

1895

Suits between Husband and Wife, at Common Law, in Equity and under New York Statutes

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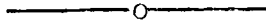
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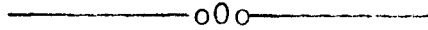
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T H E S I S



SUITS BETWEEN HUSBAND AND WIFE, AT COMMON
LAW, IN EQUITY AND UNDER NEW YORK STATUTES.



by

Ernest E. Cole

Cornell University

1895

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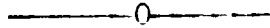
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SUITS BETWEEN HUSBAND AND WIFE, AT COMMON
LAW, IN EQUITY AND UNDER NEW YORK STATUTES.



C H A P T E R I.



Historical Sketch.

~~The law of husband and wife~~

This subject, like nearly the whole of the law of husband and wife, is greatly affected by, and grows out of, that somewhat peculiar doctrine of the common law — the unity in person of husband and wife. The common law lawyers found it expressed in Littleton in these words:— "Also, though a man may not grant, nor give his tenement to his wife during the coverture for that he and his wife be but one person in the law". Also in one or two other passages connected with the law of real property. Forever afterward when they wished a reason for some incapacity of the wife and one could not be found elsewhere they applied this fiction. Nowhere, as we have been able to find, did they attempt to give a reason for it. Therefore we will first examine the history of the mar-

(a) Coke's Littleton, Sec. 168, 187.

riage relation and find, if possible, the origin and cause for this important fiction. N

In savage life the inferior and superior positions of men are determined by prowess, power and endurance. The daily contest in which men meet are those requiring great physical capacity. Here there is an active, fierce struggle for existence in which only men of power can be of use and where women are of little or no account. Here of necessity the position of women would be one of degradation. For in the midst of such a life all her social, moral and delicate powers of refinement would be lost and she would be looked upon as a mere drudge. Consequently the savage would regard his wife as a chattel which he had obtained by reason of his superior power and therefore his to treat as he wished, and as he would any of his property. Again, the wife being of little use to the savage their women would be neglected and exposed to die. This, in time, would produce a scarcity of women when of necessity they would prey upon the wives of hostile nations. Wife capture is met with in the early history of the Greeks, Romans and Hindoos. After this arose a more genteel method of acquiring a wife, i.e. by

purchase. In India this was forbidden on the ground that it was not justice for a parent to sell his child. Thus in the evolution of the marriage relation we find three stages, first, wife capture, second, wife purchase, third, religious marriage. The orientals, although they treated their wives with greater respect than the western nations, who were under an equal civilization, still regarded them with mistrust and suspicion. One of the Hindoo laws was "A woman shall never go out of the house without the consent of her husband; she shall not eat before her husband eats, nor laugh without drawing her veil before her face." However the property rights of women were very just. She was given all the property that she should acquire by inheritance, purchase, partition, seizure and finding. But later, through the influence of Brahminism, the rights and position of women were restricted to a great extent.

In the early Roman marriage the husband purchased his wife and she became his daughter whom he treated as he would any of his children. In fact she really passed from the guardianship of the father to that of the hus-

(a) Maine's Eng. Inst., 322.

band.p She acquired and inherited for the profit of her lord, and, as Gibbon says, "So clearly was woman defined not as a person but as a thing, that if the original title were defident she might be claimed like other movables, by the use and possession for an entire year." (a) After the Punic wars, owing to the broad views and ingenuity of the Roman lawyers, combined with the aspirations of Roman women, a reform was worked. Degree by degree were the incapacities of women removed until the third century they were treated as favorably in law as at the present time. She could hold property, contract and inherit as freely as her husband. Marriage was deemed a partnership, into which husband and wife embarked, each independent of the other, and which either might terminate at any time. Here for the first time we find woman free in the legal sense and having the same rights and duties with her husband.

Coming now to the English law we find that in Anglo Saxon times the family seems to have been the predominating feature; although with regard to this there is some
 (b)
 diversity of opinion. However, in considering this sub-

(a) Gibbon's History of Rome, Vol. 4, p. 474-477.
 (b) Maine's Ancient Law, 163; Anglo Sax. Law, 122.

ject we will first examine the family or maegth and then the household. In the maegth the husband and wife were not regarded as kin to each other. The wife did not become one of the husband's maegth but remained a member of her own and it alone was responsible for her wrongs. The husband did not inherit from the wife nor the wife from the husband. Neither was the husband absolute master of his wife, for his guardianship was subject to that of the wife's maegth which continually watched over her and protected her person. Yet the father could not give his daughter in marriage against her will after she had attained her majority. He simply had a veto power. The early Anglo Saxon marriage seems to have been a sale by the father to the bridegroom, and one of the laws of King Ethelbert was "If a man carry off a maiden by force let him pay fifty shillings to the owner and afterward buy the object of his will of the owner." Some writers claim that it was not a sale of the woman but of the guardianship. First, on the ground that the price was not fixed by the parties as in a contract but by the law according to the rank of the woman. Second, that in their

(a) Schmid. Anh., 4, Sec. 1-6.

(b) Ancient Law of England, 25.

(c) Ethl., 75.

marriages there were two steps, viz., betrothal and nuptials. Now this betrothal was considered the same as any other contract, the price being merely earnest which the bridegroom was to lose in case he failed to perform the contract. In time the price came to be no longer paid but merely promised. Which step being taken others followed and it soon came to be paid to the bride. The contract now losing all appearances of being a real contract, became binding by force of some solemn act and the weotuma remained a separate gift to the end of the Anglo Saxon period. In the Kentish betrothal there were two gifts. "Then let the bridegroom declare what he will grant her if she choose his will and what he grant her if she live longer than he." The latter was called the morning gift, being a free gift from the husband to the wife in case she outlived him. From these seems to have grown the common law dower. Having now examined the marriage we will discuss the relation which it created.

The wife generally must obey her husband but in matters relating to the household she was independent. They

(a) Ine., 31; Alf., 18.

(b) Alf. Ecel. Laws, Sec. 12 (c) Schmid. Anh., 4, Sec. 3.

(c)

were co-possessors of all the property which the wife inherited, together with the morning gift. But the husband could not alien without the consent of the wife nor she without his consent. The husband might dispose of his own property but if a specific morning gift had been given he could not alien without her consent. The proceeds of their common labor belonged to the husband but after his death they constituted a part of property from which her morning gift was taken. Gifts were common between them. The wife's property could not be taken for the husband's debts, nor the husband's property for the wife's debts. Upon the death of the husband the wife took all the property she had acquired by gift or inheritance, as well as the morning gift.

Summary. They did not inherit from each other, each owned his own property, the wife could convey nearly as freely as the husband, they could make gifts to each other and the husband was not responsible for the wife's torts nor crimes.

Thus far in the history of the English marriage law there appears nothing of the fictional unity. And from this time on until the time of Littleton no trace of it

can be found. Therefore we are left to speculation. That it did not find its way into the law from any lingering notion of the patriarchal idea of the husband being the center of all power in the family, seems to be evident from the fact that such ideas were long ago left out of the Anglo Saxon law. In the order of events instead of returning to those ideas it should drift farther from them. That the Norman were not the cause of this seeming retrogression is equally unallowable. First, because the Anglo Saxon law was adopted nearly in toto by William I. Second, they would have brought with them the civil law if any and we have seen it did not exist there. The true origin seems to me to have been the teachings of the Christian fathers. We have seen the looseness of the Roman marriage and history tells us that the effect upon the social life was extremely bad. Being a partnership it was dissolved at pleasure and the home became a mockery. The Christian fathers seeing these results started out to reform the marriage relation. This reform began in about the time of St Augustine. Working independently of the civil law and legislation, step by

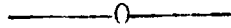
(a) Reeve's Hist of the Com. Law,

step they invested the marriage with religious solemnity and by the ninth century civil and ecclesiastical law became one, the former being wiped out. Influenced by what they had seen of loose marriage laws they went to the other extreme. Yet their object was not to lower the status of woman but to elevate her. To do this they thought as the bible says, that husband and wife should be one flesh and one blood. That they should become one, having the same objects and the same aims. This we see in the following, "Matrimony is the lawful order of joining together of Christian men and women by their assent. And as of the Deity and humanity of Christ there is made an indissoluble unity, so was matrimony, and according to such unity was such coupling found to be." So that we see that the marriage relation came under the jurisdiction of the ecclesiastical courts and impressed with their laws. In *Legrand v. Johnston*, the court said "The ecclesiastical courts according to the jurisdiction of this country have exclusive cognizance of the rights and duties arising from the marriage state. Therefore I

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- (a) Phill. Eccl. Law, Vol. 1, 707.
 - (b) Women before the law, 22-24.
 - (c) Reeves, Vol. I., p. 311.
 - (d) Reeves, Vol. I, p. 311.;
 - (e) *Legrand v. Johnston*, 3 Ves. Jr. 358.

am completely at a loss to discover an equity to control the common law and admit a suti between husband and wife upon a contract and supersede the exclusive jurisdiction of the ecclesiastical court by entering to the consideration of it." Thus the theory of unity can be traced directly to the bible idea of marriage.

CHAPTER II.



Suits at Common Law and in Equity.

Owing to the unity in person of husband and wife
(a)
here could be no suit between them at common law.

This seems to have been so evident as to practically become a maxim. Yet there were other reasons than that of their unity but which in fact grew out of it. Thus if for an injury to her person a wife could not sue alone but must secure her husband's concurrence and sue in his name. Blackstone says there was but one instance in which the wife could sue in her own name, that was where the husband abjured the realm. Thus we see it was impossible for her to sue her husband. Again they thought if the wife could be continually suing the husband or the husband the wife, it would lead to great unhappiness in the family. Such an idea was deemed to be entirely incompatible with a correct notion of the married state.

However stringent and narrow the rule of law may have been when we come to equity, we find one which in comparison, was extremely broad. Here the wife may

(a) Longendyke v. Same, 42 Barb. 367; Pitman v. Pitman, 4 Ore. 298.

maintain nearly any civil action against her husband.(a)
 Yet courts of Equity seem to have been impressed that the
 wife was under the protection of the husband and compelled
 her to bring her action by next friend, who might be a
 total stranger to her, although he was generally chozen
 by the wife and must always receive her action before he
 could act. The doctrine of unity seems never to have
 prevailed in equity, or rather the courts of equity dis-
 regarded the fiction and would ~~not~~ carry out agreements
 or contracts between husband and wife when it was equi-
 (b)
 table and just for them to do so. The following are some
 of the principal instances in which it was possible for
 husband and wife to bring suits against each other in eq-
 uity.

a. Upon an agreement for separate maintenance enter-
 ed into directly by him. Head v. Head, 3Atk. 295; Guth v.
 Guth, 3 Brown's Ch. 617; Angier v. Angier, Prec. Ch. 497;
 Seagrave v. Seagrave, 13 Ves. Ch. 442.

b. To compel specific performance of a contract en-
 tered into before and after marriage. Sidney v. Sidney,
 3 P. W. 264; Hendricks v. Isaacs, 117 N. Y. 441;

(a) Coit v. Coit, 4 How. Pr. 232; Story's Eq. Pr.
 Sec. 61.

(b) Hendricks v. Issacs, 117 N. Y. 441.

c. To restrain the husband from interfering with the wife's separate estate, or if he has already interfered to her detriment she may recover for such interference. O'Brien v. Hilburn, 9 Tex. 297; Freethy v. Freethy, 42 Barb. 641.

d. To set aside conveyances made to the husband in ignorance of her rights or which were procured by fraud. Fry v. Fry, 7 Paige's Ch. 633; Lampert v. Lampert, 1 Ves. 21.

e. To obtain equitable allowances out of that part of the husband's estate derived from the wife. Carter v. Carter, 1 Paige, 463; VanDeusen v. VanDeusen, 6 Paige, 366; Roberts v. Roberts, 2 Cox's Ch. 421.

f. To charge separate estate of the wife for money borrowed from the husband, Gardiner v. Gardiner, 22 Wend. 539; Alward v. Alward, 2 N. Y. Sup. 42; and where the wife had fraudulently faken money belonging to her husband and invested it in real estate taking the title in her own name it was held that the husband could maintain an action in equity to establish a trust in his favor. Higgins v. Higgins, 14 Abb. N. C. 13.

g. To restrain the husband from reducing her choses in action until he had made a suitable provision for

her. *Wiles v. Wiles*, 56 Am. Dec. 733; *Fry v. Fry*, 7 Paige, 461. This is more especially true in cases where he must go into equity to reduce them to possession. Then the court would apply the maxim, "He who seeks equity must do equity".

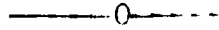
h. She may have an equitable action for conversion. *Davidson v. Smith*, 20 Iowa, 466, 468; 44 Barb. 319.

i. To remove the husband from trusteeship of her estate granted to him in trust and to recover property fraudulently disposed of by him. *Whitman v. Abernathy*, 33 Ala. 154; also an action for accounting where an estate is held jointly by them; *Martin v. Martin*, Hoffn. 462. In *Purdy v. Walter* where property was held in trust by a third party for benefit of husband and wife, and the trustee conveyed the title absolutely to the husband, the court held that the wife could not only bring an action in equity against her husband when she asked relief with respect to her separate property or for her provision out of her separate property, but in all cases where it is necessary to protect her rights.

(a) 48 Mo. 140.

Conclusion. If the wife has separate property she can bring any action in equity against her husband with regard to it.

CHAPTER III.



Suits under New York Statutes.

A statute was passed in 1860 in 1860 authorizing married women to sue and be sued the same as a feme sole in all actions relating to her separate property acquired by gift, purchase, devise or inheritance, also to bring an action in her own name to recover for an injury to her person or property and the proceeds of such action to be part of her separate estate. By chapter 172, Laws of 1862, this statute was reenacted with slight amendment which for our purpose it is unnecessary to mention. Thus it remained until 1880, when by chapter 245, sub. 38 it was repealed. The only provisions in the Code are Secs. 450, providing that, "In an action or special proceeding a married woman appears or prosecutes alone or joined with other parties as if single and it is not proper to join the husband in such action." Also Sec. 1906, which provides that in an action for slander brought by a married woman the damages recovered are part of her separate property. And sec. 1206, providing that a judgment

for or against a married woman shall be enforced the same as if she were single. So it would seem that since 1880 the right of a married woman to sue and be sued did not exist. The question came up squarely in the case of *Bennett v. Bennett* (a) where the Court of Appeals, in a lengthy and able opinion, decided that it was not the intention of the legislature to abolish this right as is evidenced by the Code provisions and the fact that in chapter 245 of 1880 they were merely getting rid of a lot of useless statutes; so that at the present time these Code provisions, together with *Bennett v. Bennett* are the basis of her right to sue and be sued. We have now traced the litigation which has arisen under the statutes.

(b)

In 1870, in the case of *Minier v. Minier*, it was held that the statute of 1862 gave the wife the same right to sue her husband that it did to sue any other person, but that the section giving her the right to sue in her own name for injury to her person did not confer upon her the power to sue her husband in tort, because it was not to be presumed that the legislature intended

(a) 116 N. Y. 584.
 (b) 4 Lansing, 421.

to thus open the door to litigation over every little quarrel which might arise between husband and wife. This case was criticized in Perkins v. Perkins, which to a large extent over-ruled it. Here it was held that the unity and oneness of husband and wife had not been destroyed by these chapters. The court said, "But by whom may she be sued? By herself? of course not. By him who is in oneness and unity with her, can he be the one half of this united one sue the other half by virtue of this statute." Again in Alward v. Alward, it was held that there could be no suit between husband and wife under these statutes. The court discussed the decisions upon the subject and said that the cases of Wood v. Wood, and Wright v. Wright were mere dicta. Also that Howland v. Howland holding that she might maintain an action of replevin, Berdell v. Parkhurst, holding that the wife could sue the husband for conversion, and Granger v. Granger holding that she might sue him upon a promissory

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- (a) 7 Lansing, 19.
 - (b) 2 N. Y. Sup. 42.
 - (c) 83 N. Y. 575.
 - (d) 54 N. Y. 437.
 - (e) 20 Hun, 472.
 - (f) 19 Hun, 358.
 - (g) 2 N. Y. St. Rep. 211.

note under any and all circumstances had been over-ruled. It is a notable fact, however that the court did not cite the cases which over-ruled the one mentioned and we have been unable to find them. In 1890 the case of Alward v. Alward was overthrown, and in Ryerson v. Ryerson, the cases which it criticized were followed, it being held that the wife could maintain an action against the husband for conversion. Again in 1892, in Mason v. Mason, there was a similar holding, and the court cited with approval the cases of Berdell v. Parkhurst and Wood v. Wood. It had been also held that where the husband and wife were tenants in common the wife could bring an action for partition. Thus we see that the lower courts in New York have had a tendency to allow nearly any suit between the marital parties, and although the question has not been decided by the court of Appeals since the cases of Wood v. Wood and Wright v. Wright, it is very evident that they will follow the dicta in those citations.

Under the statute giving the wife the right to recover in her own name for injuries to her person consid-

(a) 8 N. Y. Sup. 738.

(b) 21 N. Y. Sup. 206.

(c) Moore v. Moore, 47 N. Y. 467; Wurz v. Wurz, 15 N. Y. Sup. 720.

erable litigation has arisen and, as has been said, the court has universally held that she could not sue her husband for such torts. In *Freethy v. Freethy*, it was held that the wife could not bring an action against the husband for her slander. And in *Kujeck v. Goldman*, that he could not have an action of deceit. It was early decided that the wife could not maintain an action against the husband for assault and battery. Then the General Term, in the case of *Schultz v. Schultz*, decided that such an action could be maintained, but on appeal it was reversed.

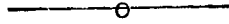
Conclusion. There may be suits between husband and wife in New York at the present time in all civil actions except personal injuries torts.

(a) 42 Barb. 641.

(b) 29 N. Y. Sup. 294.

(c) 27 Hun, 26, s. c. 89 N. Y. 644.

C H A P T E R IV.



Criminal Actions.

On grounds of public policy a distinction is made between crimes against the person of the wife and crimes against her property. The former being punishable and the latter not. There appears to be no other reason for this than that crimes against her person, as for example assault, attract more attention and appear to society to be barbarous and uncivilized, while the less outrageous crime of larceny passes un-noticed. The reason that there could be no larceny of each other's property will be examined hereafter, but it seems that the same reasons must exist in one instance that do in the other.

Assault and Battery. Blackstone says that under the old law the husband had the power of moderate chastisement but that under the politer reign of Charles II. this right came to be doubted, especially among the upper classes, but was still clung to among the lower classes. Reeves states it nearly the same and adds that the husband had the same power of correction over the wife at

(a) Reeve's Dom. Rel. 92.

common law that he had over his apprentice. Wharton also agrees with the above, but Bishop says that the power of even moderate chastisement has been questioned even in England. All give as a reason for this power the fact of the husband's liability for the wife's misconduct and that therefore he should have the right to control her. Notwithstanding these authorities, the Hon. Irving Brown, in an article in the American Law Review of 1891, after a careful review of the cases laid down the following proposition. "By the laws of England the husband never had any right to chastise his wife for any cause except self-defense". There are but few decisions in England and these few have risen since the time of Charles II., but before his time it seems to me the power to chastise at least existed, else so many statements similar to the following could not have found their way into the text-books and cases, e. g., the husband may chastise with a whip no larger than his thumb, or with a whip which could be drawn through the wedding ring, etc. In fact it seems entirely consistent with the times that such rights and powers should exist and be exercised. True it is that in Lord Leigh's Case, 3 Keable, 433, decided in 28 Chas. II. it was held that the right of even moderate chas-

tisement no longer existed in England. We will now consider a few cases which have arisen in America.

In North Carolina the question first arose in the
 (a)
 Case of State v. Rhodes, here the trial judge had charged that the husband might chastise his wife with a rod no larger than his thumb. On appeal the court held that this was not a proper standard but it should be the actual amount of injury done, and that he might chastise her to a moderate degree, giving for the same the reasons given by Blackstone. The question rose again in State v.
 (b)
 Mabrey, and it was held that while he had the right to chastise moderately he did not have the right to flourish a knife and threaten to kill her, and for such conduct
 (c)
 held him guilty of assault. Finally in State v. Oliver, it was held that the right to chastise the wife no longer existed, but the court stated that it would not hear trial complaints. Mississippi, in the case of Bradley v. State,
 (d)
 held that the husband could chastise with a whip which could be drawn through the wedding ring. This for the same reasons as are given by Blackstone, further that

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- (a) Phillip's Law (N. C.) 453.
 - (b) 64 N. C. 592.
 - (c) 70 N. C. 60.
 - (d) Walker, 156 (Miss.)

it would be better to allow small wrongs to go unnoticed than bring them to the public gaze. The following states have held that even the moderate right of chastisement did not exist. Massachusetts, (a) Ohio, (b) Texas, (c) Montana, (d) New York, (e) Alabama, (f)

Conclusion. The right of the husband to chastise the wife existed in early common law but not after Chas. II., it never existed in America, except in Mississippi and North Carolina.

Arson. At common law there is no doubt but that the wife could ^{not} be guilty of arson in burning the husband's house. (g) The reason for this was that they were one and the possession of one was the possession of the other and that at common law arson was deemed to be an offence against the possession rather than against the property. (h) The question now is, have the statutes changed the law so that she would be guilty. In New York there is no doubt but that she would, not however, because of the married women's statutes, but that the Penal Code makes even the burning of one's own dwelling arson.

- (a) Comm. v. McAfee, 77 10 8 Mass, 458
- (b) Pearman v. Pearman, 1 Swav. & Twist, 601.
- (c) Gorman v. State, 42 Tex. 221.
- (d) Albert v. Albert, 5 Mon. 576.
- (e) People v. Winters, 2 Park's Crim. L. 10; Poor v. Poor, 2 Paige, 503.
- (f) Fulgham v. State, 46 Ala. 143.
- (g) Rex. v. Marsh, 1 Mood. C. C. 182.
- (h) People v. Van Blaricum, 2 John. 105.

The question arose in Michigan in the case of Snyder v. People, and under a statute which defined arson as the burning of the dwelling house of another etc., it was held held that it was still a crime against the possession and not the property and since the unity of husband and wife had not been broken by the married women statutes, she would not be guilty. The courts of Indiana, in the cases of Garrett v. State, and Emig v. Daum, under similar married women statutes, held that arson was an offence against the property as well as possession, and therefore if the property belonged to the wife the husband would be guilty in burning it. Here the court did not decide whether the unity had been dissolved or not, but simply said that it made no difference since it was an offence against property and the statutes had given the wife power to own and control property as if sole.

Larceny. There could be no larceny by husband and wife of each other's goods at common law. The reason

(a) 26 Mich. 106.

(b) 109 Ind. 527.

(c) Emig v. Daum, 27 N. E. 323.

(d) Rex v. Marsh, *A. Wood, Q. C.*, 182

most generally given is their unity of person and that with marriage they endowed each other with the sort of property in each other's goods, but some declare it was because the wife could not commit the trespass necessary
 (a)
 to constitute larceny. Probably the whole thing grew out of the fiction of the unity. But in case the wife committed adultery and then took her husband's goods, she would be guilty of larceny. This was stated in Reg. v. Featherstone,
 (b)
 as follows, "But this rule, that they could not commit larceny, is properly and reasonably qualified when she becomes an adulteress. She thereby determines her quality of wife and her property in her husband's goods ceases." The question of the larceny by an adulteress and an adulterer is very fully discussed in
 (c)
 State v. Banks as I have been able to find, but it seems that under the cases that we have already discussed, the courts of that state would hold at the present time that they would be guilty. Yet since they have continually decided that the
 (d)
 unity had not been abolished, it is very difficult to

-
- (a) 2 Bishop's Crim. Law, 872.
 - (b) 6 Cox C. C. 376.
 - (c) State v. Banks, 48 Ind. 197.
 - (d) Bertels v. Nunan, 92 N. Y. 152.

decide just what they would do. Judge Cobley in Snyder v. People, said that under the statutes in Michigan there could be no larceny. In Indiana, while the earlier decisions hold there could not be, the late one of Beasley (a) v. State holds that there can. This was decided mainly upon the arson cases which had arisen in that state, and because larceny was an injury to her property the same as arson, so one should be a crime as much as the other. Illinois and Texas have held that it would not (b) be larceny. The law on this subject is very uncertain owing to the transition state of the statutes upon the rights of married women.

(a) 38 N. E. 35.

(b) Thomas v. Thomas, 51 Ill. 162; Overton v. State, 43 Tex. 616.

Ernest E. Cole

