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*Feb. 19, 20, 21 May 16

MATTHEW H. BROWNSCOMBE (*Plaintiff*) ..... APPELLANT;

AND

THE PUBLIC TRUSTEE of the Province of Alberta, Administrator of the Estate of ROBERT MARCELL VERCAMERT (*Defendant*) ..... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Contracts—Part performance—Statute of Frauds—Plaintiff working on farmer's land without real wages—House built on farm by plaintiff at own expense—Alleged oral agreement that on farmer's demise farm would go to plaintiff by will—Whether acts of plaintiff "unequivocally referable" to said agreement.

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

Over a period of some twenty-six years the plaintiff worked with but little financial reward for a farmer who because of a heart ailment was unable to carry on his farming operations without assistance. Following the death of the farmer, who died intestate, the plaintiff brought an action against the defendant as administrator of the estate of the deceased for specific performance of an oral agreement by which the plaintiff alleged the deceased had agreed to leave him his farm in return for services rendered, and whereas the said farm had been sold by the administrator, the plaintiff claimed the proceeds thereof. In giving judgment for the plaintiff, the trial judge found that there were acts constituting part performance of the contract so as to afford relief from the operation of the *Statute of Frauds*. On appeal, the Appellate Division concurred with the finding of the trial judge that there was an oral contract as the plaintiff alleged, but on the question as to whether the acts done by the plaintiff referred "unequivocally" to an agreement that the land was to be left by will the Appellate Division concurred with the finding of the trial judge However, it was held that although there was no part performance and the plaintiff was not entitled to recover the farm he was entitled to be compensated for his services. The plaintiff appealed and the defendant cross-appealed from the judgment of the Appellate Division.

Held: The appeal should be allowed and the trial judgment restored.

Not all the acts relied on by the plaintiff could be regarded as "unequivocally referable in their own nature to some dealing with the land", but the building of a house on the lands in question at the suggestion of the deceased farmer almost, if not wholly, at the plaintiff's expense was, as the trial judge found "unequivocally referable" to the agreement which the plaintiff alleged had been made and inconsistent with the ordinary relationship of employee or tenant.

The Appellate Division was in error in holding that the act of building the house on the farm in the circumstances of the case was not part performance of the contract.

McNeil v. Corbett (1907), 39 S.C.R. 608; *Deglman v. Guaranty Trust Co. of Canada and Constantineau*, [1954] S.C.R. 725, referred to.

APPEAL and CROSS-APPEAL from a judgment of the Supreme Court of Alberta, Appellate Division[1], allowing in part an appeal from a judgment of Farthing J. Appeal allowed and trial judgment restored; cross-appeal dismissed.

W. H. Downton, for the plaintiff, appellant.

G. R. Forsyth, for the defendant, respondent.

The judgment of the Court was delivered by

HALL J.:—This is an appeal and cross-appeal from the judgment of the Appellate Division of the Supreme Court of Alberta[1] which allowed in part an appeal by the respondent from a judgment of the late Mr. Justice Farthing in

[1] (1968), 64 W.W.R. 559, 69 D.L.R. (2d) 107.

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which he had awarded the appellant damages in the sum of $38,000 in lieu of specific performance of an oral agreement between the appellant and the late Robert Marcell Vercamert, the said sum of $38,000 representing the proceeds from the sale of certain lands which the appellant claimed Vercamert had agreed to leave to him for services rendered. The judgment also awarded a certain Chevrolet vehicle to the appellant.

The Appellate Division allowed the respondent's appeal as to that portion of the judgment that there were sufficient unequivocal acts of part performance to grant specific performance or damages in lieu thereof, and substituted a finding that the appellant was entitled to compensation for services rendered to Vercamert in an amount to be fixed by the Appellate Division. The respondent's appeal as to the Chevrolet vehicle was dismissed. The appellant appeals to this Court to restore the judgment of the learned trial judge as to the $38,000 damages awarded in lieu of specific performance. The respondent gave notice of a cross-appeal to this Court as follows:

> TAKE NOTICE that the Respondent intends to cross-appeal to the Supreme Court of Canada from that part of the judgment of the Appellate Division of the Supreme Court of Alberta delivered on the 2nd day of May, 1968 wherein the Court confirmed the decision of the Trial Judge that there was an oral agreement between the Appellant and Robert Marcel Vercamert relating to the deceased's farm lands, that there was performance by the Appellant of such oral agreement, that the evidence of such agreement was corroborated sufficiently to satisfy the provisions of the Alberta Evidence Act and that the Appellant is entitled to compensation for services rendered to the deceased, Robert Marcel Vercamert.

The matter of the Chevrolet is not an issue in this appeal.

The respondent is the Public Trustee of the Province of Alberta and was sued as Administrator of the Estate of the said Robert Marcell Vercamert who died intestate on January 16, 1961, leaving an estate, including the lands in issue in this litigation, the net value of which was $124,133.54. The lands in issue here were sold by the respondent as Administrator on February 28, 1962, for $38,000.

The facts are summarized by the learned trial judge in the opening paragraph of his judgment as follows:

> In 1932 when Canada and the world in general were in a severe business depression, the plaintiff, whose home was in Prince George, B.C.,

and who was then sixteen years of age, applied to the late Robert Marcel Vercamert at the latter's home, not far from Rockyford in Alberta, for work. The said Vercamert, a bachelor, somewhat severely crippled by heart trouble and able to do but little work on the farm where he lived and which he conducted, took the plaintiff into his home. On the evidence I find that plaintiff worked faithfully for his employer with but little financial reward for a considerable number of years. I find that on a number of occasions when plaintiff thought of leaving Vercamert's employ he was dissuaded by the latter's promised assurance that on his demise the farm would go to plaintiff by Will. In January, 1961, Vercamert died intestate and this action is the result.

The appellant's evidence of his agreement with Vercamert was corroborated by the evidence of four independent witnesses, Leon Sherger, Joseph Smith MacBeth, Lawrence Stinn and Anthony E. Velker and by the appellant's wife, to each of whom Vercamert said in effect on separate occasions that the appellant was to get the farm for having worked for Vercamert since a boy and to Sherger he said in particular that he had a will and he was leaving the farm to the appellant.

After reviewing the evidence in detail, Farthing J. made the following finding:

After careful consideration of all of the evidence, I am impelled to find that the plaintiff and Vercamert entered into an oral agreement that the plaintiff would do so such work as Vercamert might reasonably request him to do in carrying on Vercamert's farm operations until his death, and that in consideration of the plaintiff staying on with him then and carrying out such requests, Vercamert would leave to the plaintiff as payment, the farm he was operating at the time of his death; that the farm at the time of Vercamert's death consisted of Lots 24 and 25, Parcel C, Plan Grasswald 5755 A.W., and Lots 22 and 35, Parcel C, Plan R.W. 80, aforesaid; and that the reason for the agreement was Vercamert's inability because of a heart ailment to carry on his farming operations without assistance and he was financially unable to pay any real wages at the time the agreement was made.

and then he said:

The contract relating to land is within s. 4 of the *Statute of Frauds*, and there is no memorandum in writing. Therefore, part performance is necessary for the plaintiff to succeed on his claim for specific performance. *Per* Cranworth, L.C. in *Caton v. Caton* (1866), 1 Ch. App. 137, at p. 147: Part performance will afford relief from the operation of the Statute '... in many cases...when to insist upon it would be to make it the means of effecting instead of preventing fraud.' However, not all acts done in pursuance of the unenforceable contract will constitute part performance in law. They may be found to relate only to a contract of service as in *Maddison v. Alderson* (1883), 8 App. Cas. 467, and *Deglman v. Guaranty Trust Co. of Canada and Constantineau*, [1954] S.C.R. 725, except where such acts are 'unequivocally referable in their own nature to some dealing with the land which is alleged to have been the subject

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of the agreement sued upon...': *Per* Duff, J. in *McNeil v. Corbett* (1907), 39 S.C.R. 608, approved by the Supreme Court of Canada in *Deglman, supra.*

He then canvassed the evidence to determine if the acts testified to in the evidence in pursuance of the verbal contract were "unequivocally referable in their own nature to some dealing with the land" and found:

> In this case, there is no doubt in my mind that the work the plaintiff did on the farm and the services he performed for Vercamert, as well as suiting his working and living arrangements to Vercamert's needs and requests over a period of some twenty-six years, were 'unequivocally referable' to the agreement that existed between them. The plaintiff fully performed his part of the agreement, and he did so for a wholly inadequate compensation in money. Vercamert's books, which were introduced in evidence, showed a total of less than $2,200.00 paid to Vercamert [sic] over the whole period in question, and there were other exhibits filed indicating that part of that sum was paid to the plaintiff for goods purchased for Vercamert. However, as I have stated already, this evidence can only go to satisfy me that the agreement between these parties as alleged by the plaintiff, existed.

and concluded:

> I therefore find that the plaintiff was entitled to specific performance of the oral agreement which has been so partly performed. Therefore, the plaintiff was the equitable owner of the farm lands and buildings, and as the equitable owner he is entitled to the proceeds of their sale.
>
> I also find that the plaintiff is entitled to a declaration of title to the 1950 Chevrolet truck, Serial #1131403564, for the reason that it having been registered in his name in 1957 and he having performed acts of ownership in relation to it in that year and the following, by providing the license plates, and no further registration having been effected, is *prima facie* the owner, and I do not find that the evidence adduced by the defendant satisfied the onus which was on the defendant of proving otherwise.

In the Appellate Division, McDermid J.A., writing for the Court, concurred in the finding of the learned trial judge that there was an oral contract as the plaintiff alleged. In this regard he said:

> The learned trial judge came to the conclusion that there was an express contract and, as there was evidence on which the learned trial judge could so find, I think we should not interfere with that finding. In *Maddison v. Alderson* [*supra*], where a housekeeper performed services for the deceased over a long period of time on the basis that he was to leave her certain property the Law Lords expressed doubts as to the existence of a contract. Lord Selborne L.C. at p. 472 said: 'If there was a contract on his part, it was conditional upon, and in consideration of, a series of acts to be done by her, which she was at liberty to do, or not to do, as she thought fit; and which if done, would extend over the whole remainder of his life. If he had dismissed her, I do not see how she could have brought any action at law, or obtained any relief in equity.' Such a contract made during the lifetime of the parties may well be a unilateral contract as distinguished from a bilateral or synallagmatic

contract as those terms are used by Diplock, L.J. in *United Dominions Trust (Commercial) Ltd. v. Eagle Aircraft Services Ltd.*, [1968] 1 All E.R. 104. However, whether the arrangement constitutes a binding contract during the lifetime of the parties, if the services are performed, then upon the death of the person receiving the same there is a valid contract. Such validity was clearly recognized by the Supreme Court of Canada in *Deglman v. Guaranty Trust Company of Canada and Constantineau* [*supra*].

As to the argument that the contract was too vague, in Williston on Contracts, 3rd ed., vol. 1, pp. 158-9, it is stated: 'If, however, the side of the agreement which was originally too vague for enforcement becomes definite by entire or partial performance, the other side of the agreement (or a divisible part thereof, corresponding to the performance received), though originally unenforceable, becomes binding.'

Counsel for the appellant further argued that if there was an agreement the respondent had not fulfilled his side of the agreement. I think there was substantial performance of the agreement by the respondent. If there was any lack of performance on the part of the respondent, such performance was prevented by the conduct of the deceased.

However, on the question as to whether the acts done by the appellant referred "unequivocally" to an agreement that the land was to be left by will to the appellant, McDermid J.A. held:

The learned trial judge considered the acts of labour done over the life of the agreement and the respondent's act of building the house were acts of part performance. With the greatest of respect I do not agree.

Here the acts of labour done over the whole life of the agreement are not 'unequivocally and in their own nature referable' to an agreement that the land on which the acts were performed was to be left by will to the person who did the labour. Ordinarily it would be expected that such acts of labour were referable to a contract of employment to pay wages. They are certainly not unequivocal acts. See also *Turner v. Prevost* (1890), 17 S.C.R. 283. Nor do I think the act of building the house on the farm was part performance. As stated in Fry on Specific Performance, 6th ed., at p. 284: 'For acts to amount to part performance, the contract "must be obligatory, and what is done must be done under the terms of the agreement and by force of the agreement."' The respondent was in possession of the farm under a lease and as a tenant. I do not see how in the circumstances the building of the house could have been considered to have been done under the terms of a contract that the respondent was to work for the deceased and be left the farm.

But having so found, McDermid J.A. continued:

However, although there was no part performance and the respondent is not entitled to recover the farm he is entitled to be compensated for his services.

* * * *

There was evidence corroborating the claim of the respondent as required by the provisions of *The Alberta Evidence Act*, R.S.A. 1955, c. 102, s. 13. Four witnesses were called by the respondent who all stated that over the course of years the deceased had said that on his death the respondent would get the farm.

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Ordinarily this case should be referred back to the trial judge to determine the amount owing to the respondent. However, as the trial judge has since retired the amount will be determined by this Division and counsel will be given the opportunity of making representations as to what this amount should be.

The issue for decision by this Court is whether the acts relied upon by the appellant over the period 1932 to 1961 are acts which are "unequivocally referable in their own nature to some dealing with the land which is alleged to have been the subject of the agreement sued on" as stated by Duff J. (as he then was) in *McNeil v. Corbett, supra,* and approved by this Court in *Deglman v. Guaranty Trust Co. of Canada and Constantineau, supra.*

It is clear that not all the acts relied on as testified to by the appellant and his wife can be regarded as "unequivocally referable in their own nature to some dealing with the land", but in my view the building of the house on the lands in question in the years 1946 and 1947 at the suggestion of Vercamert almost, if not wholly, at the appellant's expense was, as the learned trial judge found "unequivocally referable" to the agreement which the appellant alleged had been made and inconsistent with the ordinary relationship of employee or tenant.

With respect, I think that McDermid J.A. was in error in holding that the act of building the house on the farm in the circumstances detailed in the evidence and accepted by the learned trial judge was not part performance of the contract which both the learned trial judge and the Appellate Division found existed between the appellant and Vercamert.

I would, accordingly, allow the appeal and restore the judgment of Farthing J. with costs here and in the Appellate Division. The appellant is entitled to receive the $38,000 together with interest on the said sum which has accrued to the respondent since the receipt of the said moneys and the respondent shall account to the appellant for the same. The cross-appeal will stand dismissed with costs.

Appeal allowed and trial judgment restored, with costs; cross-appeal dismissed with costs.

Solicitors for the plaintiff, appellant: Collier, Downton, Plotkins & Mackie, Calgary.

Solicitors for the defendant, respondent: Howard, Moore, Dixon, Mackie & Forsyth, Calgary.