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## ASSIGNMENT OF DOWER UNDER MISTAKE OF FACT.

CASE.—A., having been married to B., was deserted by him. He went abroad; and for more than seven years nothing was heard of or from him. Without procuring any divorce, A. was then married to C., and they lived together as husband and wife for some years, and until C.'s death. C. having died intestate, leaving considerable real and personal property, by arrangement between his heirs and A. no administration was taken upon his estate, but it was divided among the heirs; certain real estate, by deed from the heirs, being conveyed to A., in lieu of all her claims to dower, or as a distributee. All this time nothing had been heard of or from B., and he was universally regarded as dead. After this arrangement had been concluded and the division of C.'s property completed, it was discovered that B. was still alive; and thereupon the heirs of C. claimed to recover from her the real estate conveyed to her as aforesaid. All the parties were citizens and residents of Massachusetts, and the real estate in controversy was there situated.

I. At the time of A.'s second marriage the presumption of law was that B. was dead. In the absence of proof to the contrary the law would have acted on this presumption by granting administration of his estate, and vesting his real property in his heirs. And the presumption of law further is that A. supposed B. to be

dead. *Regina* v. *Curgerwen*, 11 Jur. N. S. 984; *Regina* v. *Jones*, 1 Car. & M. 614; *King* v. *Twyning*, 2 B. & Ald. 386; *Greensborough* v. *Underhill*, 12 Vermont 604. And in *Gibson* v. *State*, 38 Miss. 313, this rule was declared where the absence from the state was only for five years; and the presumption in favor of the second marriage was allowed even to overbear the presumption in favor of innocence. The marriage of A. to C. was therefore deemed by the law to be valid when it took place (*Commonwealth* v. *Thompson*, 6 Allen 591), and its invalidity can be shown only by matter *ex post facto*—*i. e.*, by the subsequent discovery that B. was living at the time of such second marriage. But A. and C. having cohabited as man and wife during the lifetime of the latter, we hold that though C. might have had the marriage declared null on proof of the facts, yet the law will not now, after his death, inquire into its validity: *Campbell* v. *Corley*, 31 L. J. Mat. Cas. 60; *Cropsey* v. *McKinney*, 30 Barb. 47. In *Gaines* v. *Hennen*, 24 How. U. S. 553, the Supreme Court of the United States held that the issue of a bigamous marriage contracted by either party in good faith is legitimate. *A fortiori*, therefore, where both parties acted in good faith and on grounds upon which the law itself would have acted, and the marriage was never impeached during the lives of both parties, and all parties concerned have since acted on the supposition of its validity, the court will not now interfere with vested rights to property that have accrued in consideration of such marriage: *White* v. *Lowe*, 1 Redfield Sur. 376. And on this principle, in an anonymous case, 2 Hem. & M. 124, Vice-Chancellor Wood refused to determine the question of a child's legitimacy at the instance of a stranger. The same doctrine was maintained in *Beavan* v. *McMahon*, 5 Jur. N. S. 686, in which, as here, the marriage was claimed to be null. And in Louisiana and Texas it has been held that such a marriage, *bonâ fide* entered into by the parties in ignorance of the existence of the impediment, is not only innocent of crime, but has all the rights, incidents and privileges of lawful marriages: *Lee* v. *Smith*, 18 Texas 141; *Carroll* v. *Carroll*, 20 Id. 731; *Patton* v. *Philadelphia*, 1 La. Ann. 98. Therefore the marriage of A. to C. must now be deemed valid for all the purposes of this question.

II. But even if the marriage ceremony between A. and C. was originally void, and now has no binding force, yet the heirs are estopped from relying on this fact by their arrangement with A.,

and their deed to her reciting this arrangement. The general principles of estoppel by deed will apply here: 2 Smith's Lead. Cas. *456; *Somes* v. *Skinner*, 3 Pick. 52; *Commonwealth* v. *André*, 3 Id. 224; *Francis* v. *Boston & Roxbury Mill Corp'n*, 4 Id. 365; *Gibbs* v. *Thayer*, 6 Cush. 30; *Cutler* v. *Dickenson*, 8 Pick. 386; *Parsons* v. *Gloucester Bank*, 10 Pick. 533; *In re Forsyth*, 11 Jur. N. S. 213. Nor will the court refuse to give effect to the estoppel upon the ground that the heirs of C. made this agreement upon a mistake of fact, unless it appears affirmatively, and not merely hypothetically, that neither the heirs nor A. would have made the agreement if they had known the true state of the case; and *non constat* but that the same arrangement would have been made if all the facts had then been known to all parties, in order to settle the question of law which would then have arisen. The court must enforce the estoppel, unless it would have cancelled the deeds; and that would only be done if fraud were clearly alleged and distinctly proved: *Martin* v. *Westbrook*, 7 L. T. N. S. 449. And this case also comes within the ordinary principles of estoppel *in pais*. Had not the rights of A. as widow of C. been recognised by the heirs, she would not have consented to the amicable settlement of his estate; it would have been thrown into the Probate Court; and she would have obtained, by judicial decree, her dower and her distributive share of the personalty, since at that time the law must have pronounced in favor of her marriage to C. The heirs therefore cannot now be permitted to retract that settlement or to deny its validity, without first putting A. into as good a position as she would have occupied had not such settlement been made; that is, they cannot be heard to deny that A. is entitled to all the rights of a lawful wife of C. It is on this principle that it was decided in *Shattuck* v. *Gragg*, 23 Pick. 88, that a parol assignment of dower is absolutely conclusive upon the party making it, and estops him from denying the right of the dowress to be so endowed. And in this case the settlement made with A. in lieu of dower must at least be equally binding as if it had been a parol assignment of dower, instead of by deed; and therefore certainly the heirs cannot now deny her right to be endowed at all. BRONSON, J., in *Dezell* v. *Odell*, 3 Hill 219, says that to constitute an estoppel *in pais* against a party there must be, first, an admission by the party inconsistent with the evidence which he

proposes to give or the title or claim which he proposes to set up; secondly, an action by the other party upon such admission; and thirdly, an injury to him by permitting the admission to be disproved. Here all these elements concur. See 2 Smith's Lead. Cas. (4th Am. Ed.) 562, Am. note; *Smith* v. *Cudworth*, 24 Pick. 196; *Dyer* v. *Rich*, 1 Met. 180; *Fuller* v. *Boston Ins. Co.*, 4 Met. 206; *Else* v. *Barnard*, 6 Jur. N. S. 621; *Cornish* v. *Abington*, 4 Hurls. & N. 549; *Holding* v. *Elliott*, 5 Id. 117. And on the same principle by which one who has contracted with a corporation as such is estopped to deny its corporate existence (*Worcester Medical Institute* v. *Harding*, 11 Cush. 285; *Stein* v. *Ind., &c., Ass'n*, 18 Ind. 237; *Pocheln* v. *Kemper*, 14 La. An. 308; *Hubbard* v. *Chapel*, 14 Ind. 601), the heirs of C., having made this settlement with A. as legally entitled to dower in C.'s estate, are now estopped to deny that she is so entitled. In *White* v. *Brocaw*, 14 Ohio St. 339, under circumstances much like these a compromise was held to work just such an estoppel as is claimed here.

III. But even if, at the death of C., A. had no right to any portion of his estate, still the settlement between her and the heirs, having been made by all parties in the utmost good faith as a compromise of a right of action supposed by all concerned to be vested in A., cannot now be disturbed in consequence of any discovery which may since have been made that in point of fact A. was not entitled to what all parties then supposed to be her rights. This settlement, having been carried out in full, stands on much stronger ground than a mere executory contract, on the same principle that an accord and satisfaction, though without force while remaining merely executory, becomes binding as soon as carried into effect: *Spring* v. *Lovett*, 11 Pick. 417; *Howe* v. *Mackay*, 5 Id. 44. But an executory contract to pay money is valid where the consideration is only the compromise of a claim upon which the law is doubtful, or even upon which the parties suppose the facts to be doubtful: Metcalf on Contracts 177. The last is exactly this case. And the compromise of a claim is a good consideration for an executory contract, even though litigation has not actually begun, provided there be a reasonable claim which it is *bonâ fide* intended to pursue: Id.; *Cook* v. *Wright*, 1 Best & Smith 559. And in *Stapilton* v. *Stapilton*, 1 Atkins 2, 3 White and Tudor's Lead. Cas. in Eq. *684 (3d Am.

Ed. 380), Lord HARDWICKE held that an agreement entered into on a supposition of a right, or of a doubtful right, even though it afterwards turn out that the right was on the other side, shall be binding, and the right shall not prevail against the agreement of the parties; for the right must always be upon the one side or the other; and therefore the compromise of a doubtful right shall be a sufficient foundation for an agreement. And the same principle has been ever since fully maintained. 2 White and Tudor's Lead. Cas. in Eq. (3d Am. Ed.) 388, 406; 1 Story Eq. Jur., § 131 *et seq.*; 1 Parsons on Contracts (5th Ed.) 438; *Lucy, ex parte*, 4 De G., MacN. & G. 356; *Adams* v. *Sage*, 28 N. Y. 103; *Thompson* v. *Bennett*, 34 Missouri 477. Parsons says, "With the courts of this country prevention of litigation is not only a sufficient, but a highly favored consideration; and no investigation of the character or value of the different claims submitted will be entered into for the purpose of setting aside the compromise, it being sufficient if the parties entering into the compromise thought at the time that there was a question between them." Pars. on Cont. 438. And in *Allis* v. *Billings*, 2 Cush. 19, such a compromise was not allowed to be impeached, even though it was claimed to have been effected by fraud, and that the fraud had been subsequently discovered. Equity will infer family arrangements on slight evidence, and will support them when practicable. *Baylies* v. *Payson*, 5 Allen 473; *Gratz* v. *Cohen*, 11 How. U. S. 1, in which our highest national tribunal refused to set aside a family compromise, even though it appeared to be subject to some doubts as to its fairness; *Wakefield* v. *Gibbon*, 1 Giff. 401; *Willoughby* v. *Brideoak*, 11 Jur. N. S. 524 and (on appeal) 706; *Williams* v. *Williams*, 2 Drew. & Sm. 378; *Partridge* v. *Smith*, 9 Jur. N. S. 742; *Bentley* v. *Mackay*, 8 Jur. N. S. 857 and (on appeal) 1001; *Jenner* v. *Jenner*, 6 Jur. N. S. 1314. And it must be admitted that to refrain from bringing a suit on a real or imaginary cause of action is as good a consideration as to discontinue a well or ill founded suit or defence to a suit already pending. The contrary presumption is absurd on its face, and directly at variance with all the cases which hold that forbearance by a creditor to sue his debtor is a good consideration for a promise by a third person to pay the debt. These heirs will not be allowed to avail themselves of subsequently discovered matters to set aside a compromise which would have been

binding upon the widow at all events; for there can be no doubt that, as required in *Smith* v. *Pincombe*, 16 Jurist 205; *Brook* v. *Mostyn*, 10 Jur. N. S. 1114; and *Greenwood* v. *Greenwood*, 2 DeG., J. & S. 28, there was here an honest disclosure by each party to the other of all such material facts known to either as bore upon the other's title, and that there was no advantage taken by either party of the other's ignorance of such facts. A compromise made under such circumstances will be upheld by the court; and this settlement will therefore be held to have vested in A. a valid title to the property conveyed to her in accordance with it.

And even if A.'s claims to a share in C.'s estate were not sufficiently well-founded to support this settlement as a compromise of a doubtful right (though this opinion would scarcely seem maintainable), it is yet an agreement upon a good consideration, on the principle that any loss or damage to the promisee by acceding to a contract is a good consideration for such contract. Had this matter been referred to the courts at the death of C., they would have decreed to A. her dower and distributive share; she would have proceeded at law but for this agreement; and she has, therefore, lost, by relying on the agreement, just what was intended to be made up for by the agreement: so that the consideration is not only good and valuable, but, if its adequacy could be inquired into, exactly adequate. If therefore this were a mere executory contract, it must now be held valid and binding on the heirs; having been completely executed, it stands on much stronger ground. *Robertson* v. *Gardner*, 11 Pick. 146. And viewing this arrangement simply as a contract made upon a valuable consideration, the heirs of C., if otherwise entitled to rescind it, could do so only by putting A. into as good a position as she occupied before the arrangement was made—*i. e.*, by admitting her right to dower and a distributive share of C.'s estate. That is, they can rescind only by admitting that they have no right to rescind; therefore they cannot rescind at all.

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