THE BRITISH AMERICAN OIL COMPANY LIMITED (*Plaintiff*) APPELLANT;

AND

JAROSLAW KOS AND HAZEL KOS (*Defendants*) ..... RESPONDENTS.

1963
*Oct. 30
Dec. 16

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Real property—Homestead mortgage executed in owner's name by brother —False declaration as to consent of wife—Estoppel not established—Mortgage invalid—Dower Act, R.S.A. 1955, c. 90.

The defendant, the registered owner of a homestead, applied to the plaintiff company for a loan to assist in financing the construction of a building on the property. The company prepared a mortgage and an agreement for loan for execution by the defendant owner and, in his absence, the company's agent had the owner's brother sign these documents in the owner's name. An affidavit purporting to be that of the owner, stating that neither he nor his wife had lived on the land since their marriage, was completed on each document and the certificate of acknowledgment under *The Dower Act*, R.S.A. 1955, c. 90, was completed and signed by a commissioner of oaths, although the owner's wife was not present. Her name was signed by the brother's wife after the documents had left the commissioner's office. The mortgage was registered by the plaintiff under *The Land Titles Act*, R.S.A. 1955, c. 170. The wife admitted that she was aware that her husband was applying for a loan and also that she had been told that her name had been signed on some papers. She found either a copy of the mortgage or of the agreement for loan among some papers of her husband's about a year later and then noticed her "signature" on it. At that time the last of the advances by the plaintiff had long since been made.

In an action of foreclosure the trial judge held that the owner was estopped from denying the validity of the execution of the mortgage and that both he and his wife were estopped from raising the objection that the formalities for consent to the release of dower under *The Dower Act* were not complied with. This judgment was reversed by a unanimous decision of the Appellate Division and the company then appealed to this Court.

Held: The appeal should be dismissed.

Sections 4 (2)(a) and 12(1) of *The Dower Act*, which contemplate that certain legal consequences may result in some instances from a disposition by a married person of a homestead made in breach of s. 3, had no application where the disposition was not by way of transfer, but was a disposition by agreement for sale, lease, mortgage or other instrument that did not finally disposed of the interest of the married person in the homestead. Dispositions of this kind were expressly forbidden and there were no provisions in the Act which accorded

*PRESENT: Martland, Judson, Ritchie, Hall and Spence JJ.

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them any validity. The disposition in question here was, therefore, invalid, unless it was open to the appellant successfully to contend that it was entitled to succeed on the grounds of estoppel.

Whether the statutory requirement for a written consent to the disposition of a homesead could be released by estoppel was questionable. However, it was not necessary to determine the point here because no evidence was found on which it could be said that there was any estoppel created which could preclude the wife from asserting her right to refuse consent to the mortgage.

The appellant failed to establish the existence of any duty, as between the wife and itself, which would obligate her to make a disclosure to it of the circumstances which she discovered, even assuming that she then discovered the existence of what purported to be her husband's affidavit falsely stating that the lands had not been the residence of himself or her since their marriage. In the absence of such a duty, no estoppel could be established merely by remaining silent.

The wife was, therefore, properly entitled to set up, as against the company, the absence of any written consent given by her to a disposition of her husband's homestead by mortgage. The fact that the land was the homestead and that no written consent was given by her was fully established. Under these circumstances the mortgage executed in breach of s. 3 had no validity and the appellant's claim to enforce it failed.

Meduk v. Soja, [1958] S.C.R. 167, followed; *Pinsky v. Waas* [1953] 1 S.C.R. 399; *Maritime Electric Co. Ltd. v. General Dairies Ltd.,* [1937] A.C. 610, referred to.

APPEAL from a judgment of the Appellate Division of the Supreme Court of Alberta[1], allowing an appeal from a judgment of Kirby J. Appeal dismissed.

W. G. Morrow, Q.C., and *J. R. Dunnet,* for the plaintiff, appellant.

A. Dubensky, for the defendants, respondents.

The judgment of the Court was delivered by

MARTLAND J.:—The issue in this appeal is as to the validity of a mortgage, dated February 12, 1957, and registered on February 27 of that year, pursuant to *The Land Titles Act,* on the Northwest quarter of Section 9, Township 51, Range 7, West of the 5th Meridian, at Moon Lake, in the Province of Alberta, of which the respondent Jaroslaw Kos is the registered owner. The respondent Hazel Kos is his wife. It is conceded that this land is their homestead within the meaning of *The Dower Act,* R.S.A. 1955, c. 90.

[1] (1964), 46 W.W.R. 36, 36 D.L.R. (2d) 422.

The purported execution of this document was effected in unusual circumstances. The respondent Jaroslaw Kos commenced the construction of a garage and filling station on a portion of the quarter-section in the year 1956. On November 7 of that year he applied, in writing, to the appellant for a loan of $12,000, to assist in financing this construction, to be secured by a first mortgage upon the lands described in the application. The description contained in that document referred to:

> N.W. ¼ (Section) .....9..... (Township) .....51.....
> (Range) .....7 W. of 5th M., ... registered in
> the .....Land Titles Office—Edmonton.....
> Frontage of Lot .....400..... feet, Depth of
> Lot .....400..... feet.

The land thus described comprised three acres.

The appellant prepared, for execution by Jaroslaw Kos, a mortgage upon the whole of the quarter-section and an agreement for loan, which referred to the loan of $12,000 to be made on the security of a first mortgage and which contained covenants by the borrower regarding the exclusive sale on the premises of the appellant's products for a period of ten years.

These documents were brought to Moon Lake by one Froeland, an agent of the appellant, to be executed. According to the evidence of Ernest Kos, the brother of Jaroslaw Kos, Froeland inquired as to the whereabouts of Jaroslaw Kos and, finding he was absent, suggested that Ernest Kos should sign them. The evidence of Ernest Kos generally did not impress the learned trial judge as being truthful. However, it is clear from the evidence of one Jensen, a commissioner for oaths called as a witness by the appellant, that both the mortgage and the agreement were signed with the name "Jaroslaw Kos" in his presence and in that of Froeland. At that time, Jensen says, he thought that the signatory was, in fact, Jaroslaw Kos. In fact it appears that both documents were signed by Ernest Kos.

An affidavit was completed on each document in Form B, as provided in *The Dower Act,* purporting to be that of Jaroslaw Kos, stating that he was the mortgagor and that neither he nor his wife had resided on the mortgaged land at any time since their marriage. This affidavit bore the

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signature "Jaroslaw Kos" and that of the commissioner for oaths, Jensen. Beneath the signature "Jaroslaw Kos" there appeared a signature "Hazel Kos". This latter signature is struck out on the affidavit which is part of the mortgage form, but was not struck out on the affidavit which is a part of the agreement for loan form.

Jensen's evidence makes it quite clear that there was no one present at the time the various signatures were placed on these two documents, other than the signatory, Froeland and himself.

On each of the two documents the form of Consent of Spouse, as provided in Form A of *The Dower Act,* had been typed out ready for signature by Hazel Kos, but they were not signed by anyone.

The Certificate of Acknowledgment by Spouse, as provided in Form C of *The Dower Act,* stating that Hazel Kos was aware of the disposition, was aware of her rights regarding the homestead under *The Dower Act* and that she had voluntarily consented to the execution of the document, was completed and signed by Jensen. His signature to this certificate was struck out on the mortgage form, but not on the other document.

There was evidence to the effect that where the signatures "Hazel Kos" appeared on the two documents the actual signatory was Vicki Kos, the wife of Ernest Kos. She did not give evidence at the trial, nor did Froeland. It is, however, clear, from Jensen's evidence, that the signatures of "Hazel Kos" were not placed on the documents until after they had been taken away from his office.

The mortgage was registered by the appellant at the appropriate Land Titles Office. It is clear that the appellant, from the form of the instruments and through the knowledge of its agent Froeland, must have been aware that he had obtained the execution of a mortgage which carried no consent by the mortgagor's wife and that the signature "Hazel Kos" on the affidavit forms had been added after the affidavits had been sworn by Jensen and after the documents had left his office.

The appellant made advances of money, to the amount of the $12,000 applied for, either directly to Jaroslaw Kos or in the form of payments to material men. Jaroslaw Kos had been told by Ernest Kos that the latter had signed his

brother's name to some papers regarding the loan. The appellant filed a caveat in respect of the agreement for loan, of which Jaroslaw Kos had some knowledge. He admitted that he had told his wife he was expecting a loan from the appellant on the garage. At no time did he advise the appellant that he had not actually signed either the mortgage or the agreement.

Hazel Kos admitted that she was aware that her husband was applying for a loan on the garage and also that she had been told by Vicki Kos that the latter had signed Hazel's name on some papers. She found either a copy of the mortgage or of the agreement for loan among some papers of her husband's about a year later and then noticed her "signature" on it.

The appellant commenced action against the respondents claiming a declaration of the amount owing under the mortgage of $13,667.85 as at March 1, 1959, with interest thereafter; judgment for such amount; and, in default, foreclosure of the mortgage.

The learned trial judge decided in the appellant's favour. After stating that none of the defence witnesses impressed him as being truthful and referring to the respondents, he went on to say:

> I am unable to accept their story that Ernest Kos did not sign with the knowledge and authority of Jaroslaw Kos; that they did not know the nature of the documents signed by the Defendant Ernest Kos, using the name Jaroslaw Kos; I am satisfied and find that the Defendant Jaroslaw Kos received the proceeds from the mortgage from the Plaintiff company, knowing that the company advanced them in the belief that they were secured by a mortgage executed by the said Defendant, in which the Dower Act had been properly complied with; that the said Defendant knew that the mortgage had been improperly signed by his brother Ernest Kos, using his signature, and that The Dower Act had not been properly complied with. I am further satisfied and find that the Defendant Hazel Kos shared this knowledge and acquiesced in the conduct of the Defendant Jaroslaw Kos.

He held that Jaroslaw Kos was estopped from denying the validity of the execution of the mortgage and that both he and Hazel Kos were estopped from raising the objection that the formalities for consent to the release of dower under *The Dower Act* were not complied with.

This judgment was reversed on appeal by unanimous decision of the Appellate Division of the Supreme Court of

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Alberta[1], which held that neither of the respondents was estopped from saying that Hazel Kos had not consented to the disposition of the homestead property made in the mortgage. In consequence, the mortgage was not valid by virtue of the provisions of *The Dower Act*. Personal judgment in favour of the appellant as against Jaroslaw Kos was granted. The appellant appeals from the judgment in relation to the mortgage.

The Dower Act of Alberta, in the form in which it now appears, was first enacted by 1948 (Alta.), c. 7. It repealed and replaced an earlier statute, R.S.A. 1942, c. 206, which had provided that a dispositon by a husband of his homestead without his wife's consent was "absolutely null and void for all purposes". The purpose of its enactment appears to have been to prevent conflict in principle between that protection afforded to a wife by *The Dower Act* and that protection afforded to a person relying upon the register under *The Land Titles Act*. It also extended the protection which it afforded to both spouses, and not merely to the wife.

The portions of *The Dower Act* which are relevant to this appeal are as follows:

> 2. In this Act,
>
> (*a*) "disposition"
>
> (i) means a disposition by act *inter vivos* that is required to be executed by the owner of the land disposed of, and
>
> (ii) includes
>
> * * *
>
> (B) a mortgage or encumbrance intended to charge land with the payment of a sum of money, and required to be executed by the owner of the land mortgaged or encumbered,
>
> * * *
>
> (*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,
>
> * * *
>
> (c) "homestead" means a parcel of land
>
> (i) on which the dwelling house occupied by the owner of the parcel as his residence is situated, and
>
> (ii) that consists of

[1] (1964), 46 W.W.R. 36, 36 D.L.R. (2d) 422.

(B) not more than one quarter section of land other than land in a city, town or village;

* * *

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.

4. (1) When land becomes the homestead of a married person it continues to be his homestead within the meaning of this Act until the land ceases to be a homestead pursuant to subsection (2), notwithstanding the acquisition of another homestead or a change of residence of the married person.

(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,

(*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.

12. (1) A married person who without obtaining

(*a*) the consent in writing of the spouse of the married person, or

(*b*) an order dispensing with the consent of the spouse,

makes a disposition to which a consent is required by this Act and that results in the registration of the title in the name of any other person, is liable to the spouse in an action for damages.

* * *

13. (1) Where a spouse recovers a judgment against the married person pursuant to section 12, the married person upon producing proof satisfactory to the Registrar that the judgment has been paid in full may register a certified copy of the judgment in the proper land titles office.

(2) Upon the registration of the certified copy of the judgment the spouse ceases to have any dower rights in any lands registered or to be registered in the name of the married person and all such lands cease to be homesteads for the purposes of this Act.

The effect of these sections is that a married person is expressly forbidden under penalty from disposing of the homestead of that married person without the written consent of the spouse. If, however, notwithstanding the pro-

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hibition contained in s. 3, a transfer of the homestead land by that married person is registered in the proper land titles office, the land ceases to be the homestead of that married person. In such event, the spouse is given a right to recover damages against the married person who made the wrongful disposition. If a judgment is recovered in such an action, and paid in full, a certified copy of the judgment may be registered in the proper land titles office, and, thereafter, the spouse who recovered the judgment ceases to have any dower rights in any lands registered or to be registered in the name of the married person.

It must be noted immediately that, although the apparent purpose of *The Dower Act* of 1948 was to bring the law as to dower into harmony with the basic principles of *The Land Titles Act,* the provisions of s. 4(2)(*a*) and of s. 12(1) are limited to the situation which occurs where a transfer is registered under the provisions of *The Land Titles Act,* thus resulting in the creation of a new title in the name of the transferee. These provisions of *The Dower Act,* which contemplate that legal consequences may result in some instances from a disposition by a married person of a homestead made in breach of s. 3, have no application where the disposition is not by way of transfer, but is a disposition by agreement for sale, lease, mortgage, encumbrance or other instrument that does not finally dispose of the interest of the married person in the homestead. Dispositions of this kind are expressly forbidden and there are no provisions in the Act which accord to them any validity, nor which would afford the non-consenting spouse any remedy in damages.

The effect of s. 3 upon an agreement for sale was considered by Estey J., giving the opinion of himself and Kerwin J. (as he then was), in *Pinsky v. Wass*[1]. He expressed the view that, under the general rule, a contract made in breach of a statutory prohibition would be void, but that, in the light of the provisions contained in ss. 4 and 12, contemplating the registration of a transfer, it was indicated that the Legislature intended that an agreement for sale made in breach of the prohibition should be voidable rather than void.

The other members of the Court did not express any opinion with respect to this point.

[1] [1953] 1 S.C.R. 399 at 405-406, 2 D.L.R. 545.

In 1958 the effect of s. 3 was again considered by this Court in relation to an agreement for sale, in *Meduk v. Soja*[1]. In that case a married woman, the registered owner of land, accepted an offer made to her to purchase the lands. Her husband did not consent in writing to the agreement. He was asked by the real estate agent, in the presence of the prospective purchasers, whether he would sign the agreement and said that he would not, since the property belonged to his wife and she could do what she pleased with it.

Cartwright J., who delivered the unanimous decision of the Court, said at p. 175:

> 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.

In my opinion the same reasoning applies in relation to a disposition of land by way of mortgage, which is made in breach of s. 3. Such a disposition is expressly forbidden by the statute. As previously pointed out, there is nothing in the statute which would purport to give such a disposition any validity whatever. The disposition in question here is, therefore, invalid, unless it is open to the appellant successfully to contend that it is entitled to succeed on the grounds of estoppel.

Whether the statutory requirement for a written consent to the disposition of a homestead could be released by estoppel is, I think, questionable (*Maritime Electric Co. Ltd. v. General Dairies Ltd.*[2]). However, as in the case of *Meduk v. Soja, supra,* I do not think it is necessary to determine the point in this case, because I do not find any evidence on which it could be said that there was any estoppel created in the present case which would preclude Hazel Kos from asserting her right to refuse consent to the mortgage.

The position is that the appellant registered a mortgage upon lands, which are now admitted to be homestead property, knowing that no consent had been given to its registration by the wife of the registered owner. Reliance was placed by the appellant on the affidavit purporting to have been

[1] [1958] S.C.R. 167, 12 D.L.R. (2d) 289.
[2] [1937] A.C. 610.

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taken by Jaroslaw Kos, stating that neither he nor his wife had lived on the land since their marriage, but no representation to that effect was made in such affidavit by Hazel Kos. It is clear that the purported signature of Hazel Kos to that affidavit could not have been made when the affidavit was sworn and that Froeland must have been fully aware of that fact. Furthermore, the name "Hazel Kos" was struck out from that affidavit attached to the mortgage and it must be presumed that it was struck out before the mortgage was registered.

The fact that Hazel Kos knew that her husband was applying for a loan on the garage, that she knew that her name had been placed on some documents by Vicki Kos and that about a year later she discovered her name, either on the mortgage form or on the agreement form, cannot be construed as any representation by her to the appellant that the lands covered by the mortgage were not the homestead of her husband.

I am extremely doubtful whether, upon the evidence adduced in this case, it would be possible to bring home to Hazel Kos actual knowledge, at any relevant time, that a purported affidavit had been made to the effect that the land in question had never been occupied since the marriage by either herself or her husband. The only basis upon which it can be suggested that she obtained any such knowledge would be the evidence as to her discovery, about a year after the mortgage was completed, among her husband's papers, of a paper that looked like a mortgage. That discovery was made at a time long after the last of the advances by the appellant had been made, so that, even if she did acquire that knowledge at that time, any representation which might be inferred from non-disclosure of that knowledge to the appellant did not cause it to act to its detriment in consequence thereof.

In any event, it is my view that the appellant has failed to establish the existence of any duty, as between Hazel Kos and itself, which would obligate her to make a disclosure to it of the circumstances which she discovered, even assuming that she then discovered the existence of what purported to be her husband's affidavit falsely stating that the lands had not been the residence of himself or her since their marriage. In the absence of such a duty, no estoppel can be established merely by remaining silent.

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In my opinion, therefore, the respondent Hazel Kos was properly entitled to set up, as against the appellant, the absence of any written consent given by her to a disposition of her husband's homestead by mortgage. The fact that the land was the homestead and that no written consent was given by her is fully established. Under these circumstances the mortgage executed in breach of s. 3 has no validity and the appellant's claim to enforce it must fail.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the plaintiff, appellant: Morrow, Hurlburt, Reynolds, Stevenson & Kane, Edmonton.

Solicitors for the defendants, respondents: Dubensky & Hughson, Edmonton.