

CANADA / JUDGMENT

Senstad v. Makus

[1978] 2 SCR 44

COURT

Supreme Court of Canada

DECIDED

30 September 1977

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Senstad v. Makus

Collection

Supreme Court Judgments

Date

1977-09-30

Report

[1978] 2 SCR 44

Judges

Laskin, Bora; Martland, Ronald; Judson, Wilfred; Ritchie, Roland Almon; Dickson, Robert George Brian

On appeal from

Alberta

Subjects

Property law

Decision Content

Supreme Court of Canada

Senstad v. Makus, [1978] 2 S.C.R. 44

Date: 1977-09-30

Jorn Senstad (Plaintiff) Appellant;

and

Alfred William Makus (Defendant) Respondent.

1977: May 5; 1977: September 30.

Present: Laskin C.J. and Martland, Judson, Ritchie and Dickson JJ.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Real property—Dower—Disposition of homestead with written consent of spouse—Failure of wife to acknowledge consent as required by statute—Valid and enforceable contract for purchase of lands in question—The Dower Act, R.S.A. 1970, c. 114, ss. 3(1), 6.

The appellant agreed to purchase from the respondent, and the vendor agreed to sell to the purchaser, five quarter-sections of land in the Province of Alberta. The agreement was in the form of an offer to purchase, signed by the purchaser. The vendor signed the acceptance of the offer.

One of the quarter-sections was the homestead of the vendor within the meaning of s. 2(c) of The Dower Act, R.S.A. 1970, c. 114. Section 3 of the Act prohibits the disposition by a married person of his homestead without the written consent of the spouse. The vendor's wife signed a written consent to the disposition of the homestead and this consent met the requirements of s. 5. The vendor refused to carry out the agreement, contending that he was not obligated to do so because his wife had not made an acknowledgment of her consent pursuant to s. 6.

The purchaser brought action against the vendor seeking a declaration that the agreement was a binding contract. The trial judge, after reviewing the authorities, concluded that as the disposition by the husband had the written consent of the wife, the prohibition contained in s. 3 did not apply so as to make the agreement incapable of enforcement. He granted a decree for specific performance and awarded damages in the amount of \$5,000. The judgment was reversed on appeal; the Appellate Division was of the view that the agreement was ineffective in the absence of an acknowledgment under s. 6. An appeal to this Court followed.

Held: The appeal should be allowed.

The agreement is only ineffective by virtue of s. 3(1) of the Act if it is made in breach of the prohibition. All that s. 3(1) says is that a disposition of the homestead by a married person is prohibited in the absence of written consent by the spouse. The Act does not provide that a written consent is no consent unless acknowledged under s. 6. Section 6 imposes an obligation on the spouse of a married person who executes a consent to acknowledge that consent, but it is a consent, nonetheless, even if it has not been acknowledged.

The purpose of the requirement of acknowledgment in the present Act is to prevent the spouse from challenging the validity of his or her consent. If a disposition of the homestead is made, carrying the written consent of the spouse, but there is no acknowledgment, or an improper acknowledgment, the validity of the consent, and therefore of the disposition, is open to attack on the ground that the spouse was not aware of the nature of the disposition, was not aware of the dower rights conferred by the Act, did not appreciate the effect of the consent, or did not give a free and voluntary consent without compulsion. The written consent is *prima facie* valid, but it

may be attacked on any of these grounds if there is not a s. 6 acknowledgment.

An acknowledgment, as evidence that the consent was freely and voluntarily given, with knowledge of the rights involved, is required to enable the Registrar to register a transfer under the provisions of s. 7. In this way he is assured, before registering the transfer, that there has been a consent to the agreement for sale which is not subject to possible attack.

In the present case the wife did not testify. No evidence was presented to show that her consent was not a genuine consent. On the contrary, there was evidence that on more than one occasion she expressed to the purchaser and to others her pleasure in knowing that he was going to take the farm.

The purchaser had a valid and enforceable contract for the purchase of the lands in question and the trial judge could properly order specific performance of it in the manner which he did.

McColm v. Belter, [1975] 1 W.W.R. 364; Choma v. Chmelyk, [1918] 2 W.W.R. 382; Overland v. Himelford, [1920] 2 W.W.R. 481; Johnsen v. Johnsen, [1922] 2 W.W.R. 272; Re Miller Estate, [1928] 3 W.W.R. 643; Spooner v. Spooner and Leyton, [1939] 1 W.W.R. 734, aff'd [1939] 2 W.W.R. 237; Reddick v. Pearson, [1948] 2 W.W.R. 1144; McColl-Frontenac Oil Co. v. Hamilton, [1953] 1 S.C.R. 127; Pinsky v. Wass, [1953] 1 S.C.R. 399, Meduk v. Soja, [1958] S.C.R. 167; British American Oil Co. v. Kos, [1964] S.C.R. 167; Martens v. Burden, [1974] 3 W.W.R. 522, referred to.

APPEAL from a judgment of the Supreme Court of Alberta, Appellate Division[1], allowing an appeal from a judgment of Milvain C.J.T.D. ordering specific performance of an agreement of purchase and sale. Appeal allowed.

R.F. Babki and J.W. Legrandeur, for the plaintiff, appellant.

B.G. Carleton and D. Shapiro, for the defendant, respondent.

The judgment of the Court was delivered by

MARTLAND J.—By an agreement of purchase and sale dated January 25, 1974, the appellant, hereinafter referred to as “purchaser”, agreed to purchase from the respondent, hereinafter referred to as “vendor”, and the vendor agreed to sell to the purchaser, five quarter-sections of land, near Wrentham, in the Province of Alberta, for the sum of \$112,000. The agreement was in the form of an offer to purchase, signed by the purchaser. The vendor signed the acceptance of this offer.

One of the quarter-sections was the homestead of the vendor within the meaning of s. 2(c) of The Dower Act, R.S.A. 1970, c. 114, being a parcel of land, other than land in a city, town or village, not exceeding one quarter-section, on which the dwelling house occupied by the vendor as his residence was situated. The vendor’s wife, hereinafter referred to as “the wife”, signed a written consent to the disposition of the homestead. The vendor’s acceptance of the purchaser’s offer and the wife’s consent appeared in the following form:

ACCEPTANCE

I, the undersigned, the owner of the above described property, hereby accept the above offer.

And I, Mrs. Cleo Makus being married to the undersigned Alfred William Makus, do hereby give my consent to the disposition of our homestead, made in this agreement and I have executed this document for the purpose of giving up my life estate and other dower rights in the said property given to me by the Dower Act, 1948, to the extent necessary to give effect to the said disposition.

DATED at Taber, Alberta, this Friday 25 of January A.D. 1974.

A.G. Ingram

Witness

A.W. Makus

Owner

A.G. Ingram

Witness

Mrs. Cleo Makus

Spouse of Owner

Section 3 of The Dower Act prohibits the disposition by a married person of his homestead without the written consent of the spouse. It reads as follows:

3. (1) No married person shall by act inter vivos make a disposition of the homestead of the married person whereby any interest of the married person will vest or may vest in any other person at any time
 - (a) during the life of the married person, or
 - (b) during the life of the spouse of the married person living at the date of the disposition,unless the spouse consents thereto in writing, or unless a judge has made an order dispensing with the consent of the spouse as provided for in section 11.
- (2) A married person who makes any such disposition of a homestead without the consent in writing of the spouse of the married person or without an order dispensing with the consent of the spouse is guilty of an offence and liable on summary conviction to a fine of not more than one thousand dollars or to imprisonment for a term of not more than two years.

Section 5 of the Act deals, inter alia, with the required form of consent and it provides:

5. (1) A consent required for the disposition inter vivos of the homestead shall be contained in or annexed to the instrument by which the disposition is effected and whenever that instrument is produced for registration under The Land Titles Act, the consent shall be produced and registered therewith.
- (2) The consent in writing of the spouse of the married person to any disposition shall, in Form A in the Schedule or to the like effect, state that the spouse consents to the disposition of the homestead and has executed the consent for the purpose of giving up the life estate of the spouse and other dower rights of the spouse in the homestead to the extent necessary to give effect to the disposition. (3) When the consent is contained in the instrument the signature of the spouse to the instrument is a sufficient signature to the consent as well as to the instrument.
- (4) The consent may be contained in or written or endorsed at the end of or at any place on the instrument and the signature of the spouse to the consent is a sufficient signature to the instrument as well as to the consent.
- (5) When the consent is annexed to the instrument, the spouse shall sign both the consent and the instrument.
- (6) The Registrar of Land Titles before registering a disposition of land that is made after the coming into force of this Act, and that
 - (a) does not purport to be consented to under this Act,
 - (b) is not accompanied by an order of a judge dispensing with the consent, and
 - (c) is not covered by a registered and subsisting release of dower rights,shall require an affidavit of the owner, in Form B in the Schedule or to the like effect, supported by any other evidence by affidavit or otherwise as the Registrar may prescribe.
- (7) Notwithstanding subsection (6) where the disposition is executed under a power of attorney, the party executing the disposition, if he is acquainted with the facts, may make the affidavit.

The form of affidavit referred to in subs. (6) is an affidavit by the owner of land that he is not married or that neither he nor his wife have resided on the land in question since their marriage.

The consent of the wife contained in the agreement in question in this case met the requirements of s. 5. The vendor refused to carry out the agreement, contending that he was not obligated to do so because his wife had not made an acknowledgment of her consent pursuant to s. 6 of, the Act, which provides:

6. (1) When the spouse of a married person executes a consent to a disposition as required under this Act or executes a disposition containing the consent, the spouse shall acknowledge apart from the married person

- (a) that the spouse is aware of the nature of the disposition, (b) that the spouse is aware that The Dower Act gives the spouse a life estate in the homestead and the right to prevent disposition of the homestead by withholding consent,
 - (c) that the spouse consents to the disposition for the purpose of giving up, to the extent necessary to give effect to the disposition, the life estate and other dower rights given by The Dower Act in the homestead, and
 - (d) that the spouse is executing the document freely and voluntarily without any compulsion on the part of the married person.
- (2) The acknowledgment may be made before a person authorized to take proof of the execution of instruments under The Land Titles Act, and a certificate of the acknowledgment, in Form C in the Schedule or to the like effect, shall be endorsed on or attached to the disposition executed by the spouse.
- (3) A judge upon being satisfied of the due execution of a consent and the making of an acknowledgment, whether the consent was executed and the acknowledgment made within or without the limits of the Province, may authorize the registration of the disposition notwithstanding that the proof of the execution of the consent or of the making of the acknowledgment is defective.

The purchaser brought action against the vendor seeking a declaration that the agreement was a binding contract. The claim succeeded at trial. Chief Justice Milvain, whose reasons are reported in [1975] 4 W.W.R. 290, concluded, after a careful review of the authorities, that as the disposition by the husband had the written consent of the wife, the prohibition contained in s. 3 of the Act did not apply so as to make the agreement incapable of enforcement. He granted a decree for specific performance and awarded damages in the amount of \$5,000.

The judgment was reversed by the Appellate Division. The reasons of the Court are reported in [1976] 6 W.W.R. 123. The conclusion reached is stated as follows:

With respect I am of the opinion that without an acknowledgment of the consent as required by s. 6 (supra) the agreement was ineffective. The Legislature has expressly provided that the spouse shall acknowledge that the spouse is aware of the nature of disposition, and of the rights given her by the Dower Act and that she "is executing the documents freely and voluntarily without any compulsion". The Legislature has shown by enacting these provisions that it considers all of these matters of importance and effect should be given to each of them. As I have stated, it is unnecessary for me to repeat further reasons for this opinion which are set out in *McColm v. Belter*, supra.

McColm v. Belter and *Belter*[2] was an earlier judgment of the Appellate Division. The facts in that case differed from those in the present case in that in *McColm* there had been no consent, as required by s. 5 of the Act.

The issue to be determined is whether the prohibition contained in s. 3 of the Act applies to a disposition to which the wife has consented in writing if she has failed, as she is required to do, to acknowledge her consent in the manner provided in s. 6.

In reaching a conclusion it is of some assistance to consider the history of The Dower Act. In tracing that history I should like to mention the assistance I have derived from the article by Dr. Wilbur F. Bowker which appears in (1955-61), 1 Alberta Law Review 501.

The first Dower Act in Alberta, which replaced an earlier statute known as The Married Woman's Home Protection Act, 1915 (Alta.), c. 4, was enacted in 1917, 1917 (Alta.), c. 14.

Section 3 of that Act provided that every disposition by act inter vivos of the homestead of a married man whereby his interest vested or might vest during his lifetime, or during the lifetime of his wife, living at the date of the disposition should be null and void unless made with the written consent of the wife.

Section 4 provided that every disposition by will of a married man and every devolution upon his death, intestate, should, as regards the homestead, be postponed to a life estate of the wife declared to be vested in her.

Section 7 stated that when a wife executed any instrument concerning a disposition or consent under the Act, she should acknowledge it, apart from her husband to have been executed of her own free will and accord, without compulsion on the part of the husband. Provision was made for a form of certificate by the person before whom the acknowledgment was made.

The purpose of the Act was to secure to the wife of a married person an interest in the family home. This was accomplished in the manner provided in ss. 3 and 4.

In *Choma v. Chmelyk*[3], which arose out of an agreement for sale of land to which the wife had not consented, Scott J. (as he then was) held that s. 3 of the Act made the agreement null and void only in so far as it affected the wife's dower interest. The agreement was valid and binding in respect of the husband's interest.

Two years later the Appellate Division considered the case of *Overland v. Himelford*[4]. In this case a husband and wife, described as "parties of the first part" in September, 1918, executed a lease of the homestead for the lifetime of the husband and wife or the survivor, the rental to be paid one half to each. They sued to set aside the lease on the ground that the wife had not acknowledged her signature apart from her husband.

On an equal division, the Court upheld the judgment at trial dismissing the action. Those upholding the trial judgment, Harvey C.J. and Beck J., held that the purpose of the Act was to preserve, in the absence of consent, the wife's contingent life interest. She could, by contract, dispose of that interest, which she had done. Stuart and Ives JJ. were of the view that the signature of the deed did not avoid the necessity for her acknowledgment of her consent, and that s. 3 rendered the instrument null and void.

Stuart J. later changed his mind concerning the view which he had expressed and so stated in *Johnsen v. Johnsen*[5], at p. 275. The Dower Act was amended by 1919 (Alta.), c. 40. This amendment confirmed as law the view expressed by Scott J. in *Choma*. It limited the impact of s. 3 to make it applicable only “in so far as it may affect the interest of the said wife in such homestead ...”.

The amending Act also provided, in an addition to s. 6, that “The execution by the wife of any such disposition shall constitute a consent under this Act”.

S.A. 1926, c. 9, amended The Dower Act by deleting from s. 3 the words which had been added to it in 1919. Following this amendment, s. 3 was returned to the same form in which it had initially appeared.

In *In re Miller Estate*[6], Walsh J. held that the effect of the 1926 amendment was to make a disposition without consent absolutely null and void. However, in *Spooner v. Spooner and Leyton*[7], Ewing J. disagreed with Walsh J., regarding the effect of the 1926 amendment, holding that, following the amendment, the earlier decisions as to the effect of s. 3, as originally enacted, were still applicable. This view was sustained by the Appellate Division[8]. The Miller case was overruled. Harvey, C.J.A., added that if the Legislature had intended that s. 3 should receive a different interpretation from that previously given to it, “one would have looked for some such words as ‘absolutely’ or ‘for all purposes’”.

Pausing at this point, it appears that the Alberta Courts were construing the provisions of The Dower Act, in the light of its purpose, to restrict the right to invoke its protection to the wife, to safeguard her interest created under the Act and to preclude the husband from using it, in his own interest, to escape from a bargain which he had made.

In 1942 the Legislature in 1942 (Alta.), c. 51, adopted the wording suggested by Harvey C.J.A. Section 3 of The Dower Act was amended by replacing the words “null and void” with the words “absolutely null and void for all purposes”.

Following this amendment, McLaurin J., as he then was, in *Reddick v. Pearson and Pearson*[9], held to be void an oil and gas lease which had been signed by both Mr. and Mrs. Pearson. The lessee had paid \$700 in monthly instalments, one of which had been acknowledged by the wife, who expressed appreciation for the prompt remittances. When a better offer was received, Mr. and Mrs. Pearson contended that there had not been a consent by her as required by The Dower Act. A commissioner for oaths had certified her acknowledgment of consent, but the husband was present in the room and at the table where the signing was done. There had been no acknowledgment apart from her husband as required by s. 7 (the forerunner of the present s. 6).

In holding the lease void, McLaurin J., referred to the 1942 amendment, and went on to say:

I have arrived at the conclusion that under this Act a stage has been reached where by reason of considerations of public policy it is imperative that the wife's consent to any disposition be given in accordance with the requirements of sec. 7 and that her hearty concurrence otherwise with this transaction does not estop her or her husband from invoking the Act to nullify the lease.

The case of McColl-Frontenac Oil Company Limited v. Hamilton and Hamilton, which ultimately reached this Court, involved a lease made in March, 1947, and facts similar to those in the Reddick case. In this Court^[10], the judgment was in favour of the lessee, but the majority decision was based upon the application of s. 9 of the Act (which does not appear in the present Act) which provided that where a woman joined with her husband in the execution of a contract for the sale of property, or gave written consent to its execution, if the consideration had been totally or partly performed by the purchaser, in the absence of fraud, she would be deemed to have consented to the sale in accordance with the provisions of the Act. As the lessee had drilled a "dry hole" pursuant to the lease and had made rental payments, it was held that the section was applicable.

Kerwin J., as he then was, dissented, holding that the lease was not a contract for the sale of property and that s. 9 was inapplicable. He also said:

It has been held in Alberta that, notwithstanding that the wife of the owner of a homestead may sign the consent, such consent must be given in accordance with s. 7. Considering the objects of The Dower Act, there would seem to be no doubt that this is the correct construction. At one time there was a difference of opinion as to the effect of non-compliance but, in 1942, s. 3 was amended by inserting the word "absolutely" before "null and void" and the words "for all purposes" immediately thereafter, so that it now appears as extracted above.

Estey J., who agreed with the majority of the Court also expressed the view that failure to comply with s. 7 of the Act would have rendered the agreement void, had it not been for the application of s. 9. The other members of the Court, comprising the majority, expressed no view on this issue.

Pausing again at this point, the situation existing after 1942 and prior to the enactment of the new Dower Act in 1948 was that s. 3 of the Act made absolutely null and void any disposition made by a husband of his homestead without his wife's written consent. The form of that consent was not specified. It could be by execution of the disposition. In these circumstances it was concluded by McLaurin J. in Reddick and by two of the judges of this Court in McColl-Frontenac that the acknowledgment of consent by the wife was a vital element in establishing her consent. Without that they felt that s. 3 became operative to render the disposition absolutely null and void.

In 1948, The Dower Act, as it then existed, was repealed and was replaced by a new statute, The Dower Act, 1948 (Alta.), c. 7. An important change was to confer upon the husband of a woman owning the homestead the same dower rights which, formerly, had only been given to the wife of a man owning the homestead.

"Dower rights" were now defined in s. 2(b) as follows:

2. In this Act,
- (b) “dower rights” means all rights given by this Act to the spouse of a married person in respect of the homestead and property of the married person, and without restricting the generality of the foregoing, includes
 - (i) the right to prevent disposition of the homestead by withholding consent,
 - (ii) the right of action for damages against the married person if a disposition of the homestead that results in the registration of the title in the name of any other person is made without consent,
 - (iii) the right to obtain payment from the Assurance Fund of an unsatisfied judgment against the married person in respect of a disposition of the homestead that is made without consent and that results in the registration of the title in the name of any other person,
 - (iv) the right of the surviving spouse to a life estate in the homestead of the deceased married person, and
 - (v) the right of the surviving spouse to a life estate in the personal property of the deceased married person that is exempt from seizure under execution;

I would draw attention to para. (i) of this subsection. The dower right there defined is to prevent a disposition of the homestead by withholding consent.

The 1948 Act, unlike its predecessor, spelled out, in s. 5(2), previously cited, the nature and the form of the written consent to a disposition contemplated by s. 3. Reference is made to Form A contained in the Schedule to the Act. No such form had been provided for in the earlier statute.

Section 3 of the new Act was substantially different from the earlier s. 3. That section, as has previously been noted, dealt with the actual disposition of the homestead, making it absolutely null and void for all purposes, in the absence of written consent. Section 3 of the 1948 Act is directed at the married owner of a homestead, prohibiting such person from disposing of the homestead without the written consent of the spouse. Subsection (2) imposes a penalty for breach of the section.

Section 4(2) of the 1948 Act provides, for the first time, that land ceases to be the homestead of a married person when a transfer by that person is registered in the proper land titles office. It provides as follows:

4. (2) Land ceases to be the homestead of a married person
- (a) when a transfer of the land by that married person is registered in the proper land titles office, or
 - (b) when a release of dower rights by the spouse of that married person is registered in the proper land titles office as provided in section 8, or

- (c) when a judgment for damages against that married person is obtained by the spouse of the married person pursuant to sections 12 to 18 in respect of any land disposed of by the married person and is registered in the proper land titles office.

This means, for example, that if a married person were to transfer title to the homestead, without the consent of the spouse, and had taken an affidavit that neither he nor his wife had resided on the land since their marriage, thus enabling the transfer to be registered, the transfer would not be invalid because of the absence of consent. The transferee would obtain title and the land would cease to be the homestead. In such event, the dower rights of the spouse change. Under s. 12, the transferor is made liable to the spouse for damages equivalent to one-half of the consideration for the disposition, or one-half of the value of the property at the date of disposition, whichever is the greater. Section 14 provides for recourse to the Assurance Fund, created under The Land Titles Act, if payment of the judgment for damages cannot be obtained.

A new section appears, as s. 7 of the Act, dealing with an agreement of sale, which provides as follows: 7. (1) Where a homestead has been sold under an agreement of sale and

- (a) the spouse entitled to dower rights has consented thereto and given the acknowledgment required by this Act, or
- (b) a judge has dispensed with the consent of the spouse to the sale, or
- (c) a subsisting release of dower rights was registered at the time of the execution of the agreement of sale,

no further signature or acknowledgment of the spouse is required upon a transfer of the homestead in fulfilment of the terms of the agreement of sale.

- (2) Upon the transferee filing

- (a) the agreement of sale accompanied by

- (i) the consent in Form A in the Schedule and the acknowledgment in Form C in the Schedule, or

- (ii) the order dispensing with the consent of the spouse, or

- (iii) the consent and acknowledgment required by chapter 206 of the Revised Statutes of Alberta, 1942, if executed before the repeal of that Act,

- (b) a transfer of the land, and

- (c) an affidavit identifying the transferee as the purchaser under the agreement of sale,

and otherwise complying with the provisions of this Act and paying the prescribed fees, the Registrar shall issue a certificate of title in favour of the transferee.

(The emphasis is my own.)

There have been three cases in this Court since the enactment of The Dower Act, 1948, in which the application of s. 3 was raised, but in none of these was the issue in the present appeal involved.

The first was *Pinsky and Pinsky v. Wass and Wass*[11]. The case was determined on the basis of the application of an “escape clause” contained in the agreement. Two of the judges also gave consideration to the application of The Dower Act, the other three thought the Act was inapplicable to the circumstances of the case. In any event, no proper dower consent had been given. *Meduk and Meduk v. Soja and Soja*[12] was a case in which a wife had agreed to the sale of the homestead, but her husband had not given his written consent to the agreement. Cartwright J., as he then was, delivered the reasons of the Court. He decided at p. 175 that “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”.

In *British American Oil Company Limited v. Kos and Kos*[13], the appellant sought foreclosure of a mortgage on a homestead. The wife of the owner had not given any consent to the mortgage. In this case the same reasoning was applied as in the case of *Meduk v. Soja*. The disposition was held to be invalid.

The issue raised in the present appeal was considered in *Martens v. Burden and Burden*[14]. Apparently no appeal was taken from the judgment at trial in that case. The present case is the first one to raise, at the appellate level, the issue of the validity, under the 1948 Dower Act, of an agreement for sale to which the written consent of the wife has been given pursuant to s. 5, but not acknowledged under s. 6.

In considering this question it is desirable to recall that the purpose of this legislation is to provide for the securing, to a spouse, of an interest in the family home by requiring consent to a disposition and by providing for a life interest after the death of the other spouse, the owner of the land. This purpose was recognized by the Alberta Courts in the earlier decisions, previously mentioned, in holding that the owner of the homestead could bind his interest in the land, even though the wife’s interest could not be affected if she had not consented to the disposition. The effect of those earlier cases has been altered by subsequent amendments to the Act, but the purpose of the Act remains the same and if the defined dower rights can be properly protected the Act is not intended to provide a means of escape from an agreement honestly made.

It has already been noted the 1948 Act substantially altered s. 3. The words, applicable to an offending disposition “absolutely null and void for all purposes” were eliminated. Instead s. 3 contains a prohibition against certain defined dispositions by the married owner of the homestead.

Cartwright J. in the passage previously quoted from *Meduk v. Soja* considered the prohibition imposed by s. 3(1), stating that what was forbidden was a disposition of the homestead without the wife's written consent. He added: "... unless John Meduk did consent in writing her acceptance was ineffective to form a contract".

In the present case Mrs. Makus did consent in writing. The 1948 Act, in s. 5, for the first time specifically stated the nature and form of that consent. The consent of Mrs. Makus conformed with that requirement. The Appellate Division was of the view that the agreement was ineffective in the absence of an acknowledgment under s. 6, but, with respect, the agreement is only ineffective by virtue of s. 3(1) if it is made in breach of the prohibition. All that s. 3(1) says is that a disposition of the homestead by a married person is prohibited in the absence of written consent by the spouse.

The Act does not provide that a written consent is no consent unless acknowledged under s. 6. Section 6 imposes an obligation on the spouse of a married person who executes a consent to acknowledge that consent, but it is a consent, nonetheless, even if it has not been acknowledged.

The Act differentiates between consent and acknowledgment. Section 7(1)(a) refers to a spouse entitled to dower rights in a homestead sold under an agreement of sale who "has consented thereto and given the acknowledgment required by the Act". Section 25(2) refers to "consent or acknowledgment". (The emphasis is my own.) What, then, is the purpose of s. 6? This section, or its equivalent has appeared in The Dower Act since its first enactment in 1917. As pointed out previously, McLaurin J., in the *Reddick* case, and Kerwin and Estey JJ. in the *McColl-Frontenac* case felt that a compliance with s. 7 (which preceded the present s. 6) was necessary to establish that a consent had been given. However, both of those cases were decided in relation to the earlier Act.

The position was substantially changed by the 1948 Act. As previously noted, one of the defined dower rights is "the right to prevent disposition of the homestead by withholding consent". The Act then went on, in s. 5, to define what constituted consent.

In my opinion the purpose of the requirement of acknowledgment in the present Act is to prevent the spouse from challenging the validity of his or her consent. If a disposition of the homestead is made, carrying the written consent of the spouse, but there is no acknowledgment, or an improper acknowledgment, the validity of the consent, and therefore of the disposition, is open to attack on the ground that the spouse was not aware of the nature of the disposition, was not aware of the dower rights conferred by the Act, did not appreciate the effect of the consent, or did not give a free and voluntary consent without compulsion. The written consent is *prima facie* valid, but it may be attacked on any of these grounds if there is not a s. 6 acknowledgment.

An acknowledgment, as evidence that the consent was freely and voluntarily given, with knowledge of the rights involved, is required to enable the Registrar to register a transfer under the provisions of s. 7. In this way he is assured, before registering the transfer, that there has been a consent to the agreement for sale which is not subject to possible attack.

In the present case the wife did not testify. No evidence was presented to show that her consent was not a genuine consent. On the contrary, there was evidence that on more than one occasion she expressed to the purchaser and to others her pleasure in knowing that he was going to take the farm. In my opinion the purchaser had a valid and enforceable contract for the purchase of the lands in question and the trial judge could properly order specific performance of it in the manner which he did.

I would allow the appeal, set aside the judgment of the Appellate Division and restore the judgment at trial, with costs to the appellant throughout.

Appeal allowed with costs.

Solicitors for the plaintiff, appellant: Rice & Co., Lethbridge.

Solicitors for the defendant, respondent: Ives and Carleton, Lethbridge.

[1] [1976] 6 W.W.R. 123, 69 D.L.R. (3d) 184.

[2] [1975] 1 W.W.R. 364.

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