

THE
AMERICAN LAW REGISTER.

DECEMBER 1887.

SOME EFFECTS OF THE HUSBAND'S ABANDONMENT
ON THE WIFE'S POWER TO CONTRACT.

At common law a married woman had no power to bind herself by contract or to acquire for her exclusive benefit any right by a contract made with her : 1 Pars. Cont. 345.

But the disability of a married woman to contract arose purely from the marriage relation and not from any presumed want of judgment and discretion. It was reasoned, (1) that her husband was entitled to the undisputed possession of her person and society, and that if allowed to contract, her body might be taken on execution and the husband deprived of his right; and (2) that such was the presumed influence of the husband over the wife that she might be led to make contracts greatly to her disadvantage.

By statutes in many states this disability has been largely removed. Independently of statute, however, if in any instance these reasons should fail, in all justice the rule should fail also.

Accordingly where the husband is an alien enemy, or has been banished or transported for life, or has abjured the realm, the wife may contract, sue and be sued as a *feme sole* : *Arthur v. Broadnax*, 3 Ala. 707; s. c. 37 Am. Dec. 707; *Cornwall v. Hoyt*, 7 Conn. 420; 1 Swift's Dig. 36; *Swift v. Silence*, 4 Ia. 321; *Troughton's Ex'rs v. Hill's Ex'rs*, 2 Hawy. (N. C.) 406; *Boyce v. Owens*, 1 Hill (S. C.) 8; *Wright v. Wright's Ex'rs*, 2 Des. (S. C.) 242; *Robinson v. Reynolds*, 1 Aik. (Vt.) 174; s. c. 15 Am. Dec. 673; *Franks v. Franks*, 7 Bingh. 762; *Newsome v. Boyer*, 3 P. Wms.

37; *Portland v. Prodgers*, 2 Vern. 104; *Deerby v. Mazarine*, Salk. 116; 1 Chit. Pl. 66; 2 Kent. Com. 154; Bac. Abr., *Baron & Femme M*; Reeves Dom. Rel. 99. The same rule obtains during the term of a limited banishment or transportation and after the expiration of such a term, where the husband remains abroad: *Carrol v. Blencow*, 4 Esp. 27.

There can be no good reason why the wife, abandoned by her husband without her fault and without provision made for her support, should not have full power to contract as an unmarried woman. (1) Even were it possible to take her body on execution for debt at the present day, his right to her society has been wilfully abandoned; and (2) there can be little danger that his influence will lead her to make injudicious contracts. On the other hand, there are the strongest reasons for treating her as a *feme sole* as regards her right to contract.

In *Gregory v. Paul*, 15 Mass. 31, a leading case upon this subject, the court said: "Miserable indeed would be the situation of those unfortunate women whose husbands have renounced their society and country, if the disabilities of coverture should be applied to them during the continuance of such desertion. If that were the case, they could obtain no credit on account of their husbands, for no process could reach them; and they could not recover for a trespass upon their persons or their property or for the labor of their hands. They would be left the wretched dependents upon charity, or driven to the commission of crimes to obtain a precarious support."

In many states, it is true, continued desertion is a ground for divorce. In *Turtle v. Muncy*, 2 J. J. Marsh. 82, it was declared to be the deserted wife's only remedy; but she may have conscientious scruples against obtaining a divorce, and should not be driven to do so: *Starrett v. Wynn*, 17 S. & R. 130.

The justness of the above argument has been recognised more or less fully by numerous courts, and to a greater or less extent the deserted wife has been allowed to contract as a *feme sole*.

WHAT IS A SUFFICIENT ABANDONMENT?

Without her Fault.—There has been much discussion as to what abandonment will thus clothe the wife with the rights of an unmarried woman. It seems clear that the husband's abandonment should not be caused by her own misconduct, and that she herself must not be the wilfully deserting party; for she "should not, by

her own wrong, acquire a privilege which she could not enjoy when faithfully performing the duties of a wife:" *Ezell v. Dodson*, 60 Tex. 331; *Earle's Ex'rs v. Earle*, 9 Id. 630; *Trawick v. Harris*, 8 Id. 312; *Abernethy v. Abernethy*, 8 Fla. 243. Where the conduct of the husband is so outrageous that the wife is driven from him, she is entitled to all the rights of one wilfully abandoned: *Love v. Moynahan*, 16 Ill. 277; *Sherrid v. Southwick*, 43 Mich. 515; *Oxenden v. Oxenden*, 2 Vern. 493.

Abandonment must be Total.—"To accomplish this change in the civil relation of the wife, the desertion must be absolute and complete: it must be a voluntary separation from and abandonment of the wife, embracing both the fact and intent of the husband to renounce *de facto*, and as far as he can do it, the marital relation, and leave his wife to act as a *feme sole*:" *Gregory v. Pierce*, 4 Met. 478; *Concord Bank v. Bellis*, 10 Cush. 276; *Abbott v. Bayley*, 6 Pick. 89; *Russell v. Brooks*, 7 Id. 65; *Roland v. Logan*, 18 Ala. 307; *Krebs v. O'Grady*, 23 Id. 726; *Love v. Moynahan*, 16 Ill. 277; *Choteau v. Merry*, 3 Mo. 254; *Butts v. Newton*, 29 Wis. 632.

Length of Absence.—Long and frequent absences from the state are not alone sufficient; and the length of time the husband has been away is not material, except as it may tend to show that the abandonment is final: *Rogers v. Phillips*, 8 Ark. 366; s. c., 47 Am. Dec. 727; *Moore v. Stevenson*, 47 Conn. 14; *Com. v. Cullins*, 1 Mass. 116; *Boyce v. Owens*, 1 Hill (S. C.) 18; *Fullerto v. Doyle*, 18 Tex. 4. A different question is presented where the husband has been absent unheard from for seven years or more; for the presumption is of death rather than abandonment: *Rosenthal v. Mayhugh*, 33 O. St. 155; *Boyce v. Owens*, 1 Hill (S. C.) 8; *Lambert v. Atkins*, 2 Camp. N. P. 272.

Aliens, and Abjuration of Realm.—In England it was held that where the husband was an alien and had never resided in that country, and the wife held herself out as a *feme sole*, she would be treated as such in relation to her contracts: *De Gaillon v. L'Aigle*, 1 Bos. & Pul. 358; *Barden v. Keveburg*, 2 M. & W. 61; *Derry v. Mazarine*, 1 Id. Raym. 147. The same rule obtains in this country, and probably it would not be necessary that she represent herself to be unmarried: *Wagg's Ex'r v. Gibbons*, 5 O. St. 580; *Gregory v. Pierce*, 4 Met. 478; *Robinson v. Reynolds*, 1 Aik. (Vt.) 174; s. c. 15 Am. Dec. 673.

Where the husband, an alien, deserted his wife in England and went abroad, she was treated as sole, because there was no presumption of an *animus revertendi*: *Walford v. De Piennes*, 2 Esp. 554. But where the husband who deserted his wife and went abroad was a subject, it was held that there must be an abjuration of the realm to entitle her to sue alone: *Bogget v. Frier*, 11 East 301.

It is believed that a complete renunciation of the marital relation with a continued absence in another country or state would now be held, in any state in the Union, to operate like an abjuration of the realm: *Stewart*, Mar. & Div., § 177.

Absence from State.—It would seem by the weight of authority, that, however complete otherwise the renunciation of the marital relation, the wife is not empowered to act as sole, unless the husband has left the state permanently: *Bell v. Bell's Adm'r*, 36 Ala. 466; s. c. 37 Am. Dec. 536; *Rogers v. Phillips*, 8 Ark. 366; s. c. 47 Id. 727; *Ballard v. Russell*, 33 Me. 196; *Edgerly v. Whalan*, 106 Mass. 307; *Gregory v. Pierce*, 4 Met. 478; *Musick v. Dodson*, 76 Mo. 624; *Brown v. Killingsworth*, 4 McCord (S. C.) 429.

In *Bell v. Bell's Adm'r*, *supra*, the husband had totally renounced the marriage relation and was living apart from his wife in open adultery, yet his administrator was declared to be entitled to her share in an estate as distributee, though it came to her after abandonment, and the husband had never claimed nor intended to claim it.

In other cases, where the question is not expressly decided, the husband's absence from the state seems to have been regarded as necessary: *Arthur v. Broadnax*, 3 Ala. 557; *James v. Stewart*, 9 Id. 855; *Mead v. Hughes' Adm'r*, 15 Id. 141; *Clark v. Valentino*, 41 Ga. 143; *Gregory v. Paul*, 15 Mass. 31; *Abbott v. Bayley*, 6 Pick. 89; *Chapman v. Lemon*, 11 How. Pr. 235; *Osborn v. Nelson*, 59 Barb. 375; *Danner v. Berthold*, 11 Mo. App. 351.

There seems, however, to be no stronger reason than precedent for the requirement that the deserting husband must have gone beyond the limits of the state. It is not easy to see how the fact that he may have stopped a few miles on one side or the other of an imaginary line can render the deserted wife's condition any more tolerable. The doctrine has been repudiated in Illinois. In *Love v. Moynahan*, 16 Ill. 274, the court said: "We hold the law to

be, that where the husband compels the wife to live separate from him, either by abandoning her or by forcing her by whatever means to leave him, and such separation is not merely temporary and capricious, but permanent and without expectation of again living together, and the wife is unprovided for by the husband in such manner as is suited to their circumstances and condition in life, she may acquire property, control her personal acquisitions and contracts, sue and be sued in relation to them as a *feme sole* during the continuance of such condition." See also *Prescott v. Fisher*, 22 Ill. 390; *Pern v. French*, 55 Id. 317; *Benadum v. Pratt*, 1 O. St. 403; *Dumond v. Magee*, 4 Johns. Ch. 318; *Bellmain v. Yeatman*, 6 Lea (Tenn.) 488; *Rhea v. Remer*, 1 Pet. 108; *Wright v. Hays*, 10 Tex. 130; *Ezell v. Dodson*, 60 Id. 331; *Lawrence v. Spear*, 17 Cal. 421.

Lack of Support.—In a majority of the cases where the right of the abandoned wife to contract has arisen, she has been left without proper provision for her support; and this is frequently mentioned as an essential element to her authority to so act: *Beekman v. Stanley*, 8 Nev. 257; *Vreeland's Ex'rs v. Ryne's Ex'rs*, 26 N. J. Eq. 160; *Lawrence v. Spear*, 17 Cal. 421; *Love v. Moynahan*, 16 Ill. 277; *Pern v. French*, 55 Ill. 317; *Gregory v. Paul*, 15 Mass. 31; *Osborn v. Nelson*, 59 Barb. 375; *Abbott v. Bayley*, 6 Pick. 89; *Rosenthal v. Mayhaugh*, 33 O. St. 155; *Rhea v. Rhemer*, 1 Pet. 105; *Slator v. Neal*, 64 Tex. 222; *Zimpelman v. Robb*, 53 Id. 274; *Ezell v. Dodson*, 60 Id. 331; *Walker v. Stringfellow*, 40 Id. 570.

Where she deals with the property or credit of the husband, or with community property, it is clear that such lack of support should exist; but where she deals with her own property or earnings, a good reason for requiring it is hard to find, and in a number of cases it does not appear to have existed: *James v. Stewart*, 9 Ala. 855; *Mead v. Hughes's Adm'r*, 15 Ala. 141; *Clark v. Valentino*, 41 Ga. 143; *Anderson v. Jacobson*, 66 Ill. 522; *Ayer v. Warren*, 47 Me. 217.

By Agreement.—Where the separation is by agreement, whether upon articles or not, the wife is not authorized to contract as sole: *Parker v. Lambert*, 31 Ala. 89; *Thrasher v. Ingram*, 32 Id. 645; *High v. Worley*, 33 Id. 196; *Turtle v. Muncy*, 2 J. J. Marsh. 82; *Dean v. Richmond*, 5 Pick. 461; *Ames v. Chew*, 5 Met. 320; *Fuller v. Bartlett*, 41 Me. 241; *Harris v. Taylor*, 35

Tenn. 536; *Moore v. Carter*, Hemph. (C. C.) 64; *Freer v. Walker*, 1 Bail. 184; *Corbett v. Poelnitz*, 1 T. R. 5; *Marshall v. Rutton*, 8 Id. 545; 2 Bl. Rep. 1195; *Hyde v. Price*, 3 Vesey 434; *St. John v. St. John*, 11 Ves. 526. But see *Rose v. Bates*, 12 Mo. 30.

Divorce a mensa et thoro.—It has been said that under a divorce *a mensa et thoro* the wife cannot bind herself by a contract: *Lewis v. Lewis*, 3 B. & C. 291; s. c. 5 D. & R. 98; *Fairthorne v. Blaquire*, 6 M. & W. 73. But the contrary doctrine would seem to be the better view: *Dean v. Richmond*, 5 Pick. 461; *Pierce v. Burnham*, 4 Met. 303.

Imprisonment.—During the term of a husband's imprisonment for crime or confinement on account of insanity, the wife should be treated as a *feme sole* to the extent at least that it may be necessary to provide for the support of herself and children: *Slator v. Neal*, 64 Tex. 222; *Ahern v. Easterby*, 42 Conn. 546; *Gustin v. Carpenter*, 51 Vt. 585.

RIGHTS AS A FEME SOLE.

His Credit and Property.—In any case where the husband has deserted the wife, permanently or temporarily, without her fault, or where his misconduct has driven her from him, she may pledge his credit for necessaries suitable to her condition in life: *Rotch v. Miles*, 2 Conn. 638; *Camberlin v. Palmer Co.*, 10 Allen 539; *Cunningham v. Reardon*, 98 Mass. 538.

The better opinion seems to be that she may also sell articles of personal property belonging to him when necessary for her support: *Ahern v. Easterby*, 42 Conn. 546; *Rawson v. Spangler*, 62 Ia. 59; *Butts v. Newton*, 29 Wis. 632; *Lawrence v. Spear*, 17 Cal. 421. But see, *Edgerly v. Whalan*, 106 Mass. 307.

She may also manage and control the homestead and is entitled to apply the profits to the support of herself and children: *Casteel v. Casteel*, 8 Blackf. 240; *Felker v. Emerson*, 16 Vt. 653.

In all the foregoing cases where the wife deals with the credit and property of the husband, she is conclusively presumed to act as his agent.

Her subsequent Acquisition.—The abandoned wife is entitled to her own earnings and to those of her minor children and may assign or sue for the same and for damages for a tort to her person or property: *James v. Stewart*, 9 Ala. 855; *Hazelbaker v. Goodfellow*, 64 Ill. 238; *Burger v. Belsley*, 45 Id. 72; *Pern v. French*,

55 Id. 317; *Love v. Moynehan*, 16 Id. 277; *Smith v. Silence*, 4 Ia. 321; *Camberlin v. Palmer Co.*, 10 Allen 539; *Starrett v. Wynn*, 17 S. & R. 130; *Spier's Appeal*, 26 Penn. St. 233; *Gustin v. Carpenter*, 51 Vt. 585.

It has long been the practice in chancery, to intercept funds coming to the wife to make provision for her when abandoned; to decree to her the interest on a trust estate or legacy, even where accrued before abandonment, dividends on stock, &c.: *Dumond v. Magee*, 4 Johns. Ch. 318; *Tyson's Appeal*, 10 Penn. St. 221; *Sleech v. Thorington*, 2 Ves. Jr. 560; *Wright v. Morley*, 11 Id. 12; *Oxenden v. Oxenden*, 2 Vern. 493; *Nicholls v. Danvers*, Id. 671; *Williams v. Callow*, Id. 752; *Watkyns v. Watkyns*, 2 Atk. 96; Schoul. *Husb. & Wife*, § 486, n.

In this country the rule prevails that she may acquire personal liabilities and is entitled at law to all other her subsequent acquisitions, real and personal, by purchase, gift, descent, devise and bequest, and may contract, sue and be sued with respect thereto in her own name: *Roland v. Logan*, 18 Ala. 307; *Prescott v. Fisher*, 22 Ill. 390; *Anderson v. Jacobson*, 66 Id. 522; *Bean v. Morgan*, 4 McCord (S. C.) 148; *Gregory v. Paul*, 15 Mass. 31; *Abbott v. Bayley*, 6 Pick. 89; *Cusack v. White*, 2 Mill Const. R. (S. C.) 279; *Cecil v. Juxon*, 1 Atk. 278; *Osborn v. Nelson*, 59 Barb. 375; *Gregory v. Pierce*, 4 Met. 478; *Lawrence v. Spear*, 17 Cal. 421; *Valentine v. Ford*, 2 P. A. Browne (Pa.) 193, and cases cited below.

In *Rhea v. Rhemer*, 1 Pet. 105, it was declared that, while a deserted wife might act as a sole trader and be sued as a *feme sole*, under the laws of Maryland she could not alien after acquired real estate without a separate examination and being joined by her husband.

In *Beckman v. Stanley*, 8 Nev. 257, while it seemed to be admitted that a deserted wife might convey her real estate at common law without being joined by her husband, it was held that the Nevada statute excluded the common law method and made it necessary for him to join in the conveyance.

In *Harrison v. Brown*, 16 Cal. 287, it was held that she could not alone mortgage real estate; and in *Wilson v. Brown*, 2 Deas. (N. J.) 277, the lien of a mortgage so executed was said to be equitable and not legal. See also, *Hall v. Faust*, 9 Rich. Eq. (S. C.) 1294; *Rees v. Waters*, 9 Watts 90.

But the argument of the court in *Wright v. Hays*, 10 Tex. 130, seems to satisfactorily meet the objections raised in the foregoing cases: "But it is contended by the appellant that, though it were separate property, yet the wife, under the statute, could not alienate land, unless in the mode pointed out by statute; and the case in 1 Peters 108, gives some countenance to the position. But the position seems to me to be positively repugnant to the whole doctrine in relation to the rights in case of desertion or absence by the husband, or his abjuration of the country, etc. The default of the husband, and the necessity of the wife's situation, require and the law authorizes her to assume his position for the care of herself, her family and property, and vest her with the capacity of a *feme sole*. His desertion and absence are the foundation of her new rights and authority. * * The joining of the husband in the wife's conveyance, her privy examination and declaration that she acts freely, all pre-suppose that a husband is present and may be exercising undue influence over her. How can these formalities be requisite in cases where the rights of the wife (and they are acknowledged by law), depend upon the supposition that, *de facto*, she has no husband? How could he join in a conveyance, when his absence is the ground upon which she acquired her right of property and upon which she can make contracts and sue and be sued in her own name?" See also, *Ann Berta Lodge v. Leverton*, 42 Tex. 18; *Rose v. Bates*, 12 Me. 30; *Gallagher v. Delargy*, 57 Mo. 29; *Danner v. Berihold*, 11 Id. App. 351; *Valentine v. Ford*, 2 P. A. Browne (Pa.) 193; and the language of many other cases, where personal property was involved, is broad enough to cover the alienation of real estate.

Her Property Acquired before Abandonment.—Where personal property acquired before coverture remains the wife's separate property, subject only to his control and management during coverture, upon abandonment, she may sell it without his consent: *Walker v. Stringfellow*, 30 Tex. 510.

The deserted wife is entitled to the control of the real estate coming to her before abandonment, and to the rents and profits thereof: *Benardum v. Pratt*, 1 O. St. 403. And in all reason it would seem that she may dispose of it as freely as if acquired after abandonment: *Rosenthal v. Mayhugh*, 33 O. St. 155; *Clark v. Valentino*, 4 Ga. 143; *contra*, *Mason v. Jordan*, 13 R. I. 193.

Community Property.—The central idea of community property, as recognised in California, Texas, Nevada, Washington, Louisiana, and Idaho, and formerly in Missouri, is that by the marriage contract the husband and wife become in a manner partners as to all property subsequently acquired by either, except by gift, devise, bequest or descent.

As the husband must provide for the family, he has the control and disposition of the community property during coverture. But upon desertion, the passive rights of the wife become active, and she may manage, control, sue for and dispose of the common property, real and personal, for the support of herself and children: *Cullen v. James*, 1 S. W. Rep. (Tex.) 314; *Ezell v. Dodson*, 60 Tex. 331; *Slator v. Neal*, 64 Id. 222; *Ann Berta Lodge v. Lev-erten*, 42 Id. 18; *Fullerton v. Doyle*, 18 Id. 4; *Cheek v. Bellows*, 17 Id. 613. Her power to dispose of the common real estate has been denied: *Harrison v. Brown*, 16 Cal. 287.

“Under such circumstances the court should not ‘weigh in golden scales’ the discretion given to the wife in the disposition of the community property [1712½ acres of land] for the support of herself and family, and this discretion will not be reviewed, unless, perhaps, in a case where it has been used as a fraud upon the rights of the husband:” *Zimpelman v. Robb*, 53 Tex. 274.

Such are the general principles of law, independent of statutes, applicable to the subject. Where statutes exist they will be found generally to be cumulative. In Kentucky, however, the statute excludes the common law, and the deserted wife must be specially empowered by chancery to contract as a *feme sole*: *Harmon v. Madden*, 10 Bush 664.

CHARLES A. ROBBINS.

Lincoln, Neb.
