alimony.[35]

III. HAVING thus shown how marriages may be made, or dissolved, I come now, lastly, to speak of the legal consequences of such making, or dissolution.

By marriage, the husband and wife are one person in law:[36] that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and cover, she performs everything; and is therefore called in our law-french a *feme-covert* [married woman]; is said to be *covert-baron*, or under the protection and influence of her husband, her baron, or lord; and her condition during her marriage is called her coverture. Upon this principle, of an union of person in husband and wife, depend almost all the legal rights, duties, and disabilities, that either of them acquire by the marriage. I speak not at present of the rights of property, but of such as are merely personal. For this reason, a man cannot grant anything to his wife, or enter into covenant with her:[37] for the grant would be to suppose her separate existence; and to covenant with her, would be only to covenant with himself: and therefore it is also generally true, that all compacts made between husband and wife, when single, are voided by the intermarriage.[38] A woman indeed may be attorney for her husband;[39] for that implies no separation from, but is rather a representation of, her lord. And a husband may also bequeath anything to his wife by will; for that cannot take effect till the coverture is determined by his death.[40] The husband is bound to provide his wife with necessaries by law, as much as himself; and if the contracts debts for them, he is obliged to pay them:[41] but for anything besides necessaries, he is not chargeable.[42] Also if a wife elopes, and lives with another man, the husband is not chargeable even for necessaries;[43] at last if the person, who furnishes them, is sufficiently apprized of her elopement.[44] If the wife be indebted before marriage, the husband is bound afterwards to pay the debt; for he has adopted her and her circumstances together.[45] If the wife be injured in her person or her property, she can bring no action for redress without her husband's concurrence, and in his name, as well as her own:[46] neither can she be sued, without making the husband a defendant.[47] There is indeed one case where the wife shall sue and be sued as a *feme sole* [single woman], *viz.* where the husband has abjured the realm, or is banished:[48] for then he is dead in law; and, the husband being thus disabled to sue for or defend the wife; it would be most unreasonable if she had no remedy, or could make no defense at all. In criminal prosecutions, it is true, the wife may be indicted and punished separately;[49] for

the union is only a civil union. But, in trials of any sort, they are not allowed to be evidence for, or against, each other:[50] partly because it is impossible their testimony should be indifferent; but principally because of the union of person: and therefore, if they were admitted to be witnesses for each other, they would contradict one maxim of law, "*nemo in propria causa testis esse debet*" [no one ought to be witness in his own cause]; and if against each other, they would contradict another maxim, "*nemo tenetur seipsum accusare*" [no one is bound to accuse himself]. But where the offense is directly against the person of the wife, this rule has been usually dispensed with:[51] and therefore, by statute 3 Hen. VII. c. 2. in case a woman be forcibly taken away, and married, she may be a witness against such her husband, in order to convict him of felony. For in this case she can with no propriety be reckoned his wife; because a main ingredient, her consent, was wanting to the contract: and also there is another maxim of law, that no man shall take advantage of his own wrong; which the ravisher here would do, if by forcibly marrying a woman, he could prevent her from being a witness, who is perhaps the only witness, to that very fact.

IN the civil law the husband and wife are considered as two distinct persons; and may have separate estates, contracts, debts, and injuries:[52] and therefore, in our ecclesiastical courts, a woman may sue and be sued without her husband.[53]

BUT, though our law in general considers man and wife as one person, yet there are some instances in which she is separately considered; as inferior to him, and acting by his compulsion. And therefore all deeds executed, and acts done, by her, during her coverture, are void, or at least voidable; except it be a fine, or the like matter of record, in which case she must be solely and secretly examined, to learn if her act be voluntary.[54] She cannot by will devise lands to her husband, unless under special circumstances; for at the time of making it she is supposed to be under his coercion.[55] And in some felonies, and other inferior crimes, committed by her, through constraint of her husband, the law excuses her:[56] but this extends not to treason or murder.

THE husband also (by the old law) might give his wife moderate correction.[57] For, as he is to answer for her misbehavior, the law thought it reasonable to entrust him with this power of restraining her, by domestic chastisement, in the same moderation that a man is allowed to correct his servants or children; for whom the master or parent is also liable in some cases to answer. But this power of correction was confined within reasonable bounds;[58] and the husband was prohibited to use any violence to his wife, *aliter quam ad virum, ex causa regiminis et castigationis uxoris suae, licite et rationabiliter pertinet* [other than lawfully and reasonably pertains to the husband for the rule and correction of his wife].[59] The civil law gave the husband the same, or a larger, authority over his wife; allowing him, for some misdemeanors, *flagellis et fustibus acriter verberare uxorem* [To beat his wife severely with whips and sticks], for others, only *modicam castigationem adhibere* [with moderate punishment].[60] But, with us, in the politer reign of Charles the second, this power of correction began to be doubted:[61] and a wife may now have security of the peace against her husband;[62] or, in return, a husband against his wife.[63] Yet the lower rank of people, who were always fond of the old common law, still claim and exert their ancient privilege: and the courts of law will still permit a husband to restrain a wife of her liberty, in case of any gross misbehavior.[64]

THESE are the chief legal effects of marriage during the coverture; upon which we may observe, that even the disabilities, which the wife lies under, are for the most part intended for her protection and benefit. So great a favorite is the female sex of the laws of England.

NOTES

1. Salk. 121.
2. Ff. 50. 17. 30.
3. Co. Litt. 33.
4. Ibid.
5. Salk. 548.
6. Gilb. Rep. 158.

7. Bro. Abr. tit. bastardy. Pl. 8.
8. Inst. 1. 10. 7.
9. Leon. Constit. 109.
10. Decretal. l. 4. tit. 2. qu. 3.
11. Co. Litt. 79.
12. Ibid.
13. 6 & 7 W. III. c. 6. 7 & 8 W. III. c. 35. 10 Ann. c. 19.
14. Ff. 23. 2. 2. & 18.
15. Ff. 1. 5. 11.
16. Cod. 5. 4. 1, & 20.
17. inst. l. 10. 1.
18. Domat, of dowries §. 2. Montesq. Sp. L. 23. 7.
19. Vinnius in inst. l. t. 10.
20. Nov. 115. §. 11.
21. Ff. 23. tit. 1. l. 8. & tit. 2. l. 16.
22. Morrison's case, coram Delegat.
23. See private acts 23 Geo. II. c. 6.
24. Stat. 26 Geo. II. c. 33.
25. Salk. 119.
26. Moor 170.
27. Co. Litt. 235.
28. Matt. xix. 9.
29. Nov. 117.
30. Cod. 5. 17. 8.
31. Moor 683.
32. 2 Mod. 314.
33. Can. 1603 c. 105.
34. 1 Lev. 6.
35. Cowel. tit. Alimony.
36. Co. Litt. 112.
37. Ibid.
38. Cro. Car. 551.
39. F. N. B. 27.
40. Co. Litt. 112.
41. Salk. 118.
42. 1 Sid. 120.
43. Stra. 647.
44. 1 Lev. 5.
45. 3 Mod. 186.
46. Salk. 119. 1 Roll. Abr. 347.
47. 1 Leon, 312. This was also the practice in the courts of Athens. (Pott. Antiqu. b. 1. c. 21.)
48. Co. Litt. 133.
49. 1 Hawk. P. C. 3.
50. 2 Haw. P. C. 431.
51. State trials, vol. 1. Lord Audley's case. Stra. 633.
52. Cod. 4. 12. 1.
53. 2 Roll. Abr. 298.

54. Litt. §. 669. 670.
55. Co. Litt. 112.
56. 1 Hawk. P. C. 2.
57. Ibid. 130.
58. Moor. 874.
59. F. N. B. 80.
60. Nov. 117. c. 14. & Van Leeuwen in loc.
61. 1 Sid. 113. 3 Keb. 433.
62. 2 Lev. 128.
63. Stra. 1207.
64. Stra. 478. 875.