

ANTE-NUPTIAL CONTRACTS; THEIR ORIGIN AND NATURE

DOWER A CLOG ON ALIENATION.

Under the common law prior to the enactment of the statute of 27 Henry VIII, also called the statute of uses, there was no method whereby a woman could by her own act bar her right to dower in her husband's lands.¹ This circumstance alone made the alienation of land very difficult and it is small wonder that the ingenuity of the lawyers early invented a method of getting around the awkward arrangement. The favorite way was to convey the land to uses, the consequence being that the wife of the owner of the beneficial interest would not be entitled to dower therein and the land was therefore capable of free alienation. That this was done for the purpose of keeping the land free from any hindrance to alienation and not for the purpose of preventing the wife from acquiring property is shown by the fact that property was usually settled upon her at the time of the marriage. Of this situation Blackstone says: "At present I have only to observe that before the making of that statute the greatest part of the land of England was conveyed to uses, the property or possession of the soil being vested in one man and the use of profits thereof in another;—Now, though a husband had the use of the lands in absolute fee-simple, yet the wife was not entitled to any dower therein, he not being *seised* thereof; wherefore it became usual, on marriage, to settle by express deed some special estate to the use of the husband and his wife for their joint lives, in joint-tenancy, or jointure; which settlement would be a provision for the wife in case she survived her husband."² Also, "Upon preconcerted marriages and in estates of considerable consequence, tenancy in dower happens very seldom; for the claim of the wife to her dower at common law diffusing itself too extensively, it became a great clog to alienation and was otherwise inconvenient to families. Wherefore—jointures have been introduced in their stead, as a bar to the claim at common law."³

¹In *re Pulling's Estate*, 93 Mich. 274, 52 N. W. 1116.

²2 Blackstone, 137, Lewis' Edition.

³2 Blackstone, 136, Lewis' Edition.

JOINTURE BEFORE AND AFTER THE STATUTE.

Before the passage of this statute jointures were merely provisions for the husband and wife for life and for the wife during marriage and also in case she survived her husband.⁴ They were not as yet attempts to bar dower, for as stated above, no claim of dower was allowed where the husband had only a beneficial interest in the land. But by virtue of the statute every person who had the beneficial interest in the land became seised and possessed of the soil itself and his wife would thereby have become entitled to both the jointure and the dower had it not also provided that a jointure conforming to the specifications therein set forth should be a bar to dower.⁵ But if the jointure did not conform to the requirements of the statute she was at law entitled to both, even though the jointure was clearly meant to be in lieu of dower. Upon this state of facts the courts of equity properly exercised their jurisdiction to restrain her from claiming both and to put her to her election as to which she would accept. The provision which the wife was thus compelled to accept became known as an equitable jointure.⁶

EQUITABLE JOINTURES, THEIR ORIGIN AND NATURE.

When jointures came before the courts after the passage of the statute the question that determined their validity, aside from the ordinary questions involved in all voluntary transactions, was whether they conformed to the requirements of the statute. If they did they constituted a legal bar to dower. If they did not, there was still the chance that they might be made a bar by the interposition of a court of equity. In the appeal to the equity courts, however, the persons applying for their aid stood in the position of asking them to restrain the dower claimants from prosecuting their common law rights because of a provision for the wife which as a conveyance of property was valid, but as a legal bar to dower was a mere nullity.⁷ Under such circumstances the courts of equity rightfully applied in its full rigor the maxim that "He who seeks equity must do equity," which in these cases invariably meant that the husband had given the wife something equally as beneficial to her as her dower rights

⁴ 2 Blackstone, 137, Lewis' Edition.

⁵ 2 Blackstone, 137, Lewis' Edition.

⁶ *Logan v. Phillips*, 18 Mo. 22; Pulling's Estate, *supra*.

⁷ Washburn on Real Property, 508.

would have been.⁸ This was done, as clearly appears, not because the courts of equity then had, or now have, the right to make contracts for parties but because they then had and now have the undoubted right and power to require from those seeking their aid that they shall do towards the adverse party what conscience requires of them to do. When, however, the transaction was not merely a provision by the husband for the wife but was an agreement between the two entered into before marriage, the courts upheld it as a contract.⁹

DOWER BARRED ON THREE GROUNDS.

There were therefore at least three different grounds upon which ante-nuptial settlements were upheld after the passage of the statute, to wit: First. Those that were strictly within the terms of the statute were held to be legal bars to dower; Second. Those that were not strictly within the terms of the statute but might nevertheless be considered equally as beneficial to the wife, were equitable bars to dower; Third. Those that rested upon the express agreement of the parties were considered valid contracts and were equally effective to bar dower.

A CONTRACT ONLY?

Are these contracts on the same footing as all contracts, or are they in a class by themselves the validity of which shall be determined only according to the rules which the courts of equity have applied to jointures? It must be confessed that the majority of the courts of this country have leaned strongly to the latter view, though, as I contend, erroneously. A careful examination of the origin of these contracts will reveal the error indicated as well as the principle which ought to govern.

A TECHNICALITY REMOVED.

The reason given by the courts for the rule that a wife could not by any ante-nuptial arrangement bar her dower rested on purely technical grounds. These were: First. At common law no person could bar himself of any right or title to land by

⁸ *Murphy v. Murphy*, 12 Oh. St. 407; *Daniler v. Daniler*, 1 Vern. 724; *Mundy v. Mundy*, 2 Ves. Sen. 122.

⁹ *Caruthers v. Caruthers*, 4 Bro. C. C. 507 (512-513); *Dyke v. Randell*, 2 DeGex, G. & M. 209; *Buckinghamshire v. Drury*, 2 Eden 69; *Tudor's Cases*, 4th Ed., page 120; *Washburn on Real Property*, 506.

receiving any collateral thing in satisfaction, unless he had actually executed a release; Second. Because until married, a woman could not execute a valid release of property of her contemplated husband, to which she had till then no title.¹⁰ The statute swept this technicality away, and thereby provided a way whereby a wife could be barred of her dower, legally, without her consent, and also a way whereby the wife by her own act could bar her dower.

DRURY V. DRURY.

One of the earliest cases to come before the courts upon this question was the case of *Drury v. Drury*, 2 Eden, 39, and the appeal thereof, *Buckinghamshire v. Drury*, 2 Eden, 61. This case was decided about the year 1762. It was a case where the wife, a minor at the time, agreed to accept a certain provision for herself in lieu of dower. Upon the death of her husband she insisted that being an infant when the agreement was executed she was not bound by it. The case was finally decided by the House of Lords. The six judges who gave their opinions to the House of Lords were not agreed: one view being that the transaction was a contract and not of such a nature as to bind the infant; the other view being that the transaction was not a contract but a provision by the husband for the wife's support, and as infants were included in the terms of the statute she was bound. The final decision was that the agreement was a bar to dower, a provision and not a contract, and the assent of the wife was held not to be an operative circumstance, though the agreement was signed in the presence of her guardian.

Nearly a century later, in 1852, the case of *Dyke v. Randell*, 13 Eng. L. & E. Rep. 411, 2 De Gex, M. & G. 209, came before the courts. In this case, by a marriage settlement made on the marriage of an adult female it was declared that in consideration of the intended marriage and "for providing a competent jointure and provision maintenance for the wife and the issue of the marriage," that the father of the husband had given him 3,000 pounds, and that the husband had given a bond for the payment of 2,000 six months after the marriage, to be settled on trusts for the benefit of himself and his wife, and the issue of the marriage. During coverture the husband bought certain lands, which he subsequently sold to a purchaser through whom defendant derives title with notice of the settlement. The hus-

¹⁰ *Rieger v. Schaible*, 115 N. W. 560, 17 L. R. A. (N. S.) 866 (Neb.).

band had become unable to pay the bond, and his widow sought dower. In this case the Lord Chancellor said:

"It was soon settled that what was not a legal bar might be made an equitable bar, the ground of this equitable bar being contract; this did not proceed on any analogy to the legal bar. As to the authorities they are very few. The rule of the court is, I think, correctly stated by Lord Alvarley in *Caruthers v. Caruthers*, that an adult female may take anything in bar of dower, that she may take a provision out of the personal estate, or even a chance in satisfaction for her dower, acting with her eyes open. This court disregards the nature of the property and the quantum, and therefore, an equitable bar has none of those qualities which attach to a legal bar; it is on contract only, as laid down by Lord Redesdale in the case of *Birmingham v. Kirwin*, 2 Sch. & Lef. 444, where his Lordship observes: 'The principle then that a wife cannot have both dower and what is given in lieu of dower being acknowledged at law as well as in equity, the only question in such cases must be whether the provision alleged to have been given in satisfaction of dower was so given or not; if the provision results from contract the question will be simply whether that was part of the contract.' If the present were a jointure operating as a bar under the statute of uses the case would be governed by the 7th section of that statute, but in equity the bar rests solely on contract, and my opinion is that in this court if a woman, being of age, accepts a particular something in satisfaction of dower she must take it with all its faults, and must look at the contract alone, and cannot in case of eviction come against any one in possession of the lands on which otherwise her dower might have attached. This has nothing to do with the performance of covenants and the like."

TWO THEORIES.

Here then are two theories; the first regarding the agreement as a provision, merely, and testing its validity only by equitable rules; the second regarding the agreement as a contract and testing its validity by the rules applicable thereto. It is well to remember, however, that in the case of *Drury v. Drury*, supra, it was not necessary to expressly determine whether the agreement was a provision or a contract: it was possible to sustain it as an equitable jointure, and consequently the question whether it might have been sustained as a contract was not definitely reached, though it seems to have been discussed.

CURRENT VIEW IN UNITED STATES.

I have not found any reason, except the two mentioned above, why a woman about to be married might not at common law make such contract relative to her dower rights as she pleased. The statute of uses swept these away and upon principle dower rights became the subject of contract the same as other property rights. In this country the almost universal view has been that the transaction is a contract. The case of *Naill v. Maurer*, 25 Md. 532 (539), states the usual view: "This, however, is not the case of a settlement or jointure, but of a contract by which the appellee has expressly relinquished all right to claim any estate or interest in the property of her deceased husband; a contract executed in good faith by parties legally competent, and as we have said sustained by a good consideration. Her power to bind herself by such a contract, in equity, must be admitted."

EQUITY MAXIMS APPLIED.

When these ante-nuptial contracts came to be considered by the courts of this country it seems clear that a great many of them failed to distinguish clearly between what was merely a contract to be tested by the rules of law and what might have passed for a jointure under the statute to be tested by the rules of equity. So they assumed in most cases an equitable jurisdiction to look into the provisions thereof to see if they were fair and reasonable. If the provision made for the wife was small in proportion to the means of the husband the contract was generally set aside on the ground that it was "unconscionable." Sometimes these cases arose in a suit by the wife to have the contract cancelled, and sometimes they arose through an appeal by the wife from an order of the court having jurisdiction refusing to assign her dower, or through an appeal by the heir from an order assigning the wife dower. But whichever way the case arose, now that the validity at law of an ante-nuptial contract had been established, the party relying on its validity was not in the position of asking the aid of a court of equity in its enforcement, as was the case in the days of the equitable jointure. The court's jurisdiction was almost always, if not invariably, invoked by the party *resisting* its enforcement. Upon this state of facts, it is submitted that, upon principle, there can be no room for the application of the maxim "He who seeks equity must do equity," nor for the corollary that "Equity will

not lend its aid to the enforcement of an inequitable agreement." If the party relying on its validity was the one applying to the courts for their aid in enforcing the contract, these maxims might apply. But such were not the cases. It is conceived that even a court of equity cannot relieve a person from his promise just because he has made an improvident bargain for himself. When the courts of law, therefore, undertook to inquire into the reasonableness of the provision made for the wife they not only departed from legal principles but sought to apply a maxim of equity where even a court of equity upon principle should not have applied it. And the courts of equity, likewise, fell into error when they undertook to invoke these maxims against a party who was not seeking their aid.¹¹ If every ante-nuptial contract is invalid where the wife does not receive as much as she would under the statute such contracts might as well be dispensed with for their only purpose is to change the provision made for her by statute.

CONFUSION IN THE BOOKS.

In consequence the books are full of cases of this kind where the courts have set aside the contract on the ground that the "consideration is inadequate" or that the contract is "unconscionable" or that the contract is not such a one as "the wife ought to accept" or that the contract is not such a one as a court of equity ought to enforce."¹² A careful reading of many of these cases will reveal that the contract involved in each was rightfully set aside because the presumption of fraud which adhered therein had not been overcome by competent proof, and that the reason stated by the court for its decision was not the ultimate ground upon which the case was decided. This leads to much confusion and uncertainty. Still it is clear that some of these courts have placed these contracts in a class by themselves and maintain the right to inquire into their provisions and to declare them void if their provisions are not fair and reasonable under all the circumstances of the case.

¹¹ *Billings v. Montenegro*, 70 S. E. 779; *Re Devoe's Estate*, 84 N. W. 927; *Ludwig's Appeal*, 101 Pa. St. 536; *McElroy v. Masterson*, 156 Fed. 36.

¹² *Colbert v. Rings*, 83 N. E. 276; *Tilton v. Tilton*, 113 S. W. 134; *Warner v. Warner*, 83 N. E. 630; *Kline's Estate*, 64 Pa. St. 126; 2 Pomeroy Sec. 927.

COURTS EVOLVING THE PRINCIPLE.

From this original position there has been a tendency to recede and most courts now place these contracts on the same footing as other contracts involving fiduciary relationship, where in principle they belong. If the parties that are about to be married have a lawful right to make a contract that shall govern the interest each as a result of the marriage shall have in the property of the other, then, upon principle, the courts are without jurisdiction to review their action or unmake their bargain except for fraud. Courts have in the past exhibited a great deal of tenderness concerning the relation of a man and woman about to be married and this may have been in keeping with the policy of the law when it regarded woman as the weaker vessel and granted her many safeguards for her protection and denied her many privileges for the same reason. But now that the law has given to women full rights the reasoning does not apply. It is hard to see why courts should be more concerned about this relation than that of guardian and ward, or trustee and cestui que trust. In all these relations the parties are allowed to make contracts to suit themselves though the relationship shifts the burden of proof to the guardian or the trustee as the case may be to establish the fairness of the contract. The presumptions arising in cases of this kind are a sufficient protection for the party occupying the least favorable position, not even excepting persons about to be married.

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