WALTER L. ALLCROFT AND GEORGE D. PRESCOTT (DEFENDANTS) ..... APPELLANTS;

AND

DANIEL L. ADAMS (PLAINTIFF) ..... RESPONDENT.

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*Dec. 17, 18.
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* Feb. 19.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Contract of hiring—Manager or expert—Dismissal.

The manager of a veneer company having heard of plaintiff as a man who could usefully be employed in the business wrote him a letter in which he stated that "what we want is a man who is a good veneer maker and who knows how to make all kinds of built up woods that are salable, such as panels. * * * We want you to take full charge of the mill, that is, the manufacturing." In reply plaintiff said: "Would say I understand fully the making of the articles you speak of as well as numerous others with proper machines and proper men to run them." And in a subsequent letter he said: "I feel from all the experience I have had I have mastered the entire principle of it (the veneer business), knowing machines required for various work, what veneer has got to be when completed." Having been hired by the manager he was discharged six weeks later and brought an action for wrongful dismissal.

Held, reversing the judgment of the Supreme Court of New Brunswick (37 N.B. Rep. 332) that he was not hired as a business manager but as an expert in the veneer business and as the evidence established that he was not competent he was properly discharged and could not recover.

APPEAL from a decision of the Supreme Court of New Brunswick(1) affirming by an equal division of the judges a verdict for the plaintiff at the trial.

*PRESENT:—Fitzpatrick C.J. and Davies, Idington, Maclennan and Duff JJ.

(1) 37 N.B. Rep. 332.

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The facts are sufficiently set out in the above headnote and fully stated in the judgments published herewith.

Teed K.C. and *Jonah,* for the appellants.

Fred R. Taylor, for the respondent.

THE CHIEF JUSTICE.—This appeal must be dismissed with costs.

DAVIES J.—This was an action for wrongful dismissal tried before Mr. Justice Landry without a jury in which he found for the plaintiff and awarded him damages in the nature of a *quantum meruit* for the time he was in defendants' employment before being dismissed, of $375, and for the wrongful dismissal, $625, in all, $1,000.

The decision of the trial judge and also of the full court in New Brunswick turned upon the question as to whether or not the plaintiff's dismissal was wrongful.

The court was equally divided, Landry J. upholding his own decision as trial judge and Chief Justice Tuck and Hanington J. concurring with him, while Barker, McLeod and Gregory JJ. were of the opinion that in view of the specific knowledge and qualifications required by the defendants of the man they wanted with respect to the special line of veneering goods in the manufacture of which they were engaged as shewn in the letters written by Prescott, one of defendants, to plaintiff, and of the specific representations made by the plaintiff to the defendants in his replies of his knowledge and qualifications on these special matters and on the faith of which he was en-

gaged; and in view of the actual qualifications which a fair test extending for six weeks of employment shewed him to possess, he was rightfully and properly dismissed.

A careful perusal of the judgment of the learned trial judge has convinced me that he failed to appreciate from the correspondence and evidence the real and substantial purpose for which the plaintiff was engaged and the special knowledge and qualifications required of him and which he represented himself to possess.

The learned judge seemed to think that the plaintiff had been engaged as a general manager of defendants' business, and that his general knowledge of the veneer business rendered him competent to discharge the duties of such general manager; and that his special representations of knowledge and ability had not been put to the test.

I am quite unable to agree in these conclusions. What was wanted by the defendants was not simply a general manager of their business which might not necessarily imply a man able himself to manufacture the veneering they were making and selling, but a practical man who knew himself how to do the work and could teach workmen who did not.

In the first letter to defendant Prescott tells him the kind of man wanted. He says:

> What we want is a man who is a good veneer maker and knows how to make all kinds of built-up woods that are salable, such as panels, dresser drawer fronts, chair seats, etc. Now, if you are open later on to talk with us, please state your side of the question. We would want you to take full charge of the mill, that is the manufacturing.

Plaintiff sends a lengthy reply, but the part to which I specially call attention is that which seems to be a direct answer to defendant's demands. He says:

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I understand fully the making of such articles as you speak of as well as others, with proper machines and proper men to run them, and ordinary intelligent man can be brought to become quite expert.

That seems to be quite clear and explicit except, perhaps, the last sentence, which it might be argued does not necessarily imply ability on his part to teach the "ordinary intelligent man" to do the necessary work.

Any doubt upon that point is, however, removed entirely by a subsequent letter from plaintiff in which the following sentences occur:

This gave me my ideas of going into the veneer business to learn it thoroughly, and although there is no end to learn in it I feel from all the experience I have had I have mastered *the entire principle of it*, knowing machines required for various work, what veneer has got to be when completed, etc. To be frank with you I have had in mind sometimes and intended eventually to connect myself with a young veneer business that I might promote the growth and work it up to the best of my ability to a large business. While I have a fine position with the Gale Manufacturing Co. here, I am of course looking into the future somewhat, and would make a change I thought later on might benefit me. I can at all times, I believe, lay my hands on good competent machine men who know their business *as also instruct those who do not.* I give almost my entire time and attention to all the work done in the Gale factory which is as I previously wrote you one of the largest and best equipped in the United States.

Here is a man who is told that what the inquirer required was

a man who is a good veneer maker and knows how to make all kinds of built up woods that are salable,

replies first by saying that "he fully understands the making of such articles," and follows that up with another letter in which he says:

I feel from all the experience I have had I have mastered the entire principle of it;

and further with reference to the difficulties defendants had stated they had had with respect to getting practical workmen:

I can at all times, I believe, lay my hands on good competent machine men who know their business as also instruct those who do not (adding), I give almost my entire time and attention to all the work done in the Gale factory which is as I previously wrote you one of the largest and best equipped in the United States.

He not only claims to have practical knowledge and to have mastered the entire principle of the manufacture of veneering, but such knowledge as entitled him to instruct ignorant and inexperienced workmen, and in his closing sentence leads defendant to believe that he occupied a practical and important post in one of the largest veneering factories in the United States which he would be loath to give up.

This was just the kind of man the defendants required, and after a personal interview the plaintiff was, after Prescott had consulted his partner, engaged by telegram and went to the factory.

At this personal interview plaintiff repeated to Prescott the statement he had previously made by letter

that he held a good position with the Gale Co., which he could hold and he would be loath to leave it.

No denial as to having made this statement is given by plaintiff or apparently any explanation, but as a matter of fact it was utterly untrue as this interview was held on the 15th July, at Portland, and he had left the Gale's factory on the 17th June previously, and was not at the time of the conversation in Gale's employment.

With reference to this point I may here say that Gale and his foreman, Anna, were both examined by

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commission and their evidence shews beyond reasonable doubt that the plaintiff's representations as to his employment with them and the nature of that employment as also as to his practical knowledge of the business were utterly fallacious and misleading.

Now with reference to the possession by the plaintiff of the actual practical knowledge and qualifications which it seems to me clearly were required of him and which he as clearly represented he possessed, it is hardly contended that if this was the basis and purpose on which and for which he was employed, that he could succeed.

Originally the claim was framed that plaintiff was hired as "foreman." At the trial it was amended so as to read "superintendent" and the case proceeded and was argued before us by the respondent upon the assumption that he was so hired, and that this meant a business manager and superintendent and did not include a practical foreman.

If he was hired as the latter no possible doubt could exist as to the result.

He himself admits in his examination that he had had no practical working knowledge or experience and that such knowledge as he did possess had been picked up by observation solely and the evidence shews clearly that as a practical foreman capable of doing the work himself or instructing ignorant workmen how to do it he was quite incompetent. The question was therefore reduced down to the nature of the employment he was engaged for.

As before stated I cannot entertain any doubt upon that point in view of the correspondence between the parties as a result of which he was employed.

Mr. Justice McLeod, who delivered the leading

judgment for the appellant below, has with great care and thoroughness analyzed the evidence alike as to plaintiff's representations of qualifications and actual qualifications.

I fully agree in all he has so fully and so well said in his judgment and have only thought it desirable to go into the questions as fully as I have done because of the great difference of judicial opinion in the court below and the misconception as I thought of the true nature of the hiring.

At the argument before us it was suggested by one of my colleagues from the bench that the agreement was one within the Statute of Frauds for a yearly service not to be completed within the year and was not in writing and could not therefore be sued on. The point was not adopted or relied upon by counsel, however, for either appellant or respondent and does not seem to have been mentioned at the trial nor in the court below, and we do not think it open on this appeal.

In the result I think the appeal should be allowed with costs and judgment entered for the defendants with costs.

IDINGTON J.—This is an appeal from the Supreme Court of New Brunswick affirming the judgment (for plaintiff, now respondent) of Mr. Justice Landry in an action for wrongful dismissal of the respondent and also for work and labour.

The action is at common law and under a system of practice and pleading provided by the Supreme Court Act of that province.

The Act is as to pleading framed upon the lines of the English Common Law Procedure Act, 1854, and the pleadings in this case are framed just as they

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would have been in a similar action under the latter Act.

The issue of whether or not there has been shewn by the plaintiff a contract that complies with the Statute of Frauds, which is in force in New Brunswick, is distinctly raised by the non-assumpsit plea on record here.

The authorities are collected in Mews Digest, Vol. 11 at foot of column 832 and top of column 833, and are too clear for argument, though since the Judicature Act in England the Statute of Frauds must, in cases of intended reliance on its provisions, be there specifically pleaded.

Before such introduction the equity rule required the statute to be pleaded, but the common law rules did not.

Applying this and its consequent application of the Statute of Frauds to the first count of this declaration there is not the necessary note in writing to enable the plaintiff to succeed.

The parties had a great deal of correspondence on a variety of matters preliminary to any contract and then Mr. Prescott, one of the defendants (now appellants), met the plaintiff at Portland in the State of Maine, where they talked over many things, relating to a possible agreement, but separated without forming any contract, as Mr. Prescott wished to consult his partner, now co-defendant, then in England.

The following telegram and letter are all that appear in the written evidence which in any way can be said to form part of the contract:

Albert, N.B., July 29, 1902.

To Daniel Adams, care Cushing Adams,
B. Falls, Vt.
accept your offer; when can you come?
APTUS VENEER CO.

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West River, N.B., July 29th, 1902.

Daniel Adams, Esq.:

Dear Friend Adams,—I simply got cable from Mr. Allcroft saying engage Mr. Adams at $3,000 a year. Am sailing early in August. Now I will try and instruct you so you will be able to find us. You will take the train from St. John about 12 o'clock, "noon," on Intercolonial Railway. You can get a ticket direct to Albert. You will change cars at Salisbury Station. While in St. John put up at Hotel Dufferin and mention to the manager or clerk that you are coming up to Albert to see me. They will then see that you get the correct train. It is no use to take any other as you would not connect and we only have one train a day. All the chair seats you want to bring ship to Aptus Veneer Co., Hillsboro, N.B. I can work the customs there better.

Yours,

(Sgd.) GEORGE D. PRESCOTT.

I do not think it can be successfully contended that these form such an agreement, or memorandum or note thereof, in writing, as to enable the plaintiff, in this case, to recover.

The intended agreement, set up in the declaration, was to extend for a year. It was not intended in any way, to begin to operate until some time after this telegram and this letter of the same date were signed. The signature of Allcroft is wanting and if we can find it covered by the signature to the telegram, yet it does not appear to the letter, and if we assumed authority to put it there Mr. Prescott has failed to do so.

But if want of signature could by some ingenuity be overcome, then how can it be said that any agreement appears on those documents? The consideration does not appear in the telegram at all. That is fatal to it as an agreement. But what of the letter? What was the man to do? Where is the contract for breach of which suit is brought by the first count? Doubtless it was verbal and that is no use. Indeed, the long

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argument as to what plaintiff's position was to be, shews not only that it was verbal, but the need of a writing to define it.

I think the case of *Harper* v. *Davies*(1) is clearly in point and that the plaintiff fails in the first count, but is entitled to succeed on the common counts.

I find since writing the foregoing that the plaintiff's letter of 25th June stated 1st of August as the time he would be free. That and the date in declaration seem as regards the Statute of Frauds conclusive against there being in law a contract.

Since writing foregoing opinion I have also had the pleasure of reading the judgment of my brother Maclennan.

I have reconsidered the whole case and read the evidence of those who could alone tell what the contract was, but cannot change the result arrived at above.

I find that the term "at $3,000 a year" used in Prescott's letter of 29th July is repeated in the oral evidence, but nothing more by which to fix any definite term of the length of engagement.

It is exceeding doubtful, if this with what the correspondence suggests as possible purpose of the parties, where they have not stated anything definite can within the later authorities be held more than a general hiring, requiring reasonable notice before dismissal, unless for cause. See *Creen* v. *Wright*(2), and the cases referred to in *Bain* v. *Anderson*(3).

It was counsel for appellant who answered me in argument as to the statute, and his answer was that there was in the case a mass of correspondence which

(1) 45 U.C.Q.B. 442. (2) 1 C.P.D. 591.
(3) 27 O.R. 369.

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he had no doubt would be found to comply with the requirements of the Statute of Frauds. I have no doubt his reply was in perfect good faith, and that as he had not been of counsel at the trial, he overlooked the point.

Even if this might, as my brother Maclennan suggests, be held a waiver by defendant of the statute, I fail to see how defendants' waiver, by failure to argue it, can be a dispensation with the need for a defendant in an action, on the common counts, to shew if he can shew, as a defence thereto, that the work was done under a special contract, which on the authorities must comply with the statute.

See the cases of *Case* v. *Barber* in Sir T. Raymond's reports(1); *Foquet* v. *Moor*(2), and remarks in *Snelling* v. *Huntingfield*(3), at end.

Appellant's counsel distinctly took the ground that by virtue of the misrepresentation inducing defendants to contract they were entitled to rescind the contract. I assume they were justified in doing so by the evidence as presented in argument here. I infer that what took place was a rescission and that the parties stood then as if the express contract had never existed.

I think the following expression of the law applicable to a contract obtained by fraud as Mr. Justice Blackburn expressed it in *The Queen* v. *Saddlers' Co.* (4), at pp. 420 and 421, applies:

> And the reasoning seems to me to amount to laying down the principle that, inasmuch as a man cannot take advantage of his own wrong every act or thing brought about by his fraud or wrong is as against him to be treated as if it never had existed. In this I can-

(1) T. Raym. 450.
(2) 7 Ex. 870.
(3) 1 C.M. & R. 20.
(4) 10 H. L. Cas. 404.

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not agree. Fraud, as I think, renders any transaction voidable at the election of the party defrauded; and if when it is avoided nothing had occurred to alter the position of affairs the rights and remedies of the parties are the same as if it had been void from the beginning; but if any alteration has taken place, their rights and remedies are subject to the effect of that alteration.

See also Leake(1), and cases cited.

Whatever goods a defrauded party gets, by such a contract, he must on electing to avoid it return or pay for.

I am unable to see any distinction between a contract of hiring which well might have coupled with it, the element of a sale, or delivery of goods into it, and any other.

This plaintiff assuredly did work worth paying for. He was engaged, as the evidence of Prescott shews, when asked if he could not have got a cheaper man merely to do veneering,

I don't know. I wanted a man who could make table tops, extension tops, cheffoniers, drawer fronts and other things. I wanted a man that could do the whole thing, and that is the kind of man I thought I was hiring. I wanted a man to take the responsibility off my shoulders. I wanted to go into the office and do the financing.

A man hired to perform such manifold duties as required and "to do the whole thing" in a factory producing a great variety of goods as this was intended for, might do many well, and fail in others, and fail in some of the material parts he had misrepresented himself capable of.

He either was called on to perform those duties, he was incapable of, early or he was not. If he was then he ought to have been dismissed long before he was, to entitle the defendants to rescission.

(1) 4th ed., p. 256.

I think it ought to be assumed, as he was not dismissed, that he was doing useful work in some of the many other things he was capable of doing, than veneering in which he was not an expert.

I incline to think there is a great deal in what the trial judge found, as to other motives for discharge. I would, in light of what followed, be inclined to assign amongst such motives this, that as the result of learning from plaintiff the knowledge picked up by him in other factories, the defendants found the undertakings they had in view in hiring him likely to grow too vast for them.

In this, if no other regard, the plaintiff is entitled at defendants' hands to consideration.

In law, the motives impelling a man to rescind a voidable contract cannot, if otherwise entitled to rescind, avail to refuse him relief.

I do not think the appellants have succeeded in bringing this case within *Harmer* v. *Cornelius*(1), That was the case of a single duty undertaken where clearly the service done if the servant incompetent to do what he represented must necessarily be worthless.

The cases where, as in the *Panama & South Pacific Telegraph Co.* v. *India Rubber, Gutta Percha & Telegraph Works Co.*(2), and *In re The Bodega Company* (3), the element of fraud, of necessity permeated and rendered the work done worthless, are also distinguishable.

I may remark that the ground upon which *Tibbs* v. *Wilkes*(4) relied upon by plaintiff, rightly goes, is on the facts here entirely against him. If he could have

(1) 5 C.B.N.S. 236.
(2) 10 Ch. App. 515.
(3) (1904) 1 Ch. 276.
(4) 23 Gr. 439.

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shewn a monthly hiring, or term of payment his case might have been different.

But that and all cases of dismissal for misconduct stand on an entirely different footing from this, which is not one of misconduct, after engagement and duties entered upon. In that class of cases plaintiff has no right to recover for a *quantum meruit* because the contract stands and has not been fulfilled.

In conclusion whilst I agree in dismissing the action raised by the first count, I submit with great respect, the duty devolves on us when we come to the common counts, to give effect to the Statute of Frauds; and if the court below had not assumed a contract for a year existed, I should have said, we must infer there was none, and in any event hold that, the defendants having rescinded, and been justified in rescinding, for misrepresentation, the services must be compensated on a *quantum meruit* basis.

I would adopt the basis of the learned trial judge as to the amount to be allowed though with some doubt, but as I am in the result not in accord with the rest of the court, I need not pursue the subject further as to costs, etc.

I would refer to the case of *Stock* v. *Great Western Railway Co.*(1), and the same case in 9 U.C.C.P. 134; *Copper Miners Co.* v. *Fox*(2); *Pulbrook* v. *Lawes*(3) and notes to *Cutter* v. *Powell*(4), at pages 9 *et seq.*; *Prickett* v. *Badger*(5).

MACLENNAN J.—Appeal by the defendants in an action for work and labour, and wrongful dismissal.

(1) 7 U.C.C.P. 526; 9 U.C.C.P. 134.
(2) 16 Q.B. 229.
(3) 1 Q.B.D. 284.
(4) 2 Sm. L.C. (11 ed.) 1.
(5) 1 C.B.N.S. 296.

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At the trial, without a jury, the plaintiff had a judgment for $1,000, being $375 for his actual services, and $625 damages for wrongful dismissal.

The judgment was affirmed on appeal, the judges being equally divided in opinion.

The plaintiff's declaration contains two counts, the first upon an agreement for service in the capacity of a foreman, to continue for a year from the 8th of August, 1902, at a yearly salary of $3,000 a year, payable monthly, broken by dismissal before the expiration of the year; and the second for work as a hired servant.

The pleas to the first count are three; namely, first, non assumpsit; 2nd, agreement obtained by the plaintiff by misrepresentation of his skill and ability to perform the duties and service required of him; and thirdly, defendants induced to enter into the agreement by fraud of the plaintiff. The only plea to the second count is never indebted.

At the opening of the trial the learned judge permitted the plaintiff to amend the first count by substituting the word "superintendent" for "foreman."

The pleadings are framed under a procedure similar to the old English common law procedure, under which the plea of non assumpsit has the effect of setting up the Statute of Frauds, which declares that no action may be brought upon a contract not to be performed within a year, unless the contract or some memorandum or note thereof in writing is signed by the party to be charged.

I think that if the statute had been relied upon at the trial I should have been obliged to hold that no contract or memorandum or note thereof in writing such as declared upon had been signed by the de-

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fendants, and that they should succeed upon their plea of non assumpsit.

But so far as appears the defendants did not either at the trial or in the court of appeal claim the benefit of the statute.

It is optional with a defendant to plead the statute, and if he do not, a recovery may be had although the contract be one not to be performed within a year. If this is so it follows that even if pleaded that defence may be waived.

I think it was waived in this case in the courts below, and at page 2 of the appellant's factum in this court he says:

> Allcroft cabled his authority to engage the respondent, and he accordingly was engaged on or about the 29th day of July at the yearly wages of $3,000.

And when attention was called to the statute, from the bench, on the argument before us, counsel did not take up the point.

I, therefore, think the case must be considered irrespective of the statute, and I am of opinion that, having regard to the whole of the evidence both written and oral, the proper conclusion is, as was assumed by the parties themselves, and by the courts below that a contract such as declared on in the first count was made out, although not by signed writing alone.

The question then remains whether the defendants have proved the second plea to the plaintiff's first count, and whether the agreement was obtained by the plaintiff from the defendants by misrepresentation of the skill and ability to perform the duties required of him.

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At the conclusion of the argument I had a strong impression that the defendants had proved that plea, and a subsequent careful consideration of the evidence has confirmed that impression, and I find my views so well expressed by my brother Davies that I forbear repeating them.

The existence of the special contract excludes any contract to be implied from the performance of service, and the plaintiff's failure upon the express contract involves failure in his whole case, and it follows that the appeal must be allowed and the action dismissed with costs, both here and below.

DUFF J. concurred with Davies J.

Appeal allowed with costs.

Solicitors for the appellants: *Trueman & Jonah.*
Solicitor for the respondent: *H. H. McLean.*