JOHN MEDUK (*Defendant*) AND BESSIE MEDUK (*Plaintiff*) ... } APPELLANTS; 1957 *Oct. 16

AND 1958 Jan. 28

JOHN SOJA AND ALICE SOJA (*Defendants*) .... } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Dower—Rights of husband under The Dower Act—Absence of consent to sale of wife's homestead—Estoppel—The Dower Act, R.S.A. 1955, c. 90, ss. 2(b)(i), 3(1), 6.

B.M., a married woman, was the registered owner of a house and lot in Edmonton, which was her homestead within the meaning of *The Dower Act*. She accepted an offer in writing to purchase the property "upon execution by the Vendor of necessary conveyances and formal documents required". B.M.'s husband, J.M., did not consent in writing to the making of the agreement. He was asked by the agent, in the presence of the prospective purchasers, whether he would sign the agreement and said he would not since the property belonged to his wife and she could do what she pleased with it.

Held: The agreement was not enforceable by the purchasers and they must deliver up possession of the property to B.M., who, however, must return the deposit paid by them. Apart from the procedural errors in the Courts below, fully set out in the reasons for judgment, the effect of s. 3(1) of *The Dower Act* was that without J.M.'s consent in writing B.M.'s acceptance of the offer was ineffective to form a contract. Even if the doctrine of estoppel could be invoked in the circumstances, there was nothing in the evidence to support an estoppel by matter

*PRESENT: Taschereau, Rand, Locke, Cartwright and Abbott JJ.

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in pais. 15 Halsbury, 3rd ed., s. 338, p. 169, quoted with approval. It was not suggested in argument that the purchasers understood, from anything that was said or done by B.M. or J.M., that the property in question was not a homestead, and the conduct of J.M. and B.M., taken either separately or collectively, could not amount to a representation that in fact J.M. had consented in writing to the sale; indeed the evidence of both purchasers made it clear that they had moved into the property knowing that he had not done so. A transaction expressly forbidden by statute was not rendered valid by the circumstance that the parties to it were all ignorant of the statutory prohibition. The evidence of the purchasers, even if accepted *in toto,* furnished no ground for extinguishing the dower rights of J.M. which, under the combined effect of ss. 2(*b*)(i) and 3(1) of the Act, included the right to prevent a disposition of the homestead by withholding his written consent.

APPEAL from a judgment of the Supreme Court of Alberta, Appellate Division, dismissing an appeal from a judgment of Primrose J. Appeal allowed.

J. W. K. Shortreed and *R. L. Brower,* for the appellants.

W. G. Morrow, Q.C., for the respondents.

The judgment of the Court was delivered by

CARTWRIGHT J.:—This is an appeal from a judgment of the Appellate Division of the Supreme Court of Alberta dismissing an appeal from a judgment of Primrose J., whereby the claim of the appellant Bessie Meduk for possession of a property known as no. 10521-83rd Street in the city of Edmonton was dismissed and the respondents were granted specific performance of an agreement for the sale to them of the said property.

To make clear the questions raised for decision it is necessary to state with some particularity not only the facts but also the procedure followed in the Courts below.

In his reasons the learned trial judge did not set out his findings of fact in detail, but stated that he did not believe the evidence of the appellants and that where there was any conflict he accepted the evidence of the respondents. Consequently in stating the relevant facts I shall give the version of the respondents where it differs from that of the appellants.

The appellants are husband and wife. At all relevant times the appellant Bessie Meduk was the registered owner of no. 10521-83rd Street, which, it is conceded, was her homestead within the meaning of that term as defined in *The Dower Act, 1948* (Alta.), c. 7 (now R.S.A. 1955, c. 90), hereinafter referred to as "the Act".

The respondents made an offer in writing, dated June 14, 1955, to purchase the property in question for $7,700 payable in cash "upon execution by the Vendor of necessary conveyances and formal documents required", possession to be given on June 17, 1955, and adjustments to be made as of that date. On June 15, 1955, a written acceptance of the offer was signed by Bessie Meduk. The offer and acceptance were on a printed form headed "Offer to Purchase and Interim Agreement", on the back of which was printed a form headed "Consent of Spouse" in the wording of Form A in the schedule to the Act. The name of the appellant John Meduk was not filled in on this form and it is common ground that he did not sign it and that he did not at any time consent in writing to the making of the agreement for sale.

Bessie Meduk signed the acceptance at the home of the respondents both of whom were present as were also John Meduk and a real estate agent, Chmelyk. Before she signed there was some discussion and the respondents agreed to pay $2 for a clothes-line and to let the Meduks have one-half of the produce of the garden of the property in question. After signing Bessie Meduk handed the key to John Soja and said that the respondents could move in at any time. Chmelyk asked John Meduk to sign and his evidence as to what occurred is as follows:

On examination-in-chief

Q. Now, you asked Mr. Meduk to sign? A. Yes, I did.

Q. Did he give you any answer, or did he sign? A. He said it is not his property. That is his wife's property and she can do whatever she pleases.

On cross-examination:

Q. Did you know that The Dower Act had to be complied with on the disposition of property? A. Yes sir.

Q. Why was not the dower affidavit taken? A. It was not taken, because usually they do the balance of the papers in the office.

Q. Did you ask Mr. Meduk to sign the interim agreement? Did you ever ask him to sign it? A. Well, I mean, I did not ask him the second time.

Q. Did you ask him to sign it? A. No, I did not, because it was not his property so I did not ask him to sign it.

Q. When you gave the document to his wife to sign, she signed it? A. Right.

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Q. Did you then say to Mr. Meduk, "Will you sign this document?" A. I asked him if he wanted to sign it, and he said, "Well, it is not my property, so I do not have to sign it."

Alice Soja did not testify at the trial but her evidence on examination for discovery, put in as part of the case of the appellant Bessie Meduk, reads, on this point, as follows:

Q. I am showing you an interim agreement marked Exhibit "A". Is that your signature on the agreement? A. That's right.

Q. Mrs. Soja, could you tell us, were you present when your husband signed this? A. I was present.

Q. Were you there when Mrs. Meduk signed this agreement? A. I was.

Q. Was Mr. Meduk present? A. He was.

Q. Did he sign the agreement? A. No.

Q. Did anyone ask him to sign the agreement? A. Yes.

Q. Who asked him? A. The agent.

Q. What did he say? A. He just asked him to sign it and he said he wasn't going to.

John Soja's evidence on this point is as follows:

On examination-in-chief:

Q. And did Mr. Meduk sign? A. No, he never sign.

Q. Did he give any explanation of why he did not sign? Did you hear him give any explanation? A. I hear what he said. He said "I do not have to sign."

Q. What did you think he said? A. He says "It is not necessary to sign it" because it is not his property. He said it is his wife's property.

On cross-examination:

Q. When Mrs. Meduk signed that paper, did her husband sign it? A. Her husband never signed.

Q. He refused to sign it? A. He said it is not necessary. It is no my property.

The respondents moved into the property in question on the night of June 15, 1955, and are still residing there. About a week after they had moved John Meduk gave to John Soja the key to a shed at the back of the property in question and also gave him some blinds which were in the shed. John Soja testified that some time after this John Meduk came to him and said: "We had better leave that deal off, he says, till listing expired. He says we are going to make this deal between ourselves." This proposal was not elaborated. Soja consulted a lawyer as to whether he could "make that kind of a deal" and did not agree to it. Subsequently, "about July 20, 1955", undated notices in writing signed by Bessie Meduk were delivered to each of the respondents, requiring them to quit and deliver up possession of the property in question on August 1, 1955; these notices were accompanied by letters dated July 19, 1955, addressed to each of the respondents. The letter addressed to John Soja read as follows:

> On the 15th day of June, A.D. 1955, you and Alice Soja signed an Interim Agreement whereby you accepted my offer to sell the premises legally described as Lot 5, Block 50, Forest Heights Subdivision, Plan 3829 H.W. and municipally described as 10521-83rd Street.
>
> The Purchase price of $7,700 was to have been paid in cash. More than a month has elapsed and payment has not as yet been made.
>
> This is therefore to inform you that my offer to sell is hereby withdrawn and that the said Interim Agreement is hereby rescinded and cancelled.
>
> Yours truly,
> (Sgd.) Mrs. Bessie Meduk
>
> cc to Morrow & Morrow
> Barristers & Solicitors
> Edmonton, Alberta.

The letter addressed to Alice Soja was the same except that for the words "you and Alice Soja" in the opening sentence the words "you and John Soja" were substituted.

At the opening of the trial a letter from the solicitors for the respondents to the solicitors for the appellants was filed; it reads as follows:

> Further to your letter of July 28th this will confirm our arrangement, firstly, that our clients admit that the formal tender of the full cash balance under their agreement was not made until two days after receipt of your client's notice purporting to cancel the agreement, and, secondly, that you admit that two days following service of the notice above formal tender was made by our clients.

On September 30, 1955, the appellant Bessie Meduk commenced proceedings by way of originating notice, directed to both of the respondents, claiming an order for possession and damages. On October 13, 1955, Egbert J. made an order directing the trial of an issue to determine the rights of the parties in and to possession and ownership of the property in question. By arrangement between the solicitors for the parties pleadings were delivered, Bessie Meduk being plaintiff and John Soja and Alice Soja defendants.

In the statement of claim, Bessie Meduk alleged that the respondents had improperly taken possession of the property in question on June 15, 1955, and in spite of repeated demands refused to deliver up possession. The prayer for relief claimed possession and damages.

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The respondents delivered a statement of defence and counterclaim setting out the agreement of June 15, 1955, their readiness and willingness to perform the same and claiming "Specific performance of the said agreement for sale and an Order directing that they are entitled to a conveyance covering the title to the said property."

Bessie Meduk delivered a reply and defence to counterclaim, para. 2 of which is as follows:

> 2. The Plaintiff states that on or about the 14th or 15th day of June, A.D. 1955, an Interim Agreement was executed whereby the Defendants offered to purchase the property described in the Plaintiff's Statement of Claim, but that the provisions of the Dower Act of the Province of Alberta, were not complied with and that the Plaintiff's husband, in the presence of the Defendants, refused to sign the Dower Affidavit required by the Act and still refuses to do so.

As a further defence to the counterclaim it was pleaded that the respondents had been unable to make payment in accordance with the terms of the agreement; but I understood counsel for the appellants to state, on the argument before us, that the defence that John Meduk has never consented in writing to the agreement and refuses to do so was the only one that need be considered.

The respondents delivered a reply to the defence to the counterclaim, paras. 3 and 7 of which are as follows:

> 3. In further reply to paragraph 2 of the Defence to Counterclaim the Defendants state that at all times material to making the Agreement between the Plaintiff and the Defendants the Plaintiff's husband indicated a willingness to sign the Dower Affidavit if, in fact, signature by him was required, and the Defendants state that this is no defence to the Counterclaim of the Defendants.
>
> 7. The Defendants further state in reply to paragraphs 2, 3 and 4 and 5 of the Defence to Counterclaim that The Dower Act is no defence to the present action and that the present Plaintiff has no right in law to plead the said statute as a defence to the present Counterclaim by the Defendants: and pleads estoppel.

At the commencement of the trial counsel for the respondents asked leave to amend by adding at the end of para. 7, quoted above, the words: "and pleads further that the plaintiff is estopped from setting up this statute as a defence." Counsel for Bessie Meduk stated that he had no objection and the amendment was allowed.

In his reasons for judgment the learned trial judge said in part:

Having considered the authorities cited by counsel, I hold that this was a voidable agreement and that the plaintiff is estopped from denying the validity of the agreement in favor of the defendants, who are innocent purchasers. It would be inequitable to assist the plaintiff in avoiding specific performance of the agreement and her reliance on the Dower Act was a patent attempt to escape liability.

The formal judgment directed specific performance and concluded with the following paragraph:

IT IS FINALLY ORDERED AND ADJUDGED that failing delivery of a registrable conveyance by the Plaintiff to the Defendants, the Defendants may apply on two days' notice to this Honourable Court for an order cancelling the Plaintiff's title to the lands covered by the aforesaid agreement for sale in favor of the Defendants.

Bessie Meduk appealed. Her appeal was heard on May 8, 1957, and judgment was reserved. On May 10, 1957, the Appellate Division made an order in the following terms:

IT IS HEREBY ORDERED that the husband of the plaintiff be added as a party defendant and that a copy of this Order be served upon him by the solicitor for the defendants.

THAT inasmuch as the vesting order was made without the husband being a party, the vesting provisions of the judgment of Primrose J. shall be stayed for thirty days after service of this Order to permit the husband to launch appropriate proceedings to establish that the agreement should be set aside because of the absence of his consent under The Dower Act. In such proceedings the respondents shall be entitled to plead *inter alia* that the husband is estopped by his conduct of setting up his claim to dower. In the event such claim is not proceeded with by the husband, or is resolved against him, the appeal stands dismissed. In the event of his success in such proceedings, the present appeal shall be further spoken to.

The respondents shall have the costs of the trial and the costs of this appeal may be spoken to after the question above set out has been determined.

On August 19, 1957, a formal judgment of the Appellate Division was entered. In this for the first time the name of John Meduk appears in the style of cause, in which he is described as "JOHN MEDUK joined as a party defendant by order of the Court appealed from [*sic*], Defendant". The judgment reads as follows:

THIS IS TO CERTIFY that the appeal of the above-named Appellant from the Judgment of The Honourable Mr. Justice Neil Primrose, of the Supreme Court of Alberta, pronounced on the 10th day of December, A.D. 1956, having come to be argued before this Honourable Court on the 8th day of May, A.D. 1957, whereupon and upon hearing Counsel as well for the Appellant as for the Respondent, this Court was pleased to reserve judgment until May 10th, 1957, whereupon, on May 10th, 1957, this Court was pleased to grant an Order directing that the vesting provisions of the

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adjudgment appealed from be stayed for thirty days after service of the said Order of May 10th, 1957, upon John Meduk, husband of the Plaintiff (Appellant) for the purpose of permitting the said John Meduk to launch appropriate proceedings to establish that the agreement forming the subject matter of the lawsuit be set aside because of the absence of his consent under The Dower Act, failing the proceedings being taken by the said John Meduk or in the event the proceedings, if taken, be resolved against him, the appeal should stand dismissed, the said Order further providing that the Respondent should have the cost of the trial in any event, the cost of the appeal to be spoken to after the disposition of the above with respect to John Meduk, whereupon following the service of a copy of the aforesaid Order of May 10th, 1957, upon said John Meduk and the said John Meduk being noted in default of any appearance on the 17th day of June, A.D. 1957, whereupon this Court was pleased to settle the question of costs of the appeal on the 18th day of July, A.D. 1957;

IT WAS ORDERED AND ADJUDGED that the said appeal should be, and the same was, dismissed with costs.

With respect, there appear to me to be grave objections to the procedure followed in the Appellate Division.

As John Meduk had not consented in writing to the making of the agreement of sale and had not given the acknowledgment required by s. 6 of the Act, it was necessary to enable the respondents to acquire a registered title in fee simple to the property in question that they should obtain an order vesting the title in them and extinguishing not only the title of Bessie Meduk but also the dower rights of John Meduk. The counterclaim amended simply by adding the name of John Meduk as a defendant did not disclose any cause of action against him. It is difficult to see what proceedings John Meduk could appropriately take in the circumstances. The order of May 10, 1957, does not provide that he is to be served with the amended counterclaim. It does not provide for any amendment of the counterclaim to set out the grounds on which relief is claimed as against him, unless the permission given to the respondents to plead *inter alia* that he was estopped by his conduct from setting up his claim to dower is to be construed as an order permitting an amendment of the counterclaim. The order appears to contemplate John Meduk initiating proceedings of some sort, in defence to which the respondents would be free to plead such matters as they might choose including estoppel. The cases to which counsel referred in which parties were added for the first time in appellate Courts furnish no precedent for an order such as was made in the case at bar, and I know of none.

However, I do not find it necessary to pursue this question as, even on the assumption that the pleadings had been amended so as to set up every claim for relief to which it was argued before us that the respondents were entitled, it is my opinion that on the evidence their claim could not succeed.

The wording of the order of May 10, 1957,—"to permit the husband to launch appropriate proceedings to establish that the agreement should be set aside"—indicates that the order was founded upon the erroneous assumption that there was an agreement in existence. No doubt the acceptance by Bessie Meduk of the respondents' offer would have formed a contract if the property had not been the homestead, but, since it was so, the making of the agreement by her without the consent in writing of her spouse was expressly forbidden by s. 3(1) of the Act and unless John Meduk did consent in writing, her acceptance was ineffective to form a contract.

The submission of the respondents is that both Bessie Meduk and John Meduk are estopped by reason of their conduct from averring that John Meduk did not give the required consent. For the purposes of this branch of the matter I will assume, without deciding, that the doctrine of estoppel could be invoked to render valid a transaction which the Legislature has expressly forbidden, but even on that assumption, it is my opionion that the submission of the respondents fails.

The general rule as to estoppel by matter *in pais* is satisfactorily stated in Halsbury's Laws of England, 3rd ed., vol. 15 (1956), s. 338, p. 169, as follows:

> Where one has either by words or conduct made to another a representation of fact, either with knowledge of its falsehood, or with the intention that it should be acted upon, or has so conducted himself that another would, as a reasonable man, understand that a certain representation of fact was intended to be acted on, and that the other has acted on the representation and thereby altered his position to his prejudice, an estoppel arises against the party who made the representation, and he is not allowed to aver that the fact is otherwise than he represented it to be.

It was not suggested in argument that the respondents understood from anything that was said or done by the appellants that the property in question was not the homestead and there was no evidence sufficient to support such an argument had it been made.

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It being admitted that the property in question was the homestead, the fact which, unless the appellants are estopped from averring it, is fatal to the respondents' claim is that John Meduk has never consented in writing to the sale. It is argued that the conduct of John Meduk in stating that it was not necesary for him to sign, in standing by while Bessie Meduk gave the respondents permission to move into the property, in handing the key to the shed to John Soja, and in making the proposal as to "leaving the deal off" until the listing expired, and the failure of either Bessie Meduk or John Meduk to assert the dower rights of the latter until the delivery of the defence to the counterclaim, are circumstances sufficient to raise an estoppel; but, whether taken separately or collectively, they do not amount to a representation that in fact John Meduk had consented in writing to the sale, and indeed the evidence of both John Soja and Alice Soja makes it clear that they moved into the property knowing that he had not done so.

The evidence is consistent with the view that all the parties acted in ignorance of the provisions of the Act and that on learning of them from her solicitors Bessie Meduk set them up in the defence to the counterclaim, the first occasion on which, as a matter of pleading, it became necessary for her to do so. A transaction expressly forbidden by statute is not rendered valid by the circumstance that the parties to it were all ignorant of the statutory prohibition.

In my opinion, the evidence of the respondents, accepted *in toto*, furnishes no ground for extinguishing the dower rights of John Meduk which, under the combined effect of s. 2(*b*)(i) and s. 3(1) of the Act, include the right to prevent disposition of the homestead by withholding his consent in writing. I conclude that the appeal must succeed.

Counsel for the appellants stated in answer to a question from the bench that, in the event of the appeal succeeding, their claim for damages would not be pressed. The respondents are, in my opinion, entitled to the return of their deposit.

For the above reasons, I would allow the appeal, set aside the judgments below, and direct that judgment be entered providing, (i) that the respondents deliver up possession of the property in question to the appellant Bessie Meduk, (ii) that the claim of the appellant Bessie Meduk for damages be dismissed without costs, (iii) that the appellant Bessie Meduk repay to the respondents the sum of $500, the amount of their deposit, without interest, (iv) that the counterclaim be dismissed, and (v) that the appellants recover from the respondents their costs throughout.

Appeal allowed with costs throughout.

Solicitors for the plaintiff Bessie Meduk, appellant: Shortreed, Shortreed & Stainton, Edmonton.

Solicitors for the defendant John Meduk, appellant: Brower & Johnson, Edmonton.

Solicitors for the defendants John Soja and Alice Soja, respondents: Morrow, Morrow & Reynolds, Edmonton.