

whether the duty of care would extend to injuries on adjoining land and to trespassers on the premises where the work was being done did not have to be answered, but it is submitted that, for the reasons adduced, there should be no difference in a contractor's liability in such cases.

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WIFE'S REFUSAL TO BAR DOWER IN HUSBAND'S CONTRACT OF SALE — PURCHASER INSISTING ON A CLEAR TITLE — PURCHASER'S RIGHT TO ELECT SPECIFIC PERFORMANCE — POWER OF COURT TO ORDER PORTION OF PRICE PAID INTO COURT TO SECURE DOWER — NO ABATEMENT OF PRICE TO PURCHASER.

The effect of a wife's refusal to bar her dower in land that her husband has contracted to sell has been reviewed recently in the Ontario Court of Appeal in *Freedman v. Mason*.¹ Here Louis Freedman signed an offer to purchase certain lands of Mason listed with real estate brokers. When the brokers presented the offer to Mason, he accepted and signed it, but his wife did not sign. Later on discussing the contract with his solicitors, Mason saw that it was not as advantageous as he had at first thought, and he decided not to carry it out. He was also informed that his wife was not obliged to sign the deed and to bar her dower. Mason informed Freedman that unless a more satisfactory agreement could be reached, his wife would refuse to bar her dower. Negotiations proved futile. Before the closing date of the transaction, Louis Freedman assigned the offer to purchase to the appellant, Sydney Freeman. The appellant's solicitors tendered the amount due under the contract. Mason's solicitor tendered a deed signed by Mason only and demanded the full purchase price. The appellant refused to accept the deed or a return of the deposit, but demanded a deed with bar of dower executed.

The appellant brought an action for specific performance or damages. He later added an alternative claim praying for specific performance with an abatement of the purchase price for the inchoate right of dower. At the trial a further alternative claim was added — an order declaring that the appellant was entitled to a conveyance by Mason and to have a sum set aside from the purchase price to provide for the wife's claim to dower if she should survive her husband and that during the joint lives of Mason and his wife, the interest on the money so set aside should be paid to Mason. The Court held that the appellant was entitled to the last alternative.

1. (1957) 9 D.L.R. (2d) 262.

The general rule developed by the courts of equity in dealing with the situation where a vendor represents that he has a good title to land he has agreed to sell, when in fact there is a defect in the title, has been very well expressed by Lord Eldon in the following passage:

... if a man, having partial interests in an estate, chooses to enter into a contract representing it ... as his own, it is not competent to him afterwards to say, though he has valuable interests, he has not the entirety; and therefore the purchaser shall not have the benefit of his contract. For the purpose of this jurisdiction the person contracting under these circumstances is bound by the assertion in his contract; and, if the vendor chooses to take as much as he can have, he has a right to that, and to an abatement; and the court will not hear the objection, by the vendor, that the purchaser cannot have the whole.²

The doctrine endeavours to preserve the right of the purchaser to the land. But he is not compelled to take it with the defect; he may rescind the contract and sue for damages.

The principle above stated satisfies the ends of justice where the defect is a vested interest in some third person. For the vendor should only be required to pay for as much as he gets. But rights such as dower are not vested interests and do not attach to the land immediately but only subject to a condition in the future. There is a possibility that the condition may never be satisfied, i.e., the wife may predecease the husband. If the court decrees specific performance with an abatement of the purchase price and the wife predeceases the husband, the buyer receives all he bargained for, but not the vendor. He has passed all the title but has not received the whole of the contract price. This is inequitable to the husband.

Despite the above reasoning, when in 1856 the question arose in Canada for the first time, in *VanNorman v. Beaupré*,³ an Ontario case, it was decided that the purchaser was entitled to specific performance with an abatement of the purchase price.

In England in 1857, on similar facts, the court ordered specific performance but, in lieu of an abatement of the purchase price, a sum was ordered to be paid into court out of the purchase price to provide for the wife's claim to dower if she should survive her husband, and it was further ordered that during the joint lives of the vendor and his wife the interest upon the money so set aside should be paid to the vendor.⁴ If the wife predeceased him, the principal was to be paid over to the vendor.

2. *Mortlock v. Buller* (1804) 10 Ves. 292, at p. 314; 32 E.R. 857, at p. 866.

3. (1856) 5 Gr. 599.

4. *Wilson v. Williams* (1857) 3 Jur. (N.S.) 810.

This approach was followed in Ontario in *Skinner v. Ainsworth*,⁵ no mention being made of *VanNorman v. Beaupré*, though it is a decision of the same court. In the case under discussion, MacKay, J. A., rightly it is submitted, followed *Skinner v. Ainsworth*.

In the absence of legislation, the doctrine is the best that can be done to preserve the rights of the purchaser. But land which may become subject to a dower interest at any time is not very desirable, and the purchaser is left in the position of gambling on the wife's predeceasing her husband. Probably in most cases the purchaser would rescind the contract and sue for damages.

This, however, is just one of the problems that a wife's right of dower gives rise to, and it is submitted that the legislature should examine the whole subject and modify it in the light of present day circumstances.

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5. (1876) 24 Gr. 148.