RECENT ENGLISH DECISIONS.

High Court of Justice. Court of Appeal.

BRITTAIN v. ROSSITER.

The plaintiff entered the defendant's service under a verbal contract for a year, to commence two days after the day on which the contract was made. Before the expiration of the year, the defendant dismissed him. To an action for wrongful dismissal, the defendant pleaded the Statute of Frauds. *Held,* that the verbal contract was not made absolutely void by the Statute of Frauds, s. 4, but was an existing contract, though not enforceable; no new contract could, consequently, be implied from any acts done under such an existing contract; and the principles of equity, as to part performance, in contracts relating to land, were not to be extended to contracts relating to other matters.

Carrington v. *Roots,* 2 M. & W. 248, and *Reade* v. *Lamb,* 6 Exch. 130, commented on; *Snelling* v. *Lord Huntingfield,* 1 C., M. & R. 20, followed.

THIS was an action for wrongful dismissal, and the defendant pleaded the Statute of Frauds

At the trial, before HAWKINS, J., and a common jury, the plaintiff stated that he had three interviews with the defendant, on Tuesday, the 17th, Thursday, the 19th, and Saturday, the 21st of April; that the hiring was discussed at all three interviews, and that on the 21st of April it was arranged that the plaintiff should enter into the defendant's service for a year, at the rate of 170*l.* per annum for the first and 200*l.* per annum for the second half-year, and that his duties should commence on Monday, the 23d of April.

On the 23d of April, the plaintiff entered into the defendant's service, and was employed for several months; but before the expiration of a year, the defendant dismissed the plaintiff, without notice, giving him one month's salary in lieu of notice.

On this evidence, HAWKINS, J., held that the contract was complete on Saturday, April 21st, and was one not to be performed within a year, and directed a verdict for the defendant.

The Exchequer Division (KELLY, C. B., and HAWKINS, J.) refused a rule for a new trial, and the Court of Appeal (BRETT, COTTON and THESIGER, L.JJ.) refused a rule on the grounds of the contract not being within the Statute of Frauds, and that some conversation, which took place on Monday, the 23d, between the plaintiff and the defendant, amounted to a contract on that day; but granted a rule *nisi* for a new trial, on the ground that there had been a part performance of the contract, so as to take the case out of the Statute of Frauds, and also on the ground that there was evidence of a hiring independently of the Statute of Frauds.

Lawrance, Q. C., and *Hutchins*, for the defendant, showed cause.—You cannot imply a contract when an express contract is in existence. *Snelling* v. *Lord Huntingfield*, 1 C., M. & R. 20, is on all fours with this case, and has been followed by *Giraud* v. *Richmond*, 2 C. B. 835; *Leroux* v. *Brown*, 12 C. B. 801; *Banks* v. *Crossland*, Law Rep. 10 Q. B. 97; *Appleby* v. *Johnson*, Law Rep. 9 C. P. 158.

Bottomley Firth, for the plaintiff, in support of the rule.—The *dicta* of the judges in *Carrington* v. *Roots*, 2 M. & W. 248, show that this contract was void absolutely, and then a new contract can be implied: *Reade* v. *Lamb*, 6 Exch. 130; *Inman* v. *Stamp*, 1 Stark. N. P. 12; *Thomas* v. *Williams*, 10 B. & C. 664; *Fairman* v. *Oakford*, 5 Hurlst. & N. 635; *Beaston* v. *Collyer*, 4 Bing. 309. As to part performance—*Attorney-General* v. *Day*, 1 Ves. Sr. 218; *Bond* v. *Hopkins*, 1 Sch. & Lef. 413

Brett, L. J.—I am of opinion, after due consideration, that this rule must be discharged. It seems to me that it was proved, beyond the capability of contradiction, that there was on Saturday, April 21st, an express contract of service for a year, which year was commenced on the Monday, and that, therefore, that express contract was within the 4th section of the Statute of Frauds; that is to say, that it was a contract, but, being only verbal and not written, it was a contract upon which neither party could maintain an action so as to charge the other.

It was suggested that, inasmuch as the plaintiff did on Monday enter, and continue for some time, in the defendant's service, we must, from his so doing, imply another contract to serve for a year, which contract would be subject to the same conditions as the original contract, but would not be within the Statute of Frauds; and it was said that we can imply that contract from what was done, because the first contract was void absolutely.

In the first place, I think, on the true view of the case, that it is not right to say that the first contract is void absolutely, because it is within the 4th section of the Statute of Frauds. There is a contract, but no person can be charged upon it in a court of law. If the original contract still exists, then, it seems to me, you cannot, from the acts done in the performance of that contract, imply a new contract. Those acts were done by the parties as a part performance of the actual, existing contract, and not with any intention of acting under another contract, and it would be drawing a wrong inference to say that from those acts you can infer that the parties intended another contract. I think that the proposition cannot be controverted, that no other contract can be implied from the acts done than the original contract, because there was the original contract, which was an express contract, in existence. All that can be said is that no action can be maintained for a breach of that express contract, for the statute prevents any one being charged on such a contract when not in writing. That is the whole effect of section 4.

Cases were cited to show the contrary, and the cases of *Carrington* v. *Roots* and *Reade* v. *Lamb* were most relied on, and it was said that there were in those cases judicial declarations that the contract was absolutely void, because it had not been reduced into writing; but it must be observed that those declarations were not necessary for the decision of the cases in which they occur. What was really decided in those cases was, it being admitted you could not charge a person directly on the contract because it was not in writing, no more could you do so indirectly, and that you could not rely on the contract in any cause of action which necessitated the admission of the validity of that contract—that is to say, of its binding force in a court of law. There were no doubt phrases used in those cases, which are relied on as saying that the contract is absolutely void, but those cases were considered in *Leroux* v. *Brown*, by Lord Chief Justice JERVIS and Mr. Justice MAULE, and they took the same view of this case as I have now attempted to express, and gave a clear decision (and one which was necessary for the case before them), that a contract expressly made in words, which is within the 4th section, is not void because it has not been reduced into writing, but only that it cannot be enforced, nor anything depending on it, in an English court of law.

Snelling v. *Lord Huntingfield*, which has never been overruled, and which is strongly, to my mind, supported by *Leroux* v. *Brown*, is directly in point in the present case, and seems to me to have been rightly decided.

I am of opinion, therefore, on that point, that the contract was not void absolutely, but was existing, and as it was existing, from the acts done in performance of it, you cannot imply any other contract.

The misfortune for the plaintiff in this case is, that he was obliged to insist that he had a hiring for a year, and the only way he could prove that was by being enabled to rely on the contract into which he entered on the Saturday. He cannot rely on that in consequence of the Statute of Frauds, and so he cannot maintain an action on that view of the case.

Then it was said that, as there was part performance, we might look at the contract, notwithstanding the Statute of Frauds, and that we could do so, because we must now act on the same principles as existed in courts of equity before the Judicature Act. Now, we know that in certain cases of part performance with regard to contracts for the purchase of lands, the equity courts have looked at the evidence to see what the contract was with regard to that land, though there was no contract in writing; but the application of that principle in equity was confined to questions only upon contracts relating to lands. They did not apply the principle to such a contract as the present.

I will say no more as to the decisions in equity, with regard to contracts relating to land, than that I think they were bold decisions, having regard to the Statute of Frauds. The principle was never applied to a contract like this before the Judicature Act was passed. Can it be now, after the passing of the Judicature Act? It seems to me the right construction with regard to the application in common-law courts of the principles of equity is, that the Judicature Act gives no one any right which he had not before, either in law or equity courts, because if it does it alters the rights of people; whereas, I venture to say the Judicature Act alters no rights—it only transfers procedures. If that is a true proposition, before this act was passed no one could be charged on a contract like the present, either in equity or law; if by reason of an attempt to apply some abstract principle of equity to this case, we were to enable a person to enforce this contract, we should enable him now to do that which no one could have done before, either in law or equity.

Cotton, L. J.—I think this rule must be discharged. It was argued that, though the contract was not enforceable, because of the 4th section of the Statute of Frauds, yet that there was, under the circumstances, an implied contract, and it was attempted to take the case out of the rule which lays down that you cannot imply a contract with reference to matters as to which there existed an express contract, by saying that the effect of the 4th section of the Statute of Frauds is to make that express contract absolutely void.

I am of opinion that that is not a fair construction of the section. The courts of equity construed the section not as making the contract void, but only as making evidence of such contracts void, and, under certain circumstances, they dispensed with anything required by the Statute of Frauds, considering that certain other matters were sufficient to justify them in looking at evidence not ordinarily allowed to be shown. *Carrington* v. *Roots* and *Reede* v. *Lamb* are both cases with *dicta* of the judges, tending to show that section 4 makes the contract void altogether, but I think there is a passage in the judgments which explains what is meant. In *Carrington* v. *Roots* the action was brought by a party who had purchased by a verbal contract a growing crop of grass, with liberty to go on the close wherein it grew for the purpose of cutting and carrying it away, and it was held that he could not maintain trespass against the seller for taking away the horse and cart from the close, for the action was, in substance, one charging the defendant on the contract within section 4 of the Statute of Frauds. Lord ABINGER says, "Whenever an action is brought on the assumption that the contract is good in law, that seems to me to be, in effect, an action on the contract. If the whole transaction between the parties were set forth in the declaration, the contract would form part of it, and, in effect, the plaintiff now says that the defendant ought not to take his cart, because it was lawfully there under that contract. This is a collateral and incidental mode of enforcing the contract, though it is not directly sued on." Mr. Baron PARKE says, "I think this is an averment of a binding contract for the sale of the crop, with a right to enter on the land in order to take the crop. The contract being void by the statute, the action cannot be maintained." And when he says a "void" contract, he means it is not a contract that one party could, as a matter of right, enforce against the other. In *Reade* v. *Lamb* the question was whether certain pleas were properly pleaded, and the judges say that for this purpose the 4th and 17th sections are the same.

I am of opinion that under the statute the verbal contract made on Saturday, April 21st, was an existing contract, but was unenforceable.

Then it was said that even if there is no implied contract, yet the original contract may, notwithstanding the Statute of Frauds, be now enforced in this court in consequence of the part performance, and that that principle can be applied now since the passing of the Judicature Act. The first thing necessary to consider as to that is, what is the doctrine of part performance? It is argued that as a rule the governing principle of the courts of equity was that they would not allow the Statute of Frauds to be made use of to defraud another; but that is not really the full principle; if it had been so, the case of a man who had received the purchase-money for lands, and refused to convey those lands, would come within the principle, but it is clear that the receipt of 20,000*l.* under a verbal contract will not, without more, enable the person who has paid that money to enforce the contract; and yet what could be more to another's fraud than that?

The real principle is this: when the equity courts found a man in possession of land where, if there was no contract, he would be a trespasser, then, taking such possession as being strong evidence of ownership of the land, they implied a contract, and said we will allow the parties to go into evidence to show what the real circumstances were under which the land was held. That being so, can that principle be applied to the present case? It is said that it can be by virtue of the Judicature Act, section 24, sub-sections 4, 7, which enables any court of common law to enforce those rights which equity expressly enforced without sending the party there. The intent and object of the act was to constitute one court, to deal with all matters in dispute between the parties, without sending them from one court to another. I agree with Lord Justice BRETT, that it was not intended by the Judicature Act to give any new rights to parties, but simply to enable the court to deal with all the rights that had been previously dealt with in equity. The doctrine of part performance in equity has been confined to actions relating to lands, and that being so, I think we ought not on any vague notion, to interfere on equitable principles to give to persons a right which they would not have had previously to the passing of the Judicature Act, or to apply the doctrine of part performance to cases in which equity would not have applied it, and in which equity never interfered.

THESIGER, L. J.—There are two questions raised in this case. The first is whether the plaintiff can maintain his action at common law, and the second is, if he cannot do so, whether he can by reason of the equitable doctrine of part performance.

I feel reluctantly constrained to an opinion that he cannot in either way. I say, "reluctantly," for it appears to me manifestly unjust, that where a contract of hiring has been acted on, and one party has had, to a great extent, the benefit of the contract, that that party can put an end to that contract at any time he thinks convenient, without giving any notice to the other party, and I should have been glad to hold here that the party who has entered upon the contract of service, and has acted upon it, at all events, at the very least, is entitled to reasonable notice before such service could be terminated.

As regards the right to maintain this action at common law, it is admitted that the contract between the parties was finally settled on the Saturday, the 21st of April: and it is not in dispute that if the contract was concluded on that day, that it was a contract within section 4 of the Statute of Frauds. The question then arises, What is the effect of that statute on such a contract? Is it, as was contended by Mr. *Firth*, that the contract would be swept away altogether, and does not, therefore, stand in the way of proof of another contract? or is it a contract still in existence, though it cannot be enforced by action on the part of the plaintiff? There is no doubt that there are expressions to be found in the cases to which our attention has been called, from which it might be inferred that several judges were of opinion that such a contract was absolutely void under section 4 of the Statute of Frauds, but I think even if the cases are looked at by themselves, it is clear that it was not necessary for the purposes of those cases to decide if the contract was absolutely void; and certainly, if you look aside from those cases to the other cases cited, it is clear that there have been distinct decisions, where the point was necessary to be decided, to the effect that a contract is not absolutely void under the 4th section, and really when one looks at the statute itself it seems impossible to hold that the contract can be absolutely void. If the words of the 4th section clearly point to no more than this, that no action shall be brought on the contract, and that it is not absolutely void, it is clear from this that, while no action can be maintained against one of the parties to the contract, supposing he did not sign it, it may be the case, on the other hand, that another party, having signed it, may have an action brought against him. Obviously, therefore, it may be void as against one party while it is enforceable against the other.

The arguments in *Carrington* v. *Roots* and *Reade* v. *Lamb* were pointed to this, that, though there is a difference in the language of the 4th and 17th sections, yet, in reality, the result of these two sections, as regards contracts within them, is the same; but, if that be so, it by no means follows that, even under the 17th section, the contract is void for all purposes. On the other hand, I think it is clear that it is not void for all purposes, and it is a real existing contract, though not enforceable, for this reason, that the statute in the 17th section provides that part performance shall enable the contract to be enforced. *Snelling* v. *Lord Huntingfield*, which has never been overruled, is a distinct decision on the point we have to decide, and has been followed in several cases.

When a contract is not enforceable within the Statute of Frauds it is still an existing contract, and the result of it being an existing contract is that there can be no implied contract while that express contract is in existence; and though it may be hard on a person who has been a party to such a contract that he can in no way enforce either the express or any implied contract, yet if we follow *Snelling* v. *Lord Huntingfield* the law is so laid down, and we are bound by it.

The result is that, there being in the present case an express contract on Saturday, April 21st, not enforceable as within the Statute of Frauds, the plaintiff cannot maintain an action on that contract, and, on the other hand, he cannot maintain one on an implied contract.

It has been said that, though there cannot be a recovery on an executory contract where there is no memorandum to satisfy the Statute of Frauds, yet if the contract had been executed to the extent of a man going into the service, and of the other getting the benefit of that service, there can be a recovery in respect of the service so rendered; and I must confess that if the matter were *res integra*, and we were not bound by the authorities, I should have great difficulty in seeing why we should not hold that a man could recover in respect of such service, and why we should no equally maintain the proposition that he could not be turned ou of the service without a reasonable notice, such as implied by law or contemplated by the parties. But the contrary is decided in *Snelling* v. *Lord Huntingfield.*

Then it is said that in equity, notwithstanding the Statute of Frauds, where there has been, with reference to contracts relating to lands, an entry upon the land and a part performance of the contract in that respect, a court of equity may look to see what that act really represented—in other words, what was the contract to which that act was to be referred? I must confess I see no reason or principle why, where there has been an entry upon a service under a contract of hiring, the equity doctrine should not equally apply, and why we should not, in the same way, look to see what is referable, and (just as the principle of equity is founded on this, that, notwithstanding the statute, equity will not allow fraud on a party who has been induced to change his position), why should we not also act on that principle in a case of entry upon service. But at the same time I feel that these doctrines relating to part performance are doctrines which are not to be extended, and that we ought not, at all events, at this late period, to go beyond what the courts have distinctly decided as the principle; and though if we could clearly see that the principles which are applied with regard to contracts relating to land are to be or might be applied to cases of contracts of hiring of service, I think there is nothing in section 24 of the Judicature Act which would prevent our holding that that principle is to be applied; yet I do think that the fact of equity never having applied this principle to this kind of cases, is, at all events, sufficient to bind us to say that equity has not considered that the principle ought to be extended.

For these reasons I concur in holding that the decision of the court below was right, and ought to be affirmed.

Rule *nisi* discharged.

In America also, the weight of authority is that an oral contract to labor for more than a year is not taken out of the operation of the statute, by a mere partial performance by the person employed, so that he can recover for a wrongful dismissal before the time expires; whatever may be the effect of part performance in contracts relating to land. And this is so, whether the statute, as is sometimes the case, expressly declares the contract "void," or merely enacts that "no action shall be brought upon it." In neither case is there any exception made by reason of part performance, as there is in the section relating to the sale of goods, &c. The fact that such exception is made in one section of the statute, and omitted in another, is sufficient proof that it was not intended to so extend it; and, although *courts of equity* have allowed such effect to partial performance in contracts for the sale of real estate, yet *courts of law* do not incline to extend such exception to any other cases. *Comes* v. *Lamson*, 16 Conn. 246. See the subject examined in *Marcy* v. *Marcy*, 9 Allen 8. And the argument leads to the conclusion that even complete performance by the laborer, will not render the contract so far valid, that the laborer could sue upon the *original contract*, and recover for his labor according to the contract price: *Emery* v. *Smith*, 46 N. H. 151. But of course the laborer might recover upon a *quantum meruit*, where he has served the entire time; and doubtless the contract price agreed to by the employer is *admissible* against him as tending to show the value of the services; not as a contract, but as an admission. See *McGlucky* v. *Bitter*, 1 E. D. Smith 618; *Nones* v. *Homer*, 2 Hilt. 116; *Sims* v. *McEwen*, 27 Ala. 184; *Ray* v. *Young*, 13 Tex. 550. And probably if the plaintiff had fully performed his contract with the defendant's consent, and should sue on a *quantum meruit*, he could recover no more at most than the contract price; for the contract might regulate the amount or value of the services, even if the action was not specifically upon it, but only for work and labor generally: *Van Valkenburgh* v. *Croffert*, 7 N. Y. Weekly Dig. 164 (1877). Whether a laborer could recover anything for *partial* performance of such a contract, if he wilfully leaves before the time expires is not fully agreed. Some cases hold that the contract can not be set up against a plaintiff to defeat his recovery upon a *quantum meruit;* because the spirit of the statute is that the contract shall not be enforced or set up in a court of justice. See *King* v. *Welcome*, 5 Gray 41; *Comes* v. *Lamson*, 16 Conn. 246; *Tague* v. *Hayward*, 25 Ind. 428; *Scotten* v. *Brown*, 4 Harring. 324; *Finch* v. *Finch*, 10 Ohio St. 507. Whether he could commence a suit before the expiration of the time fixed by the contract is not so clear. See *Clark* v. *Terry*, 25 Conn. 395.

But, perhaps, the main question is not yet fully settled, since some respectable authorities are the other way, notably the decisions in Vermont. See *Philbrook* v. *Belknap*, 6 Vt. 383: *Mack* v. *Bragg*, 30 Id. 571; where it was distinctly held that the laborer could not recover anything for partial performance, the contract being entire, and the plaintiff bound by it, though oral. But they seem to us to take too limited a view of the spirit and intention of the statute. It is true the statute merely says, that "no action shall be brought upon it," &c., and it is true in one sense, no action is brought upon it when it is merely set up to defeat another action. But does not the statute mean that no such contract shall be enforced in a court of justice, and no rights established by it? If a plaintiff sues for goods bargained and sold, could a defendant plead by way of set-off, that the plaintiff had orally agreed to labor for him for more than a year, and had not fulfilled his contract, by which he owed him more than the value of the goods? And yet he would not be bringing any action on his contract, but only defeating another's action by setting it up. This would be adhering to the letter at the expense of the spirit, and sacrificing the substance to the shadow.

EDMUND H. BENNETT.