CYRIL McKENZIE and GEORGE McKENZIE (*Plaintiffs*) ..... APPELLANTS;

AND

HENRY BENJAMIN HISCOCK and CHARLES S. DOWIE (*Defendants*) RESPONDENTS.

1967

*May 23, 24, 25 Oct. 3

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Contracts—Agreement to sell half-section of land—Property subsequently sold to third party—Action for specific performance—Quarter-section subject to provisions of The Homesteads Act—Wife's consent to sale not given—Discretionary power to award damages as to remaining quarter-section—The Queen's Bench Act, R.S.S. 1953, c. 67, s. 44(9).

Appeals—Appeal to Supreme Court of Canada—Jurisdiction—Amount in controversy—The Supreme Court Act, R.S.C. 1952, c. 259, s. 36(a).

In an action for specific performance of a contract for the sale by the respondent H to the appellants of the west half of a section of land, the trial judge in dismissing the action held that the negotiations between the parties had never ripened into contract. On September 26, 1961, H had given a signed note, addressed to the appellants, which read: "The price I am asking for the [land] is $13,500. This price is good until Nov. 30th, 1961." Tenders of the said purchase

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

1967

McKENZIE *et al.* *v.* HISCOCK *et al.*

price in cash were made to H on November 17 and November 29, 1961. On October 2, 1961, H and his wife signed an agreement for the sale of the half-section to the respondent D for the price of $14,000 and on October 18, 1961, executed a transfer of title to him but this transfer was not registered until January 1962 and in the meantime the appellants had, on November 14, 1961, filed a caveat claiming as purchasers of the land in question.

The court of Appeal held, (i) that H had agreed to sell the half-section to the appellants but, (ii) that as the northwest quarter of the section had been a homestead of H and his wife and she had refused to consent to the sale to the appellants the agreement could not be enforced as to that quarter and, (iii) that in all the circumstances of the case the Court ought not to decree specific performance as to the southwest quarter but should award damages which it fixed at $800. In the result it was directed that judgment be entered against H for $800 with costs of the trial and of the appeal and that as against D the action and appeal stand dismissed without costs.

On appeal to this Court the appellants asked specific performance as to the half-section, alternatively specific performance as to the southwest quarter-section with compensation, in either case consequential relief and, as against D, that they be awarded costs throughout. The respondents, by notice to vary, asked that the action be dismissed as to both respondents with costs throughout.

At the opening of argument the question of the Court's jurisdiction to hear the appeal was raised from the bench and, after some discussion, it was decided that this question should be reserved and counsel were heard fully on the merits of the appeal as well as on the question of jurisdiction.

Held: The appeal and cross-appeal should be quashed.

There was in existence on November 30, a contract binding H to sell the half-section in question to the appellants for $13,500. This contract would *prima facie* have been specifically enforceable but for the facts that the northwest quarter of the section was subject to the provisions of *The Homesteads Act,* R.S.S. 1953, c. 111, as amended by 1954 (Sask.), c. 21, and the wife of H at no time consented to the sale thereof to the appellants. H's wife could not be compelled to consent to the sale of the said quarter-section to the appellants and without her consent there was no enforceable contract as to that quarter. The appellants were entitled neither to a decree of specific performance in regard to the northwest quarter nor to damages for failure to carry out the agreement to convey it. *Meduk v. Soja,* [1958] S.C.R. 167; *British American Oil Co. Ltd. v. Kos,* [1964] S.C.R. 167; *Halldorson v. Holizki,* [1919] 1 W.W.R. 472, affirmed [1919] 3 W.W.R. 86, applied; *Scott and Sheppard v. Miller,* [1922] 1 W.W.R. 1083, referred to.

As to whether the Court of Appeal had erred in not directing specific performance of the sale of the southwest quarter-section with compensation, that Court had fully recognized that while the jurisdiction conferred by *The Queen's Bench Act,* R.S.S. 1953, c. 67, to award damages in lieu of specific performance is discretionary, the discretion must be exercised judicially. That being so, this Court ought not to

interfere unless satisfied that the discretion has been wrongly exercised and should have been exercised in the contrary way. Far from being so satisfied, the Court agreed that in the circumstances of this case the award of damages was "not only an adequate but a more appropriate remedy". The amount at which the Court of Appeal assessed the appellants' damages had not been shown to be erroneous. Accordingly, assuming that the Court had jurisdiction, the appeal and cross-appeal should be dismissed.

On the matter of jurisdiction, the question raised was whether, as required by s. 36(*a*) of the *Supreme Court Act*, "the amount or value of the matter in controversy in the appeal exceeds ten thousand dollars". Since the case of *Orpen v. Roberts*, [1925] S.C.R. 364, it has been settled that the amount or value of the matter in controversy is the loss which the appellant will suffer if the judgment in appeal is upheld. In the case at bar the loss which the appellants will suffer if the judgment is upheld is not $13,500, the price which they agreed to pay, but rather the difference between that sum and the value of the half-section, plus a possible award of damages in addition to the decree of specific performance. On the evidence, it appeared impossible to say that the total of these two amounts could amount to as much as $10,000. Jurisdiction could not be assumed in a doubtful case.

In the opinion of the Court, the amount or value of the matter in controversy in the appeal did not exceed $10,000 and the Court was without jurisdiction. *Tonks et al. v. Reid et al.*, [1965] S.C.R. 624; *Cully v. Ferdais* (1900), 30 S.C.R. 330, applied.

APPEAL and CROSS-APPEAL from a judgment of the Court of Appeal for Saskatchewan[1], allowing in part an appeal from a judgment of Balfour J. Appeal and cross-appeal quashed.

Robert H. McKercher, Q.C., and *John A. Stack*, for the plaintiffs, appellants.

George J. D. Taylor, Q.C., for the defendants, respondents.

The judgment of the Court was delivered by

CARTWRIGHT J.:—This is an appeal from a judgment of the Court of Appeal for Saskatchewan[1] allowing in part an appeal from a judgment of Balfour J.

The action was for specific performance of a contract for the sale by the respondent Hiscock to the appellants of the west half of Section 31 in Township 30 in Range 12 west of the Third Meridian in the Province of Saskatchewan.

[1] (1966), 54 W.W.R. 163.

1967

McKENZIE *et al.* v. HISCOCK *et al.*

Cartwright J.

The learned trial judge dismissed the action without costs, holding that the negotiations between the parties had never ripened into contract.

The Court of Appeal held, (i) that the respondent Hiscock had agreed to sell the half-section mentioned above to the appellants but, (ii) that as the northwest quarter of the section had been a homestead of Hiscock and his wife and she had refused to consent to the sale to the appellants the agreement could not be enforced as to that quarter and, (iii) that in all the circumstances of the case the Court ought not to decree specific performance as to the southwest quarter but should award damages which it fixed at $800. In the result it was directed that judgment be entered against the respondent Hiscock for $800 with costs of the trial and of the appeal and that as against the respondent Dowie the action and appeal stand dismissed without costs.

In this Court the appellants ask specific performance as to the half-section, alternatively specific performance as to the southwest quarter-section with compensation, in either case consequential relief and, as against Dowie, that they be awarded costs throughout.

The respondents, by notice to vary, ask that the action be dismissed as to both respondents with costs throughout.

At the opening of the argument before us the question of our jurisdiction to hear the appeal was raised from the bench and, after some discussion, it was decided that this question should be reserved and counsel were heard fully on the merits of the appeal as well as on the question of jurisdiction.

The facts are fully set out in the reasons for judgment of Brownridge J.A. with whom Hall J.A. agreed. Woods J.A. agreed in the result but for somewhat different reasons. A comparatively brief statement of the facts will be sufficient to indicate the reasons for the conclusion at which I have arrived.

The plaintiffs farmed the west half of the section in question as tenants of the respondent Hiscock during the years 1946 to 1961. From time to time during this period the matter of the sale of the land to the McKenzies was discussed and about the month of July 1961, Hiscock

informed the plaintiffs that he had decided to sell. At this time the Hiscocks were living in the City of Saskatoon and the McKenzies were farming the half-section together with other land which they owned in the district of Zealandia, Saskatchewan.

Commencing in July 1961, there were discussions and correspondence between the appellants and the respondent Hiscock looking to the sale of the half-section and seeking to fix the price. It is not necessary to set these out in detail.

Up to September 26, 1961, the price discussed had been $12,800 and the appellants had applied to the Farm Credit Corporation for a loan of that amount.

On September 26, 1961, the respondent Hiscock telephoned to the appellant George McKenzie and told him the price of $12,800 was not satisfactory and that the appellants would have to pay $13,500. The McKenzies asked to be assured that the price would not be raised again and later in the day drove to Saskatoon accompanied by a friend, Lyle Moen, to see the Hiscocks. After a conversation lasting some two hours a document filed as ex. P.1 was written out and signed. It reads as follows:

Sept. 26th, 1961.

George and Cyril McKenzie

The price I am asking for the W1/2-31-30-12-W3 is $13,500. Thirteen Thousand five hundred dollars.

This price is good until Nov. 30th, 1961.

G. W. McKenzie
per Cyril McKenzie

'Henry Benjamin Hiscock'
214 Ave. Q.N.,
Saskatoon

Lyle Moen
Sept. 26, 1961
Saskatoon

The appellants contend that a binding agreement to sell was made on September 26, 1961, of which ex. P.1 is a sufficient memorandum in writing and, alternatively, that ex. P.1 was an offer to sell at the price stated which was open for acceptance by them up to November 30, 1961, and which was accepted by tenders of the purchase price in cash made to the respondent Hiscock on November 17 and

1967

McKENZIE *et al.* v. HISCOCK *et al.*

Cartwright J.

November 29, 1961. The second of these tenders was accompanied by a letter dated November 30, 1961, reading as follows:

November 30, 1961.

Mr. Henry Benjamin Hiscock,
214 Avenue Q. North,
Saskatoon, Sask.

Dear Sir:

We are hereby tendering Thirteen Thousand, Five Hundred ($13,500.00) Dollars in cash on behalf of George McKenzie and Cyril McKenzie, for the purchase of the West Half of Section 31, in Township 30, in Range 12, West of the Third Meridian, in compliance with your agreement dated the 26th of September, A.D. 1961.

In the event that you cannot sell the whole of the West half of Section 31, in Township 30, in Range 12, West of the Third Meridian because of homestead rights on one Quarter-Section of the said Half-Section, we hereby tender one-half of the sum of Thirteen Thousand Five Hundred ($13,500.00) Dollars in cash for the purchase of the remaining Quarter Section of the said West Half of the Third Meridian, being Six Thousand, Seven Hundred and Fifty ($6,750.00) Dollars in cash.

The tender of the amount of Six Thousand, Seven Hundred and Fifty ($6,750.00) Dollars is based on the negotiated price for the One-Half Section of Forty ($40.00) Dollars per acre for approximately Three Hundred and Twenty (320) acres, and Seven Hundred ($700.00) Dollars in addition thereto, making the sum of Twelve Thousand, Eight Hundred ($12,800.00) Dollars plus Seven Hundred ($700.00) Dollars, amounting to Thirteen Thousand, Five Hundred ($13,500.00) Dollars for the said one-half Section, Six Thousand Seven Hundred and Fifty ($6,750.00) Dollars is the sum of Forty ($40.00) Dollars per acre for approximately One Hundred and Sixty (160) acres plus Three Hundred and Fifty ($350.00) Dollars.

We are making these tenders by way of a new tender and also by way of affirming our tender on the 17th day of November, A.D., 1961, of Thirteen Thousand, Five Hundred ($13,500.00) Dollars in cash on behalf of George McKenzie and Cyril McKenzie for the purchase of the West Half of Section 31, in Township 30, in Range 12, West of the Third Meridian, in compliance with your agreement dated the 26th day of September, A.D. 1961.

Yours truly,
MACKLEM & CUELENAERE
per 'M. C. Cuelenaere'
Solicitors for George
McKenzie and Cyril McKenzie.

On October 2, 1961, the respondent Hiscock and his wife signed an agreement for the sale of the half-section to the respondent Dowie for the price of $14,000 and on October 18, 1961, executed a transfer of title to him but this transfer was not registered until January 1962 and in the meantime the appellants had, on November 14, 1961, filed a caveat claiming as purchasers of the land in question.

At the time of making the later of the two tenders mentioned above the appellants had not been given notice of the sale to Dowie or of any revocation by the respondent Hiscock of the offer (if such it was) contained in ex. P.1. Prior to agreeing to purchase the land in question Dowie had knowledge of the existence and contents of ex. P.1 and had obtained legal advice as to its effect.

Both the learned trial judge and the Court of Appeal found the facts to be as briefly summarized above. These findings are supported by the evidence and should not be disturbed.

The learned trial judge held that ex. P.1 was not an offer to sell but rather an indication of a willingness to negotiate or an invitation to the appellants to submit an offer to buy; he found the case to be indistinguishable from the judgment of the full Court of the North-West Provinces in *Blackstock v. Williams*.[1]

In the Court of Appeal Brownridge J.A., with whom Hall J.A. agreed, held that on September 26, 1961, the respondent Hiscock orally offered to sell the half-section to the appellants for $13,500, that they immediately accepted his offer, that in the evening of the same day an added term was agreed to and that thereupon there came into existence a contract for the sale of the half-section at the price mentioned a condition of which was that if the appellants could not raise the purchase money by November 30 neither party would be bound. He held further that ex. P. 1 constituted a sufficient memorandum in writing of this contract.

Woods J.A. took the view that ex. P.1 was an offer to sell the land for $13,500 open for acceptance at any time up to November 30, that it was accepted by the tender of the purchase price at a time when the appellants had not been notified that the offer was revoked and that accordingly the respondent Hiscock was bound by the contract.

While I incline to prefer the view of Woods J.A., I do not find it necessary to choose between these two views as on either there was in existence on November 30 a contract binding the respondent Hiscock to sell the half-section in question to the appellants for $13,500 and I agree with this

[1](1907), 6 W.L.R. 79, 7 Terr. L.R. 362.

1967

McKENZIE *et al.* v. HISCOCK *et al.*

Cartwright J.

conclusion. This contract would *prima facie* have been specifically enforceable but for the facts that the northwest quarter of the section was subject to the provisions of *The Homesteads Act*, R.S.S. 1953, c. 111, as amended by 1954 (Sask.), c. 21, and Mrs. Hiscock at no time consented to the sale thereof to the appellants.

The relevant provision of *The Homesteads Act* is the first paragraph of subs. 1 of s. 3 which reads as follows:

> 3 (1) Every transfer, agreement for sale lease or other instrument intended to convey or transfer an interest in a homestead to any person other than the wife of the owner, and every mortgage intended to charge a homestead in favour of any such person with the payment of a sum of money, shall be signed by the owner and his wife if he has a wife who resides in Saskatchewan or has resided therein at any time since the marriage, and she shall appear before a district court judge, local registrar of the Court of Queen's Bench, registrar of land titles or their respective deputies or a solicitor or justice of the peace or notary public and, upon being examined separate and apart from her husband, she shall acknowledge that she understands her rights in the homestead and signs the instrument of her own free will and consent and without compulsion on the part of her husband.

While the form of this enactment differs considerably from the corresponding provisions of *The Dower Act* of Alberta which were considered by this Court in *Meduk v. Soja*[1] and in *British American Oil Co. Ltd. v. Kos*[2], in my opinion, the reasoning in those cases shews that Mrs. Hiscock could not be compelled to consent to the sale of the northwest quarter-section to the appellants and that without her consent there was no enforceable contract as to that quarter. The matter has been considered in the Courts of Saskatchewan in the case of *Halldorson v. Holizki*[3]. The *Act respecting Homesteads* there considered was 1915 (Sask.), c. 29, as amended by 1916 (Sask.), c. 27, and is in substantially the same terms as the Act with which we are concerned. In that case a husband had agreed to sell 400 acres part of which was the homestead and the wife did not consent to the sale. At. p. 477 of the trial judgment Taylor J. said:

> I conclude therefore that the assent of the husband alone to an agreement of sale respecting the homestead is an ineffectual assent. The bargain is inchoative until the wife assents in the manner required by the statute, and the husband is not liable for failure to perform the agreement in so far as it relates to the homestead.

[1] [1958] S.C.R. 167.
[2] [1964] S.C.R. 167.
[3] [1919] 1 W.W.R. 472, affirmed [1919] 3 W.W.R. 86.

In *Scott and Sheppard v. Miller*[1], the Court of Appeal for Saskatchewan left open the question whether a husband could be held liable in damages for failure to perform an agreement by him to sell the homestead when his wife refused to consent to the sale; but the reasoning of Lamont J., with whom Haultain C.J.S. agreed, appears to me to be persuasive for the view that the husband would not be liable. He said at pp. 1087 and 1088:

> Our *Homestead Act* was passed for the purpose of preventing a husband from disposing of the homestead without the consent of his wife, given without compulsion and of her own free will. Although the Act gives the wife an interest in the homestead independent of her husband, it must not be forgotten that they are still man and wife, with, in most respects, interests which are identical. The prosperity of the husband generally speaking means the prosperity of the wife, while any losses sustained by him are losses which she must share. If, therefore, the husband enters into an agreement to sell the homestead, and if it be held that his wife's refusal to consent to the sale results in the husband being mulcted in heavy damages for breach of his contract, which damages will be so much loss to their joint estate, it seems to me that the freedom of will and the absence of compulsion which the statute requires on the part of the wife would be very greatly interfered with. In many of such cases I fear the wife would be found making a declaration that she was signing the conveyance of her own free will, when, in fact, she was doing so very reluctantly, and under the compulsion, which threatened loss by way of heavy damages for her husband's breach of contract, would exert upon her. To put this species of compulsion upon a wife seems to me to be entirely inconsistent with the spirit of the Act.

In my view, in the case at bar, the appellants were entitled neither to a decree of specific performance in regard to the northwest quarter nor to damages for failure to carry out the agreement to convey it.

Before leaving this point mention should be made of the argument developed in the appellants' factum, but not referred to in the judgments below, to the effect that because Mrs. Hiscock consented to the sale to Dowie her refusal to consent to the sale to the appellants cannot be relied upon as a defence to their action. This argument should, in my opinion, be rejected. If the appellants are to be awarded specific performance the sale and transfer to Dowie would of necessity have to be set aside. The circumstance that a wife is willing to consent to the sale of the homestead to one person is no ground for holding that her consent to its sale to another person at a lower price is unnecessary.

[1] [1922] 1 W.W.R. 1083.

1967

McKENZIE *et al.* v. HISCOCK *et al.*

Cartwright J.

Turning now to the question whether the Court of Appeal erred in not directing specific performance of the sale of the southwest quarter-section with compensation, it may first be observed that s. 44(9) of *The Queen's Bench Act*, R.S.S. 1953, c. 67, provided:

> 44. The law to be administered in this province as to the matters next hereinafter mentioned shall be as follows:
>
> (9) In all cases in which the court has jurisdiction to entertain an application for an injunction against a breach of any covenant, contract or agreement or against the commission or continuance of any wrongful act or for the specific performance of any covenant, contract or agreement, the court may if it thinks fit award damages to the party injured either in addition to or in substitution for such injunction or specific performance, and such damages may be ascertained in such a manner as the court may direct, or the court may grant such other relief as it may deem just;

The jurisdiction conferred by this section to award damages in lieu of specific performance has existed in England since the enactment of 21 & 22 Vict., c. 27 (commonly called *Lord Cairn's Act*). While the jurisdiction conferred is discretionary the discretion must be exercised judicially and this was fully recognized in the judgments delivered in the Court of Appeal in the case at bar. That being so, it is my view that we ought not to interfere unless satisfied that the discretion has been wrongly exercised and should have been exercised in the contrary way. Far from being so satisfied, it is my opinion that in the particular circumstances of this case which are examined at length in the reasons of Brownridge J.A. the award of damages is as he found "not only an adequate but a more appropriate remedy". I find no error in the reasoning which led him to this result.

The amount at which the Court of Appeal assessed the appellants' damages has not been shown to be erroneous.

For these reasons, assuming that we have jurisdiction, I would dismiss the appeal. On the same assumption, I would dismiss the cross-appeal raised by the notice to vary. I have already stated my agreement with the finding of the Court of Appeal that the respondent Hiscock did agree to sell the lands in question to the appellants and with its decision to award damages in lieu of specific performance. The figure at which the damages were fixed has not been shown to be excessive. I would not interfere with the orders as to costs made by the Court of Appeal.

1967

McKENZIE *et al.* v. HISCOCK *et al.*

Cartwright J.

It remains to consider the question of our jurisdiction to entertain the appeal. Upon this question being raised counsel for the appellants submitted that we have jurisdiction while counsel for the respondents argued to the contrary.

The relevant provision of the *Supreme Court Act*, R.S.C. 1952, c. 259, is clause (*a*) (substituted 1956, c. 48) of s. 36. The judgment of the Court of Appeal is a final judgment of the highest Court of final resort in the province pronounced in a judicial proceeding and the question is whether "the amount or value of the matter in controversy in the appeal exceeds ten thousand dollars".

While, in my opinion, on the facts as found it was impossible for the appellants to be awarded a decree of specific performance as to the whole of the half-section that claim was put forward in the appeal and I cannot say that this was done frivolously or otherwise than in good faith. Had the appeal succeeded *in toto* the appellants would have been awarded specific performance of the agreement to convey the half-section, plus perhaps some damages for delay in performing the contract, but would, of course, have had to pay the purchase price of $13,500. In *Tonks et al. v. Reid et al.*[1], it was said, in a unanimous judgment of this Court, at p. 627:

> Since the case of *Orpen v. Roberts,* [1925] S.C.R. 364, it has been settled that the amount or value of the matter in controversy is the loss which the appellant will suffer if the judgment in appeal is upheld.

In the case at bar the loss which the appellants will suffer if the judgment is upheld is not $13,500, the price which they agreed to pay but rather the difference between that sum and the value of the half-section, plus, as mentioned above, a possible award of damages in addition to the decree of specific performance. On the evidence in the record it appears to me impossible to say that the total of these two amounts could amount to as much as $10,000. In *Cully v. Ferdais*[2], Taschereau J., as he then was, delivering the unanimous judgment of the Court said at p. 333, after stating that the question of jurisdiction in that case might not be free from doubt:

> However the right to appeal is not clear, and the rule as to appeals is that the Court cannot assume jurisdiction in a doubtful case.

[1] [1965] S.C.R. 624.

[2] (1900), 30 S.C.R. 330.

1967

McKENZIE *et al.* *v.* HISCOCK *et al.*

Cartwright J.

In my opinion, the amount or value of the matter in controversy in the appeal does not exceed ten thousand dollars and we are without jurisdiction. Had this question been raised at an early stage by a motion to quash substantial expense would have been saved.

I would quash both the appeal and the cross-appeal. In the somewhat unusual circumstances of this case I would make no order as to costs in this Court.

Appeal and cross-appeal quashed.

Solicitors for the plaintiffs, appellants: Wedge, McKercher & McKercher, Saskatoon.

Solicitors for the defendants, respondents: Goldenberg, Taylor, Tallis & Goldenberg, Saskatoon.