THOMAS TURNER AND ALICE TURNER..... } APPELLANTS.

AND

JAMES CHARLES PREVOST AND OTHERS..... } RESPONDENTS.

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*Jan. 23, 24.
*June 12.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Statute of frauds—Contract relating to interest in land—Part performance.

B., a resident of British Columbia, wrote to his sister, in England, that he would like one of her children to come out to him, and in a second letter he said "I want to get some relation here for what property I have, in case of sudden death, would be eat up by outsiders and my relations would get nothing." On hearing the contents of these letters T., a son of B.'s sister and a coal miner in England, came to British Columbia and lived with B. for six years. All that time he worked on B.'s farm and received a share of the profits. After that he went to work in a coal mine in Idaho. While there he received a letter from B. containing the following: "I want you to come at once as I am very bad. I really do not know if I shall get over it or not, and you had better hurry up and come to me at once, for I want you and I dare say you will guess the reason why. If anything should happen to me you are the person who should be here." On receipt of this letter T. immediately started for the farm but B. had died and was buried before he reached it. After his return he received the following telegram which had not reached him before he left for home: "Come at once if you wish to see me alive, property is yours, answer immediately. (Sgd) B." Under these circumstances T. claimed the farm and stock of B. and brought suit for specific performance of an alleged agreement by B. that the same should belong to him at B.'s death.

Held, affirming the judgment of the court below, that as there was no agreement in writing for the transfer of the property to T., and the facts shown were not sufficient to constitute a part performance of such agreement, the fourth section of the statute of frauds

*PRESENT: Sir W. J. Ritchie C.J. and Fournier, Taschereau, Gwynne and Patterson JJ.

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was not complied with, and no performance of the contract could be decreed.

APPEAL from a decision of the Supreme Court of British Columbia affirming the judgment at the trial which refused a decree for specific performance.

In addition to the facts stated in the above head-note it appeared that after the death of Bridges the defendant Prevost was appointed administrator to his estate by the court and, by leave of the court, sold a portion of the real estate to one Power who is a defendant in the suit, and a part of the relief claimed is that the sale may be declared void and the administrator required to repay the purchase money to Power. This was refused but the plaintiff was held entitled to compensation which was fixed at the amount received for the land and the net proceeds of the sale of the stock and farm implements, but out of this sum the plaintiff was to pay the costs of Power and the administrator. The full court varied this judgment by ordering that the plaintiff should pay these costs generally and that he should receive a sum equal to the value of the cattle on the lands sold, a new trial to be had if the parties could not agree upon such value.

From the judgment of the full court the plaintiff, Thomas Turner, and his mother, Alice Turner, one of the defendants, appealed to the Supreme Court of Canada.

S. H. Blake Q.C. for the appellants cited *Alderson* v. *Maddison* (1); *Studds* v. *Watson* (2); *Re Maddever* (3); *McDonald* v. *McKinnon* (4); *Magee* v. *Kane* (5).

Moss Q.C. for the respondent, Prevost, referred to

(1) 7 Q.B.D. 174; 8 App. Cas. 467.
(2) 28 Ch. D. 305.
(3) 27 Ch. D. 527.
(4) 26 Gr. 12.
(5) 9 O.R. 478.

Caton v. *Caton* (1); *Campbell* v. *McKerricher* (2); *Ridgway* v. *Wharton* (3).

McCarthy Q. C., and *A. F. McIntyre* appeared for the respondent Power, citing *Finch* v. *Finch* (4); *Shaw* v. *Crawford* (5); *Price* v. *Salusbury* (6); *Hope* v. *Hope* (7); *Gervais* v. *Edwards* (8).

SIR W. J. RITCHIE C.J.—As regards the real estate, or the proceeds thereof sought to be recovered in this action, I think the court below was right in holding that the alleged agreement cannot be enforced by reason of the non-compliance with the statute of frauds, there being in this case no writing signed by the party to be charged or his agent, as required by the statute in actions on an agreement concerning lands, nor is the case taken out of the statute by evidence of part performance. As regards so much of the decree as touches the value of the stock and implements on the farm at the death of the intestate, as it has not been appealed against it will stand.

FOURNIER J. concurred.

TASCHEREAU J.—I am of opinion that this appeal should be dismissed with costs.

GWYNNE J.—Apart from the judgments in *Alderson* v. *Maddison* in the Court of Appeal (9) and in the House of Lords (10), I should have been of opinion that the present is not at all a case for the application of the doctrine of part performance taking a case out of the operation of the 4th section of the Statute of Frauds; but in view of the above judgments in *Alderson*

(1) 1 Ch. App. 149; L. R. 2 H.L. 127.
(2) 6 O.R. 86.
(3) 3 DeG. M. & G. 677.
(4) 23 Ch. D. 267.
(5) 4 Ont. App. R. 371.
(6) 32 Beav. 446.
(7) 8 DeG. M. & G. 735.
(8) 2 Dr. & War. 80.
(9) 7 Q. B. D. 174.
(10) 8 App. Cas. 467.

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v. *Maddison* (1) it is impossible, without utterly disregarding those judgments, to apply that doctrine to the present case. The arguments on behalf of the plaintiff are based upon the same fallacy as that which Lord Justice Baggallay, in giving judgment in *Humphreys* v. *Green* (2), pronounced the arguments on behalf of the plaintiff in that case to rest, namely, that they relied upon the parol agreement itself to prove that the alleged acts of part performance were referable to that agreement, and I must add that there seems to have been much in the conduct of the plaintiff wholly inconsistent with the particular parol agreement, which he now insists upon, ever having been made. That the plaintiff had reasonable expectation of some benefit from his uncle's will cannot, I think, be doubted and his disappointment, no doubt, has been great, but to hold that he is entitled, upon the equitable doctrine of part performance, to the very benefit which he insists upon would be to extend that doctrine beyond what is warranted by the decided cases upon which the doctrine rests. While we may sympathise with the plaintiff in his disappointment we cannot strain the law beyond its legitimate limits for his benefit. We may, however, I think, while dismissing his appeal do so, under the circumstances, without costs, as was done in *Alderson* v. *Maddison* (1) and direct the costs of the administrator, Prevost, to be paid out of the estate of the intestate. I think, also, that so much of the order of the court below as, in the event of the parties differing upon the "sum to be paid as the value of the cattle and increase," directs a new trial to be had, and all that is in the order subsequent to that direction, should be expunged from the order and that, in lieu thereof, it should be directed that it should be referred to an officer of the court to take evidence as to such value

(1) 8 App. Cas. 467. (2) 10 Q.B.D. 158.

and to report thereon to the court in the ordinary manner.

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PATTERSON J. concurred.

Appeal dismissed with costs.

Solicitor for appellant Thomas Turner: *Theodore Davie.*

Solicitor for appellant Alice Turner: *Gordon E. Corbould.*

Solicitor for respondent Prevost: *Geo Jay, jr.*

Solicitor for respondent Power: *Chas. E. Pooley.*