

CANADA / JUDGMENT

Thompson v. Guaranty Trust Co.

[1974] SCR 1023

COURT

Supreme Court of Canada

DECIDED

27 August 1973

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Thompson v. Guaranty Trust Co.

Collection

Supreme Court Judgments

Date

1973-08-27

Report

[1974] SCR 1023

Judges

Martland, Ronald; Judson, Wilfred; Spence, Wishart Flett; Laskin, Bora; Dickson, Robert George Brian

On appeal from

Saskatchewan

Subjects

Contract

Decision Content

Supreme Court of Canada

Thompson v. Guaranty Trust Co., [1974] S.C.R. 1023

Date: 1973-08-27

Angus Reed Thompson (Plaintiff) Appellant;

and

Guaranty Trust Company of Canada, Administrator of the Estate of Richard John Copithorne,
Deceased (Defendant) Respondent.

1973: June 11, 12; 1973: August 27.

Present: Martland, Judson, Spence, Laskin and Dickson JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Contracts—Oral agreement to devise estate to plaintiff in consideration of plaintiff working
deceased's farm—Part performance—Statute of Frauds.

The appellant started to work for the deceased as a farm labourer in 1922. By 1924 he had become the operator and manager of the whole farm industry owned by the deceased and he continued as such until the death of the deceased in 1970. Neither man ever married and the deceased died intestate. The appellant sued for specific performance of an agreement alleged to have been entered into between him and the deceased whereby the deceased agreed that in consideration of the appellant remaining with the deceased and working and operating the farm lands of the deceased until the death of the deceased, the deceased would devise and bequeath to the appellant the whole of his estate both land and personalty. The trial judge gave judgment in favour of the appellant. An appeal was allowed by the Court of Appeal and the appellant then appealed to this Court. The trial judge's finding, approved by the Court of Appeal, that an oral agreement as alleged had been established was accepted by this Court.

The action was argued in all Courts upon the basis that there was no sufficient memorandum within s. 4 of the Statute of Frauds and the vital issue in the present appeal was whether or not lacking such a memorandum in writing there had been sufficient acts of part performance on the part of the appellant to take the case out of the said s. 4 of the Statute of Frauds.

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Held: The appeal should be allowed.

The Court held that the appellant had proved acts which were unequivocally referable to the very lands in question and that therefore he had adduced the evidence of part performance which took the case out of the provisions of s. 4 of the Statute of Frauds.

Brownscombe v. Public Trustee of Alberta, [1969] S.C.R. 658, applied; Maddison v. Alderson (1883), 8 App. Cas. 467; 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 from a judgment of the Court of Appeal for Saskatchewan, allowing an appeal from a judgment of MacPherson J. Appeal allowed.

M.C. Shumiatcher, Q.C., and Robert D. McCrank, for the plaintiff, appellant.

C. Ross Wimmer and R.B. Buglass, for the defendant, respondent.

The judgment of the Court was delivered by

SPENCE J.—This is an appeal from the judgment of the Court of Appeal for Saskatchewan pronounced on June 28, 1972. By that judgment, the said Court of Appeal allowed an appeal from the judgment of MacPherson J. at trial which had been pronounced on July 14, 1971.

The appellant, as plaintiff, had sued for specific performance of an agreement alleged to have been entered into between him and the deceased Richard John Copithorne whereby the said deceased agreed that in consideration of the respondent remaining with the deceased and working and operating the farm lands of the said deceased until the death of the deceased the deceased would devise and bequeath to the respondent the whole of his estate both land and personalty.

In order to come to a decision in this matter, I find it necessary to outline the facts adduced in the evidence in some considerable detail. I am of the opinion that this would be most efficiently done by quoting extensively from the judgment of MacPherson J. at trial:

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At Indian Head in 1921, Gus met Dick and in the spring of 1922 he went to work for him as a farm labourer. He stayed there until Dick died in 1970, 48 years later.

For some of that time, there was a female housekeeper on the farm but during most of those years the two lived alone. Neither ever married.

In 1922, Dick owned two quarter sections of land against which there was debt. He was then 33. When he died at the age of 81, he owned considerably more land and other assets. His estate exceeded \$200,000.00 in value. No Will has been found.

For the first two years, Gus was paid by Dick \$50.00 and his keep. In about 1924, Dick became ill and remained unable to work for two years and Gus then did all the farming and kept the house and nursed Dick. Many witnesses describe their relationship through the years as like that of brothers or father and son. Very possibly their intimacy and mutual confidence commenced during this illness. It was then that Dick made his first promise to make Gus, his heir. He said that he could not then afford to pay Gus's wages but, if Gus agreed to stay and work that all his property would be Gus's "if I don't recover".

Again in 1928, Dick was in bed for a good part of the farm season. This time he was injured when he was run over by a one-way plough. Again, he made the same promise and again Gus agreed to stay.

On 28 April 1942, Dick was thrown from a horse and suffered an injury to a leg which left him a cripple for the rest of his life. There were then two papers signed by Dick in the hospital. The smaller one was entirely in his own hand and signed also by Gus. The second was a long document which Gus believed was a Will but, as he testified, may not have been. Both were stolen along with all of Dick's duplicate Certificates of Title and other papers, in 1969, and are beyond my interpretation. I shall refer to these as the 1942 papers.

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As he handed Gus the papers, he said that all the property was Gus's and nobody could bother him. Then he told Gus to look after Christina who was the housekeeper I have mentioned. He referred to the larger paper as a Will.

As a result of Dick's injury, Gus's induction into the Army was deferred and he remained on the farm throughout the war.

Later, in the 1940s, Gus decided to leave Dick and go elsewhere. He decided not to leave, however, because once again, Dick agreed that upon Dick's death his whole estate would go to Gus, if Gus stayed and worked the farm.

On 4 January 1969, it was necessary to take Dick to hospital. At his request, Mr. and Mrs. Schoenau came to drive him there. Gus went along. Before leaving their home, Dick produced from his strongbox the larger of the 1942 papers, the one which Gus thought was a Will, and said to Gus: "Here's everything if I don't come back." Dick wept. Mrs. Schoenau remembers him then saying to Gus "I am giving everything to you." That night, while Gus was away and the house was empty, the box and its contents, including the presumed Will, were stolen.

The duplicate Certificates of Title were replaced by the procedure under The Land Titles Act.

On 22 May 1970, Gus, with the assistance of a neighbour took Dick to the hospital for the last time. Many incidents occurred in the hospital which would indicate to me that Dick, until the end, intended to give his property to Gus.

Gus had in his possession cheques payable to Dick totalling about \$4,500.00. These included two cheques from the Government of Saskatchewan in compensation for land taken for a roadway, and one from the Lutheran Synod as payment on an agreement for sale of land. Gus gave all the cheques to Dick who endorsed one and gave them all back to Gus, saying it was all Gus's now, the money and the land and that he, Dick, did not want to spend any of Gus's money.

Then occurred, the oddest and, the most confusing incident in the whole story. Perhaps it was also tragic. Dick told Gus to get Ed Poells to draw a paper turning everything over to Gus. Gus passed the

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instructions to Poells who drew, in duplicate, a Power of Attorney. This was signed by Dick who then told Gus to get himself a lawyer because Dick's property was all now his, and added the precatory injunction that he, Gus, was not to forget Olive, George and Buster, the children of Christina, the deceased housekeeper.

Mr. Poells is of the genus small town factotum—insurance agent, notary public, without whom this Province could not carry on, but those errors sometimes give rise to litigation. Mr. Poells is a very self-assured individual, a bit of an exhibitionist and a most unsatisfactory witness. When Gus told him what Dick wanted, Poells assumed it was a Power of Attorney. In direct testimony, Poells told us that although Dick did not read the document that he, Poells, had fully explained it to him. I am satisfied that Poells told Dick that the document turned everything over to Gus but I seriously doubt that he made him or the others present to understand that this was a temporary thing. Mrs. Schoenau who signed as witness said Dick was relieved after signing and he remarked that everything was now Gus's and he could do with them as he pleased.

The document itself is the ordinary printed form of Power of Attorney, double foolscap size, folded and possessing two and a half pages of small print. The only words added to the printed form were the names of Richard John Copithorne and Angus Reed Thompson. Although Dick's eyes were sharp, he did not read the document. He was told that it turned everything over to Gus, as it did. He saw the names typewritten. He did not understand its temporary quality. I am satisfied on the balance of probabilities that he thought he was signing a Will, and that he intended it as such.

The learned trial judge further stated:

Up to about 1924, when Dick's first lengthy illness occurred, Gus was paid normally for work done. Then for two years he did almost everything around the farm and the home, including the care of Dick. Thereafter, except for Dick's season of incapacity when run over by the one-way, apparently the two

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shared the work until 1942 when Dick was crippled. From 1942 until 1970, the evidence is abundant that Gus was a constant and tireless worker on the farm. He was, in my view, more than a worker, he became a skilled farmer and manager in the sense of making decisions concerning crops, equipment, purchases and sales, or, at least, sharing in the decisions with Dick after consultation.

After 1942, the two were constantly together except when Gus was in the fields. Dick could drive a tractor or truck only for short periods. Mrs. Schoenau, who knew them for the last ten years, never saw Dick drive. He was never anywhere without Gus, she said. She described their visits to the farm where Gus did the cooking and the housework. The house was only fairly clean, said this housewife, but the food was very good.

Gus, sometime during the years, with some assistance, rebuilt the house, putting in new floors and constructing a new roof. He built all the granaries.

The learned trial judge made further extensive references to the evidence and then gave his assessment of the two chief actors in the drama, Richard John Copithorne and the appellant Angus Reed Thompson, in these words, “they were kind, simple, honest people”, and again, “the simplicity, humility and honesty of Gus were plain and I believed him throughout”.

Maguire J.A. in giving the judgment of the Court of Appeal for Saskatchewan said:

The learned trial judge, MacPherson J., in a written judgment, found and held that the respondent [here appellant] had established an oral contract as alleged. There is evidence fully supporting this finding, and it cannot be disturbed.

With this finding I am in complete agreement and indeed I am of the view that the appeal was argued in this Court on the basis that the existence of an oral contract whereby the deceased

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promised to give to the appellant his whole estate if the appellant should remain and work with him on the farm until his, Copithorne's, death has been established.

Although The Saskatchewan Evidence Act contains no such provision as may be found, for instance, in s. 14 of the Ontario Evidence Act, R.S.O. 1970, c. 151, it was argued by the respondent in this Court that the uncorroborated evidence of a claimant against an estate of a deceased person will be regarded with jealous suspicion and that the Court generally requires corroboration of such a claim citing the decision of this Court in *Adamson v. Vachon*[1].

Counsel for the appellant did not contest the requirement by judicial decision, apart from any statute, of corroboration but he cited a great deal of evidence in his submission which was corroborative of the claim made by the appellant. I think I may dispose of the matter briefly by saying that a very large part of the evidence to which MacPherson J. alluded in his reasons for judgment and upon which he based his reasons is such independent evidence as satisfied the requirement of corroboration and I am quite ready to accept his finding, as approved in the Court of Appeal, that the contract was established as not only a finding of fact upon such establishment of the contract but is a finding that there was corroborative evidence of such contract.

The action has been argued in all Courts upon the basis that there was no sufficient memorandum within s. 4 of the Statute of Frauds and the vital issue in this appeal is whether or not lacking such a memorandum in writing there have been sufficient acts of part performance on the part of the appellant to take the case out of the said s. 4 of the Statute of Frauds.

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The learned trial judge, after his very complete review of the evidence, expressed his conclusion in these words:

Thus, I have no hesitation in holding that Gus's work was directed to the contract and that constituted not only part performance as equity requires but complete performance. The contract was that Gus was to inherit all of Dick's estate and that, consequently, is enforceable.

The plaintiff shall have judgment for the entire estate in accordance with paragraph 15(l)(i) of the Statement of Claim. The parties will have their party and party costs of the estate. Counsel may speak for special counsel fees.

On the other hand, Maguire J.A., giving judgment for the Court of Appeal for Saskatchewan, came to another conclusion stating:

I cannot, however, construe any act or acts of the Respondent as meeting the stated test as expounded in *Deglman v. Guaranty Trust*, [1954] S.C.R. 725; *Brownscombe v. Public Trustee of Alberta*, [1969] S.C.R. 658; *In re Meston: Meston v. Gray et al.*, [1925] 3 W.W.R. 656.

and concluded:

I must, therefore, with all respect, hold that the learned trial Judge erred in holding that the Respondent was entitled to the whole estate of the deceased, pursuant to the terms of the oral agreement.

The test was enunciated by Lord Selborne in the House of Lords in *Maddison v. Alderson*[2], when he said at p. 478:

On that point later authorities have overruled Lord Hardwicke's opinion; and it may be taken as now settled that part payment of purchase-money is not enough; and judges of high authority have said the same even of payment in full ... Some of the reasons which have been given for that conclusion are not satisfactory; 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. I am not aware of any case in which the whole

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purchase-money has been paid without delivery of possession, nor is such a case at all likely to happen. 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 ...

It is the interpretation of those latter words which has been the subject of a series of cases in this Court. Those cases are: *McNeil v. Corbett*[3], *Deglman v. Guaranty Trust Co. of Canada* and *Constantineau*[4]; and *Brownscombe v. Public Trustee of Alberta*[5].

In *McNeil v. Corbett*, supra, Duff J., (as he then was) considered whether the transfer of a \$500 debenture from one party to another was evidence of part performance. The learned justice quoted from *Maddison v. Alderson*:

"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;"

and then continued:

i.e., to an agreement respecting the lands themselves ...

and held that in that particular case there was 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. A sale and purchase of the stock and bonds actually transferred would suffice to explain them. The acts were held not to be part performance so as to take the case out of the Statute of Frauds.

I think I can say, therefore, that the facts of the McNeil v. Corbett case bear no similarity to the facts in the present case and although the statement of law is one to which one can have no exception we are not assisted in the applica-

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tion of that statement of law to the facts in the present case.

In the Deglman case the respondent was the nephew of the deceased. Both lived in Ottawa. When he was about twenty years of age and while attending a technical school for six months, he lived with the deceased, his aunt, at 550 Besserer Street. His aunt owned both 550 Besserer Street and the adjoining residence, No. 548 Besserer Street. The promise or contract alleged was that the deceased agreed with her nephew that if her nephew would be good to her and do 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 she would leave for him the premises at 548 Besserer Street. The respondent did not continue to live at 550 Besserer Street after the six-month period. He married and he had a home of his own. He did, on occasion, take his aunt for trips to Montreal and elsewhere and did odd jobs around both houses and ran various errands for her. Cartwright J., as he then was, then said at p. 729:

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.

This Court, therefore, came to the conclusion that such acts were not acts as to which evidence could be received to establish part performance of the contract and granted to the nephew only a quantum meruit sum as the Court of Appeal did in the present case.

It should be noted that the very vague and general character of the services performed in Deglman bear little resemblance to the services performed in the present case. In the first place, the nephew never lived at 548 Besserer Street, the premises which he alleged his aunt had contracted to leave to him in her will, and had performed services at either 548 or at 550 Bess-

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erer Street and had performed various other desultory acts of assistance much more referable to the natural desire of a dutiful nephew to assist an aged aunt than any contract for leaving a specific property to him in a will. Moreover, I am of the opinion that the relationship between the claimant and the deceased, that of nephew and aunt, is of some importance in considering the acts of part performance which were alleged. It is also, of course, notable that the nephew had his own life away from the aunt and with his own wife and family.

In *Brownscombe v. Public Trustee of Alberta*, supra, the Court considered very different circumstances and those which resemble markedly the circumstances in the present case. *Brownscombe* when only sixteen years of age had applied to Vercamert at the latter's home for work. Vercamert, as was the deceased in the present case, was a bachelor somewhat severely crippled by heart trouble and able to do but little work on the farm where he lived. The learned trial judge made a finding which was quoted by Hall J. in giving reasons for judgment in this Court as follows:

"... 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."

At p. 664, Hall J. said:

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

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the agreement which the appellant alleged had been made and inconsistent with the ordinary relationship of employee or tenant.

Therefore, this Court held that the plaintiff had proved acts of part performance to take the case out of the Statute of Frauds and directed specific performance.

Counsel made the submission in the present appeal that the acts of part performance which were alleged by the appellant were not so decisive and were not so unequivocally referable to the very lands as were those in *Brownscombe*. I am personally of the opinion that practically every act of part performance as to which evidence was given, and I have read the record carefully, were acts which were unequivocally referable to a contract in reference to the very lands in question, that is the farm consisting of five one-quarter sections which had been the property of the deceased. The appellant was no mere farm hired man and had not been since about 1924 but from 1924 until the death of Richard John Copithorne on June 2, 1970, the appellant had been the operator and manager of the whole farm industry owned by the deceased. There was not one part of the work in reference to that farm in which the appellant had not taken not only a prominent part

but the leading part and both physically and because of age the deceased had relied solely on the intelligent and arduous labour of the appellant. It is quite clear that the deceased, more than anyone else, realized and appreciated the nature and the quality of the appellant's work. We have independent evidence that the deceased told his cousin in 1969, the year before his death, that but for Gus he, Dick, would be in the poorhouse.

In *Brownscombe v. Public Trustee of Alberta*, Hall J. found the building of the house to be a factor plainly referable to an agreement as to

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the very land. Counsel for the respondent here objected that the house was not built by the appellant but the appellant simply renovated and made more comfortable the residence which both he and the deceased had for some time before occupied. I am of the opinion that that distinction is quite unimportant. The evidence is that the house was a wreck, that it was totally rebuilt by the appellant and, in my view, it is exactly the same kind of a circumstance that had occurred in the *Brownscombe* case. Moreover, the appellant changed the farm from a rather run down marginal proposition to one where the total estate of the deceased at his death amounted to about \$200,000. Broken old barns were torn down, granaries were built, a garage building was purchased in the town and hauled on to the property, a thoroughbred Hereford cattle business was commenced, and the evidence that the deceased and the appellant had agreed to share the proceeds of this business two-thirds and one-third, in my opinion, rather than being evidence mitigating against the alleged contract is evidence which will confirm and corroborate it. That was a distribution of proceeds during the lifetime of the deceased and it is quite separable from any contract to give to the appellant what remained at the death of the promisor, the deceased.

I therefore cannot distinguish the circumstances in the present case from those which the Court considered in the *Brownscombe* case except to say that probably the circumstances are stronger in favour of this appellant than they were for *Brownscombe* in that case. I would, therefore, hold without hesitation that the appellant has proved acts which are unequivocally referable to the very lands and that therefore he has adduced the evidence of part performance which takes the case out of the provisions of s. 4 of the Statute of Frauds.

I would allow the appeal and restore the judgment of the learned trial judge. The appellant is

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entitled to his costs throughout. The respondent was given its costs at trial out of the estate. The respondent was brought into this Court and therefore I am of the opinion that the respondent is entitled to its costs in this Court out of the estate. I would not, however, make any order as to the respondent's costs in the Court of Appeal for Saskatchewan.

Appeal allowed with costs.

Solicitors for the plaintiff, appellant: Shumiatcher and Associates, Regina.

Solicitors for the defendant, respondent: Wimmer, Toews & Malone, Regina.

[1] (1914), 6 W.W.R. 114.

[2] (1883), 8 App. Cas. 467.

[3] (1907), 39 S.C.R. 608.

[4] [1954] S.C.R. 725.

[5] [1969] S.C.R. 658.

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