

1966  
 \*May 24, 25  
 June 21

MARY LAZARENKO (*Plaintiff by* }  
*counterclaim*) ..... } ... APPELLANT;

AND

RUSSELL BOROWSKY as Administrator  
 of the Estate of Rose Borowsky, de-  
 ceased, and RUSSELL BOROWSKY as  
 Administrator with will annexed (*de*  
*bonis non*) of the Estate of Nicholas  
 Wachniuk, deceased (*Defendants by*  
*counterclaim*) } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

*Domestic relations—Cohabitation in expectation of marriage—Entitlement  
 to property rights of a wife claimed on basis of alleged agreement—  
 Failure to establish intention to enter into binding legal contract.*

One RB, the daughter of W, brought an action for the possession of certain lands and premises which had been transferred to her by her father. She sought possession of the land from the appellant who was in occupation thereof, and who had refused to surrender the same. The appellant, by her defence, claimed the right of possession of the land, and counterclaimed against both the plaintiff and W for a declaration that she was entitled to the property rights of a wife therein by virtue of an agreement between herself and W. In the alternative she claimed compensation, on a *quantum meruit* basis, for housekeeping services performed by her for W.

Initially, the appellant had gone to live with W believing that he was a widower, and that he intended to marry her, although he told her that he was not then ready to marry. After learning that he was not a widower, but a married man, she left him for a brief period, and then returned. There was then talk of a divorce, but again W said he would divorce his wife "when I will be ready". When they first lived together and also after her departure and return, W told the appellant that the land would be hers. W made a will in the appellant's favour but this will was later revoked by a will in favour of his daughter and, prior to his death, W transferred the land to his daughter, who became registered as owner.

The trial judge found that there was an agreement between the appellant and W whereby the latter agreed to give her the land and the household contents to induce her to continue their relationship after she discovered that he was still married. He gave judgment vesting the land in the appellant. On the appeal to the Court of Appeal, the finding of the existence of an agreement was apparently not challenged. The appeal was allowed on the grounds that such an agreement was based upon an immoral consideration, *i.e.*, illicit cohabitation, and was, therefore, void, being contrary to public policy. From that decision the appellant appealed to this Court.

*Held:* The appeal should be dismissed.

\* PRESENT: Fauteux, Martland, Judson, Ritchie and Hall JJ.

The evidence failed to establish an intention on the part of the parties to enter into a binding legal contract whereby the appellant would live and look after W in consideration of his agreement to transfer the land to her, or to pay her some unascertained sum by way of compensation for her services. On the contrary, the true situation was that the appellant was content to accept the lodging provided by W, and to live with him as his wife, in the hope that some day he would marry her and that some day he would give her the land.

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APPEAL from a judgment of the Court of Appeal for Manitoba, allowing an appeal from a judgment of Hall J. Appeal dismissed.

*Sidney Green*, for the appellant.

*G. O. Jewers*, for the respondents.

The judgment of the Court was delivered by

MARTLAND J.:—The proceedings in this case were commenced by Rose Borowsky, the daughter of Nicholas Wachniuk, by virtue of her being the registered owner of certain lands and premises in the City of Winnipeg, municipally known as 756 Mountain Avenue, hereinafter sometimes referred to as “the land”, which had been transferred to her by her father. She sought possession of the land from the appellant who was in occupation thereof, and who had refused to surrender the same.

The appellant, by her defence, claimed the right of possession of the land, and counterclaimed against both the plaintiff and Wachniuk for a declaration that she was entitled to the property rights of a wife therein by virtue of an agreement between herself and Wachniuk. In the alternative she claimed compensation, on a *quantum meruit* basis, for housekeeping services performed by her for Wachniuk.

Both Wachniuk and Rose Borowsky died after the proceedings were commenced and prior to the trial. The respondent is the administrator of the estates of both of them.

The only evidence at trial of any importance was that of the appellant, which was accepted by the learned trial judge. She stated that she had met Wachniuk in August, 1960, at an auction sale. At that time she was a widow, and was living with her daughter and the daughter's family. She was then 65 years of age. Her only income was the widow's allowance and she paid her daughter \$20 a month

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for her room and board. Wachniuk was then over 70 years of age.

The appellant says that she told him she was a widow and that he told her he was a widower and that he wanted to get married. He said that he wanted her for his wife.

She was then asked the following questions and gave the following answers:

Q. Did he tell you what this would involve, what you would have to do?

A. That he would have a wife for his house.

Q. Did he say anything about his house?

A. He said it will be mine.

Q. What happened as a result of this meeting?

A. He said to get married he wasn't ready then.

The appellant went to live with Wachniuk on September 1, 1960. When asked whether there was any discussion of marriage, she said he kept speaking continuously about that, that he said they would get married, but "he wasn't ready yet".

About a month later, the appellant learned that Wachniuk was still a married man, his wife being still alive. She says that after she learned of this "He said I am unable to marry, but everything is yours."

At some time after the appellant learned that Wachniuk was not free to marry her, and, according to her evidence, because of this, she left Wachniuk and returned to her daughter's house for a period which she estimated, in direct evidence, as three days, and, on cross-examination, as three weeks. However, at his request, she returned to him. The evidence does not disclose that, at this time, he made any new promise regarding the land in order to induce her to return to him. He did tell her that he was going to divorce his wife "When he will be ready."

Later Wachniuk fell ill, and the appellant says that she looked after him until, on May 5, 1963, he went to hospital on his doctor's orders. On his release from hospital, on May 17, he went to live with his daughter, Rose Borowsky. He went back to hospital on August 22 and died on November 20, 1963.

On February 14, 1963, Wachniuk made a will which, after devising certain property, other than the land, to his

daughter, left the residue of his estate to the appellant. Her evidence as to this is as follows:

Q. Did you talk to Mr. Wachniuk about your rights?

A. Yes, I was speaking.

Q. What was said?

A. I told him and he said, "Don't worry about it. Where you are you will remain there."

Q. Did he do anything?

A. Yes, he did.

Q. What did he do?

A. He made a Will.

Q. How did this come about?

A. He said, "if you are not certain with me I will make you a Will."

Q. What did he do?

A. I went and he made me a Will.

This will was later revoked by a will in favour of his daughter and, prior to his death, Wachniuk had transferred the land to his daughter, who became registered as owner.

The foregoing is a summary of the appellant's evidence respecting her rights to the land. The learned trial judge found there was an agreement between the appellant and Wachniuk whereby the latter agreed to give her the land and the household contents to induce her to continue their relationship after she discovered that he was still married. He gave judgment vesting the land in the appellant.

Apparently the finding of the existence of an agreement was not challenged on the appeal to the Court of Appeal. The appeal was allowed on the grounds that such an agreement was based upon an immoral consideration, *i.e.*, illicit cohabitation, and was, therefore, void, being contrary to public policy.

From that decision the appellant appealed to this Court.

I have carefully examined the appellant's evidence. In my opinion, even if it is accepted completely, as it was by the learned trial judge, it fails to establish the making of a legal contract which would entitle the appellant either to obtain title to the land, or compensation on a *quantum meruit* basis.

The evidence is that, initially, the appellant went to live with Wachniuk believing that he was a widower, and that

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he intended to marry her, although he told her that he was not then ready to marry. After learning that he was not a widower, but a married man, she left him for a brief period, and then returned. There was then talk of a divorce, but again Wachniuk said he would divorce his wife "when I will be ready".

The appellant was apparently content to live with Wachniuk on the basis of these rather vague assurances as to his intent, some time in the future, to marry her.

I have already referred to the appellant's evidence respecting the land. When they first lived together, and Wachniuk told her he wanted her for his wife, he said to her that "it will be mine". After her departure and return "He said I am unable to marry but everything is yours." There is some evidence of other like statements. They amount to nothing more than an expression as to future intent, and the appellant was content to live with Wachniuk without anything further.

Wachniuk did get as far as making a will in the appellant's favour, which does establish that, at the time he made it, he did intend that the appellant should have the land after his death. Later he apparently changed his mind and this will was revoked.

In my opinion all of this evidence fails to establish an intention on the part of the parties to enter into a binding legal contract whereby the appellant would live with and look after Wachniuk in consideration of his agreement to transfer the land to her, or to pay her some unascertained sum by way of compensation for her services. On the contrary, the true situation was that the appellant was content to accept the lodging provided by Wachniuk, and to live with him as his wife, in the hope that some day he would marry her and that some day he would give her the land. We do not know what Wachniuk's intent was, as his death prevented his giving evidence. But on the appellant's own evidence I do not find that any of his statements to her were anything more than expressions of intent. They were not made in contemplation of legal consequences in the form of a binding contract. In view of this conclusion it is unnecessary to consider the question as to whether a

contract of the kind alleged by the appellant would be void  
as against public policy.

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In my opinion the appeal should be dismissed with costs.

*Appeal dismissed with costs.*

*Solicitors for the appellant: Mitchell, Green and Minuk,  
Winnipeg.*

*Solicitors for the respondents: Fillmore, Riley & Co.,  
Winnipeg.*

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