

(323 Ill. 323)

VAN KOTEN v. VAN KOTEN. (No. 17435.)(Supreme Court of Illinois. Oct. 28, 1926.
Rehearing Denied Dec. 10, 1926.)**1. Dower** ⇨42—**Husband and wife** ⇨30.

Husband and wife, by postnuptial contract, based on valuable consideration, may release their rights in each other's property and thereby extinguish all rights, including right of dower.

2. Husband and wife ⇨278(1)—**Where spouses are living apart, or can no longer live together with confidence in each other, or separation is necessary for health or happiness, property settlement, fairly and understandingly made, is valid.**

Agreements between husband and wife for separation are not per se invalid, and, where they are living apart, or can no longer congenially live together with confidence and faith in each other, or separation is necessary for health or happiness of one, agreement, fairly and understandingly made, settling their rights in each other's property, is valid.

3. Husband and wife ⇨278(2).

Provision in valid separation agreement that husband will pay wife certain sum, each month for her support is not void as against public policy.

4. Marriage ⇨1.

"Marriage" is a civil contract to which there are three parties—the husband, the wife, and the state—a status based on public necessity.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Marriage.]

5. Husband and wife ⇨4.

Obligation imposed by marriage contract to support wife cannot be abrogated without consent of state.

6. Husband and wife ⇨278(2).

Agreement between husband and wife, material provision of which is that wife release all rights to support, is void as against public policy.

7. Husband and wife ⇨279(2).

Wife, seeking to rescind separation agreement settling property rights, for fraud, must return or tender money received under it.

8. Husband and wife ⇨279(2)—**Wife, bound to return or tender money received under separation contract as condition of its rescission for fraud, made a sufficient tender when she alleged readiness and willingness to repay the sum.**

Wife, bound to return money received under separation contract as condition of rescission for fraud, alleging that she was ready and willing to repay it, made a sufficient tender, as the court might order it paid into court when defendant's rights required it, as condition precedent to granting relief.

Error to Circuit Court, Champaign County; Franklin H. Boggs, Judge.

Bill by Ida Van Koten against Clifford E. Van Koten and others. Decree dismissing the bill, and plaintiff brings error. Reversed and remanded.

Dobbins & Dobbins, of Champaign, for plaintiff in error.

Herrick & Herrick, of Farmer City, for defendant in error.

HEARD, J. November 28, 1921, Clifford E. Van Koten and Ida Van Koten, residents of Champaign, being husband and wife and the parents of a child aged 7 years, entered into a written agreement which, after reciting that the parties thereto had ceased to live and cohabit together as husband and wife, and that it was the desire of the parties to arrange their property interests so that each might relinquish and surrender any and all rights and interest which he or she might have or claim in the property of the other and the wife to relinquish any rights which she might have to future support and maintenance from the husband, provided that, for and in consideration of the premises and of the sum of \$3,000 in hand paid by Clifford E. to Ida Van Koten, and of the deliverance to her of all the household goods and furniture contained in the dwelling house formerly occupied by them, and the payment of all bills for family expenses then outstanding, she thereby released to him all claims, rights, title, or interest from making any claim for support or maintenance in any manner from him. It was further agreed that Van Koten should pay to his wife the sum of \$20 on the first of every month for the care and support of the child, which payments were to continue as long as the child should be in her custody. It was further agreed between the parties that, in consideration of the division and adjustment of the properties, each agreed to and did thereby relinquish any and all future rights which he or she might acquire in any property of the other by reason of the marriage relation, and that, in case any such right or interest arose thereafter, each of the parties agreed to execute and deliver, on request, any and all instruments of conveyance to relinquish such right. After the signing of this agreement Van Koten paid to his wife the sum of \$3,000 and delivered to her the household goods and furniture mentioned in the contract and paid to her each month the sum of \$20 for the support of the child. Thereafter Ida Van Koten filed her bill in chancery in the circuit court of Champaign county against Clifford E. Van Koten, A. L. Schilling, and Lottie Schilling, praying that certain deeds signed by her and Van Koten to the Schillings should be canceled and set aside, and that the agreement of November 28, 1921, between her and Van Koten should be set aside and canceled, and that he should be required to pay to her a just