BEATRICE C. DEGLMAN *(Defendant)* ...APPELLANT;

1954

*Feb. 25, 26
*June 21

AND

THE GUARANTY TRUST COMPANY OF CANADA (ADMINISTRATOR OF THE ESTATE OF LAURA CONSTANTINEAU BRUNET, DECEASED) *(Defendant)* ..... RESPONDENT,

AND

GEORGE CONSTANTINEAU *(Plaintiff)* RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Contracts—Land—Parol agreement to leave real property by will for services rendered—Part performance—Referability to such land—Statute of Frauds, s. 4—Quantum Meruit—Statute of Limitations.

The respondent sought to recover from the estate of his deceased aunt under an oral agreement whereby the aunt, on condition that the respondent perform such services as she might request during her lifetime, undertook to make adequate provision for him in her will and in particular to leave him a certain piece of land. The respondent fully performed his part of the agreement. The aunt, who owned other land as well, died intestate.

Held: that the acts relied upon were not unequivocally and of their own nature referable to any dealing with the land in question so as to take the case out of s. 4 of the Statute of Frauds; but that the deceased having had the benefits of full performance by the respondent of an existing although unenforceable contract, the law imposed upon her, and so upon her estate, the obligation to pay the fair value of the services rendered. The cause of action did not accrue until the death of the deceased intestate and the statutory period only then began to run. *Wilson* v. *Cameron* 30 O.L.R. 486 and *Fox* v. *White* [1935] O.W.N. 316 overruled. The rule in *Maddison* v. *Alderson* 8 App. Cas. 467, as adopted in *McNeil* v. *Corbett* 39 Can. S.C.R. 608, followed.

APPEAL by the defendant, representative of the next-of-kin, from the judgment of the Court of Appeal for Ontario (1) (*sub nom Constantineau* v. *Guaranty Trust Co.*), which dismissed her appeal from the judgment of Spence J. enforcing an oral contract regarding certain land.

*PRESENT: Rinfret C.J. and Taschereau, Rand, Estey, Locke, Cartwright and Fauteux JJ.

(1) [1953] O.W.N. 665; [1954] 3 D.L.R. 785.

1954

DEGLMAN v. GUARANTY TRUST CO. OF CANADA AND CONSTANTINEAU

Alastair Macdonald, Q.C. and *G. J. Gorman* for the appellant.

M. H. Fyfe, Q.C. for the respondent.

The judgment of Rinfret C.J. and of Taschereau and Rand JJ. was delivered by:

RAND J.:—In this appeal the narrow question is raised as to the nature of part performance which will enable the court to order specific performance of a contract relating to lands unenforceable at law by reason of s. 4 of the Statute of Frauds. The respondent Constantineau claims the benefit of such a contract and the appellant represents the next of kin other than the respondent of the deceased, Laura Brunet, who resist it.

The respondent was the nephew of the deceased. Both lived in Ottawa. When he was about 20 years of age, and while attending a technical school, for six months of the school year 1934-35 he lived with his aunt at No. 550 Besserer Street. Both that and the house on the adjoining lot, No. 548, were owned by the aunt and it was during this time that she is claimed to have agreed that if the nephew would be good to her and do such services for her as she might from time to time request during her lifetime she would make adequate provision for him in her will, and in particular that she would leave to him the premises at No. 548. While staying with her the nephew did the chores around both houses which, except for an apartment used by his aunt, were occupied by tenants. When the term ended he returned to the home of his mother on another street. In the autumn of that year he worked on the national highway in the northern part of Ontario. In the spring of 1936 he took a job on a railway at a point outside of Ottawa and at the end of that year, returning to Ottawa, he obtained a position with the city police force. In 1941 he married. At no time did he live at the house No. 548 or, apart from the six months, at the house No. 550.

The performance consisted of taking his aunt about in her own or his automobile on trips to Montreal and elsewhere, and on pleasure drives, of doing odd jobs about the two houses, and of various accommodations such as errands

and minor services for her personal needs. These circumstances, Spence J. at trial and the Court of Appeal, finding a contract, have held to be sufficient grounds for disregarding the prohibition of the statute.

The leading case on this question is *Maddison* v. *Alderson*, (1). The facts there were much stronger than those before us. The plaintiff, giving up all prospects of any other course of life, had spent over twenty years as housekeeper of the intestate until his death without wages on the strength of his promise to leave her the manor on which they lived. A defectively executed will made her a beneficiary to the extent of a life interest in all his property, real and personal. The House of Lords held that, assuming a contract, there had been no such part performance as would answer s. 4.

The Lord Chancellor, Earl Selborne, states the principle in these words:—

> All the acts done must be referred to the actual contract, which is the measure and test of their legal and equitable character and consequence.

At p. 479, referring to the rule that payment of the purchase price is not sufficient, he says:—

> The best explanation of it seems to be, that the payment of money is an equivocal act, not (in itself) until the connection is established by parol testimony, indicative of a contract concerning land . . . All the authorities show that the acts relied upon as part performance must be unequivocally, and in their own nature referable to some such agreement as that alleged.

Lord O'Hagan, at p. 485, uses this language:—

> It must be unequivocal. It must have relation to the one agreement relied upon, and to no other when it must be such, in Lord Hardwicke's words, "as could be done with no other view or design than to perform that agreement".

At p. 489 Lord Blackburn, speaking of the delivery of possession as removing the bar of the statute, says:—

> This is, I think, in effect to construe the fourth section of the Statute of Frauds as if it contained these words, "or unless possession of the land shall be given and accepted". Notwithstanding the very high authority of those who have decided those cases, I should not hesitate if it was res integra in refusing to interpolate such words or put such a construction on the statute.

(1) (1883) 8 App. Cas. 467.

1954

DEGLMAN v. GUARANTY TRUST CO. OF CANADA AND CONSTANTINEAU

Rand J.

I am quite unable to distinguish that authority from the matter before us. Here, as there, the acts of performance by themselves are wholly neutral and have no more relation to a contract connected with premises No. 548 than with those of No. 550 or than to mere expectation that his aunt would requite his solicitude in her will, or that they were given gratuitously or on terms that the time and outlays would be compensated in money. In relation to specific performance, strict pleading would seem to require a demonstrated connection between the acts of performance and a dealing with the land before evidence of the terms of any agreement is admissible. This exception of part performance is an anomaly; it is based on equities resulting from the acts done; but unless we are to say that, after performance by one party, any refusal to perform by the other gives rise to them, which would in large measure write off the section, we must draw the line where those acts are referable and referable only to the contract alleged. The facts here are almost the classical case against which the statute was aimed: they have been found to be truly stated and I accept that; but it is the nature of the proof that is condemned, not the facts, and their truth at law is irrelevant. Against this, equity intervenes only in circumstances that are not present here.

There remains the question of recovery for the services rendered on the basis of a *quantum meruit*. On the findings of both courts below the services were not given gratuitously but on the footing of a contractual relation: they were to be paid for. The statute in such a case does not touch the principle of restitution against what would otherwise be an unjust enrichment of the defendant at the expense of the plaintiff. This is exemplified in the simple case of part or full payment in money as the price under an oral contract; it would be inequitable to allow the promissor to keep both the land and the money and the other party to the bargain is entitled to recover what he has paid. Similarly is it in the case of services given.

This matter is elaborated exhaustively in the Restatement of the Law of Contract issued by the American Law Institute and Professor Williston's monumental work on Contracts in vol. 2, s. 536 deals with the same topic. On the principles there laid down the respondent is entitled to

recover for his services and outlays what the deceased would have had to pay for them on a purely business basis to any other person in the position of the respondent. The evidence covers generally and perhaps in the only way possible the particulars, but enough is shown to enable the court to make a fair determination of the amount called for; and since it would be to the benefit of the other beneficiaries to bring an end to this litigation, I think we should not hesitate to do that by fixing the amount to be allowed. This I place at the sum of $3,000.

The appeal will therefore be allowed and the judgment modified by declaring the respondent entitled to recover against the respondent administrator the sum of $3,000, all costs will be paid out of the estate, those of the administrator as between solicitor and client.

The judgment of Estey, Locke, Cartwright and Fauteux JJ. was delivered by:

CARTWRIGHT J.:—The facts out of which this appeal arises are stated in the reasons of my brother Rand.

The appeal was argued on the assumption, that there was an oral contract made between the respondent and the late Laura Constantineau Brunet under the terms of which the former was to perform certain services in consideration whereof the latter was to devise No. 548 Besserer Street to him, that the contract was fully performed by the respondent and that there was no defence to his claim to have the contract specifically performed other than the fact that there was no memorandum in writing thereof as required by the Statute of Frauds, which was duly pleaded.

It is clear that none of the numerous acts done by the respondent in performance of the contract were in their own nature unequivocally referable to No. 548 Besserer Street, or to any dealing with that land. On the other hand there are concurrent findings of fact, which were not questioned before us, that the acts done by the respondent were in their nature referable to some contract existing between the parties. On this view of the facts the learned trial judge and the Court of Appeal were of opinion that the acts done by the respondent in performance of the agreement were sufficient to take it out of the operation of the Statute of Frauds and that it ought to be specifically

1954

DEGLMAN v. GUARANTY TRUST CO. OF CANADA AND CONSTANTINEAU

Cartwright J.

enforced. The reasons which brought the Court of Appeal to this conclusion are succinctly stated in the following paragraph:—

> A more serious argument presented by the appellant was that this agreement being an agreement whereby the aunt would leave to him at her death a particular piece of property, the acts of part performance must be such as in their own nature were referable to and affected the land in question, and he relied upon the decision and judicial views expressed in the case of *Maddison* v. *Alderson* (1). We have, however, been referred to the decision in this Court of *Fox* v. *White* (2), where this Court distinguished the decision in *Maddison* v. *Alderson* and the principles there laid down from a case such as the case at bar, and in that case this Court held that if the acts relied upon as being acts of part performance were referable to some contract, and consistent with the contract alleged, then evidence was admissible as to the precise terms of the particular contract alleged. We are of the opinion that the acts in this case which are alleged to be acts of part performance are plainly referable to the existence of a contract and are consistent with the particular contract alleged, and that when the evidence is admitted as to the precise terms of the particular contract the plaintiff's case is made out and the acts of part performance take the case out of the Statute.

The judgment of the Court of Appeal in *Fox* v. *White* is reported only in the Ontario Weekly Notes, but counsel informed us that they had examined the original reasons of the learned Justices of Appeal and that nothing of substance is omitted in the printed report. It is to be observed that Middleton and Masten JJ.A. who agreed with Riddel J.A. in dismissing the appeal did not in terms concur with his reasons. The statement of Riddel J.A. applied by the Court of Appeal in the case at bar, was taken from the article on Specific Performance in Halsbury's Laws of England, 1st Edition, Vol. 27, para. 49, of which Sir Edward Fry was the author. That statement of the rule was expressly approved by the Court of Appeal for Ontario in *Wilson* v. *Cameron* (3). At pages 490 and 491 Sir William Meredith C.J.O., who delivered the unanimous judgment of the Court, said:—

> In Fry on Specific Performance, 5th ed., para. 582, it is said that "the true principle, however, of the operation of acts of part performance seems only to require that the acts in question be such as must be referred to some contract, and may be referred to the alleged one; that they prove the existence of some contract, and are consistent with the contract alleged". And again (para. 584) it is said: "To make the acts of part performance effective to take the contract out of the Statute

(1) (1883) 8 App. Cas. 467. (2) [1935] O.W.N. 316.
(3) (1914) 30 O.L.R. 486.

of Frauds, they must be consistent with the contract alleged and also such as cannot be referred to any other title than a contract, nor have been done with any other view or design than to perform a contract".

To the same effect is the statement of the principle in Halsbury's Laws of England, Vol. 27, para. 49. After stating the principle in somewhat similar language to that used by the Lord Chancellor in *Maddison* v. *Alderson* (1), to which I shall afterwards refer, it is there said: "If, however, the acts of part performance are referable to some contract, and are consistent with the contract alleged, evidence is admissible as to the precise terms of the particular contract which is alleged. In effect, the necessity of writing is dispensed with, and the Court is entitled to find what the parties have actually agreed, although the terms of the agreement go beyond those to which the acts of part performance in themselves point".

The passages quoted from the 5th Edition of Fry on Specific Performance and from the 1st Edition of Halsbury are repeated in the same words in the current editions of those works.

In *Wilson* v. *Cameron* at page 491, after quoting the statement of the Earl of Selborne L.C. in *Maddison* v. *Alderson* at page 479:— "All the authorities shew that the acts relied upon as part performance must be unequivocally, and in their own nature, referable to some such agreement as that alleged", Meredith C.J.O. proceeds:—

> It is plain, I think, that the Lord Chancellor, by the use of the words "some such agreement as that alleged", did not intend to state the principle in narrower terms than those in which it is stated in Fry on Specific Performance and Halsbury's Laws of England in the passages I have quoted.

It will be observed that in *Fox* v. *White,* Riddell J.A. was of opinion that some, if not all, of the expressions of opinion in *Maddison* v. *Alderson* as to the nature of the acts of performance which will take an unwritten contract out of the operation of the Statute were *obiter* as the Law Lords had held that no contract had been proved and that ground was sufficient to dispose of the appeal. With the utmost respect, I am unable to agree with this. While it is true that the Law Lords expressed doubts as to the existence of a contract in that case, it appears to me from the following passages that what was said in their speeches in regard to part performance formed the *ratio decidendi* of the case.

At pages 473 and 474, the Earl of Selborne L.C. said:—

> Mr. Justice Stephen and the Court of Appeal arrived at the conclusion that a contract was proved in this case (notwithstanding the character of the evidence and the form of the verdict), on which, but

(1) (1883) 8 App. Cas. 457 at 479.

1954

DEGLMAN v. GUARANTY TRUST CO. OF CANADA AND CONSTANTINEAU

Cartwright J.

for the Statute of Frauds, the appellant might have been entitled to relief; but they differed on the question of part performance, Mr. Justice Stephen thinking that there was part performance sufficient to take the case out of the Statute of Frauds, the Court of Appeal thinking otherwise. This makes it necessary for your Lordships now to examine the doctrine of equity as to part performance of parol contracts.

At page 484, Lord O'Hagan said:—

> In this case, the learned judge who presided at the trial, and the judges of the Court of Appeal seem all to have thought that an unwritten contract capable of execution by a Court of Equity, on the fulfilment of the proper conditions, was established by the verdict and the reported testimony. In my view, it is not necessary to decide the point, though it was the subject of ingenious argument at the bar, on the one side and the other.

At pages 487 and 488, Lord Blackburn said:—

> But it seems to me that in this case the evidence is evidence from which a contract would not have been found by a jury, if it had been explained to them that to make a contract there must be a bargain between both parties. I doubt, therefore, whether in any way the judgment in favour of the defendant could have stood, though perhaps it might have been necessary to have a new trial. I do not decide this, for it is quite clear that the contract alleged is a contract for an interest in lands; and it is not denied that there was no note or memorandum of the contract signed by Thomas Alderson.
>
> And I have come to the conclusion that this is not a case in which part performance gives an equitable right to have the contract (assuming that there was one) specifically performed.

At page 491 Lord FitzGerald said:

> The decision of your Lordships' House is to rest on the ground that there was nothing in the case to take the supposed agreement out of the operation of the 4th section of the Statute of Frauds.

In *Wilson* v. *Cameron,* Meredith C.J.O. did not treat what was said in the judgments in *Maddison* v. *Alderson* in regard to the point with which we are here concerned as *obiter,* but interpreted those judgments as supporting the statements from Halsbury and Fry on Specific Performance which he adopted in the passage which is quoted from his judgment above. I am unable to agree with this interpretation. After an anxious consideration of the judgments in *Maddison* v. *Alderson,* of all the cases cited by counsel and of the decisions referred to by the Court of Appeal for Ontario in *Fox* v. *White* and in *Wilson* v. *Cameron,* I have reached the conclusion that the correct interpretation of the decision in *Maddison* v. *Alderson* is that adopted by this Court in

McNeil v. *Corbett* (1). In that case the unanimous judgment of the Court was delivered by Duff J., as he then was. The judgment turns on the question whether the acts relied upon as part performance were sufficient to take the contract sued on, which was for the purchase of an interest in lands and of which there was no sufficient written memorandum, out of the operation of the Statute of Frauds. At pages 611 and 612 Duff J. says:—

> With great respect, moreover, I must disagree with the view of the court below that the plaintiff has made out a case enabling him to take advantage of the doctrine known as the doctrine of part performance. A condition of the application of that doctrine is thus stated by Lord Selborne, in *Maddison* v. *Alderson*. at page 479:—
>
> > "All the authorities shew that the acts relied upon must be unequivocally, and in their own nature, referable to some such agreement as that alleged;"
>
> i.e. to an agreement respecting the lands themselves; and, as further explained in that case, a plaintiff who relies upon acts of part performance to excuse the non-production of a note or memorandum under the Statute of Frauds, should first prove the acts relied upon; it is only after such acts unequivocally referable in their own nature to some dealing with the land which is alleged to have been the subject of the agreement sued upon have been proved that evidence of the oral agreement becomes admissible for the purpose of explaining those acts. It is for this reason that a payment of purchase money alone can never be a sufficient act of performance within the rule.
>
> Here there is nothing in the nature of the acts proved which bears any necessary relation to the interest in land said to have been the subject of the agreement in question.

Mr. Fyfe argues that it appears from the report of the judgment in this case in the Court below (41 N.S.R. 110) that the only act that could have been relied on as a part performance was the payment of money and that consequently what was said by Duff J. in the passage quoted above was not strictly necessary to the decision of the case and should be regarded as *obiter*. I do not find it necessary to decide whether the passage quoted is, strictly speaking, binding upon us as I am convinced that it states the law correctly.

It may be observed that the reports do not indicate whether the decision in *McNeil* v. *Corbett* was referred to in argument in *Fox* v. *White* or in *Wilson* v. *Cameron;* it is not referred to in the judgments in either case.

(1) (1907) 39 Can. S.C.R. 608.

1954

DEGLMAN v. GUARANTY TRUST CO. OF CANADA AND CONSTANTINEAU

Cartwright J.

An interpretation similar to that in *McNeil* v. *Corbett* was placed upon the decision in *Maddison* v. *Alderson* by Turgeon J.A., with whom Haultain C.J.S. and Lamont and McKay JJ.A. agreed, in *Re Meston, Meston* v. *Gray et al* (1). At page 888, Turgeon J.A. said:—

> . . . In order to exclude the operation of the Statute of Frauds, the part performance relied upon must be unequivocally referable to the contract asserted. The acts performed must speak for themselves, and must point unmistakably to a contract affecting the ownership or the tenure of the land. and to nothing else.

I have already expressed the view that the acts relied upon by the respondent in the case at bar are not unequivocally and in their own nature referable to any dealing with the land in question and on this point the appellant is entitled to succeed.

It remains to consider the respondent's alternative claim to recover for the value of the services which he performed for the deceased and the possible application to such a claim of the Statute of Limitations.

I agree with the conclusion of my brother Rand that the respondent is entitled to recover the value of these services from the respondent administrator. This right appears to me to be based, not on the contract, but on an obligation imposed by law.

In *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Barbour Ltd.* (2), Lord Wright said, at page 61:—

> It is clear that any civilized system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is to prevent a man from retaining the money of or some benefit derived from another which it is against conscience that he should keep. Such remedies in English law are generically different from remedies in contract or in tort, and are now recognized to fall within a third category of the common law which has been called quasi-contract or restitution.

and at page 62:

> Lord Mansfield does not say that the law implies a promise. The law implies a debt or obligation which is a different thing. In fact, he denies that there is a contract; the obligation is as efficacious as if it were upon a contract. The obligation is a creation of the law, just as much as an obligation in tort. The obligation belongs to a third class, distinct from either contract or tort though it resembles contract rather than tort.

(1) [1925] 4 D.L.R. 887.

(2) [1943] A.C. 32.

Lord Wright's judgment appears to me to be in agreement with the view stated in Williston on Contracts referred to by my brother Rand.

In *Scott* v. *Pattison* (1) the plaintiff served the defendant under a contract for service not to be performed within one year which was held not to be enforceable by reason of the Statute of Frauds. It was held that he could nonetheless sue in *assumpsit* on an implied contract to pay him according to his deserts. While I respectfully agree with the result arrived at in *Scott* v. *Pattison* I do not think it is accurate to say that there was an implied promise. In my view it was correctly decided in *Britain* v. *Rossiter* (2) that where there is an express contract between the parties which turns out to be unenforceable by reason of the Statute of Frauds no other contract between the parties can be implied from the doing of acts in performance of the express but unenforceable contract. At page 127 Brett L.J., after stating that the express contract although unenforceable was not void but continued to exist, said:—

> It seems to me impossible that a new contract can be implied from the doing of acts which were clearly done in performance of the first contract only, and to infer from them a fresh contract would be to draw an inference contrary to the fact. It is a proposition which cannot be disputed that no new contract can be implied from acts done under an express contract, which is still subsisting; all that can be said is that no one can be charged upon the original contract because it is not in writing.

Cotton L.J., at pages 129 and 130 and Thesiger L.J. at page 133 expressed the same view. In the case at bar all the acts for which the respondent asks to be paid under his alternative claim were clearly done in performance of the existing but unenforceable contract with the deceased that she would devise 548 Besserer Street to him, and to infer from them a fresh contract to pay the value of the services in money would be, in the words of Brett L.J. quoted above, to draw an inference contrary to the fact.

In my opinion when the Statute of Frauds was pleaded the express contract was thereby rendered unenforceable, but, the deceased having received the benefits of the full performance of the contract by the respondent, the law imposed upon her, and so on her estate, the obligation to pay the fair value of the services rendered to her.

(1) [1923] 2 K.B. 723. (2) (1879) 11 Q.B.D. 123.

1954

DEGLMAN v. GUARANTY TRUST CO. OF CANADA AND CONSTANTINEAU

Cartwright J.

If this is, as I think, the right view of the nature of the obligation upon which the respondent's claim rests it follows that the Statute of Limitations can have no application. There are a number of cases in which on facts somewhat similar to those in the case at bar, the opinion has been expressed that while a party in the position of the respondent in the present case can recover the value of services rendered by him under an unenforceable contract his right to recover is limited to the value of the services rendered in the six years preceding the commencement of the action. Examples of such cases are, *Cross* v. *Cleary* (1), *Re Meston, Meston* v. *Gray* (*supra*) and *Walker* v. *Boughner* (2). These cases seem to have proceeded on the view that the liability of the defendant was under "an implied promise to pay a reasonable sum per annum" (see *Cross* v. *Cleary* (*supra*) at page 545). I have already indicated my reasons for holding that, in the case at bar, no such promise can be implied. In my opinion the obligation which the law imposes upon the respondent administrator did not arise until the deceased died intestate. It may well be that throughout her life it was her intention to make a will in fulfilment of the existing although unenforceable contract and until her death the respondent had no reason to doubt that she would do so. The statutory period of limitation does not commence to run until the plaintiff's cause of action has accrued; and on the facts of the case at bar the cause of action upon which the respondent is entitled to succeed did not accrue until the death of the deceased intestate.

For the above reasons I would dispose of the appeal as proposed by my brother Rand.

Appeal allowed with costs.

Solicitors for the appellant: *Clark, Macdonald, Connolly, Affleck & Brocklesby.*

Solicitors for the respondents: *Beament, Fyfe & Ault.*

---

(1) (1898) 29 O.R. 542. (2) (1889) 18 O.R. 448.