

ing the time. It was held that the parol agreement, being invalid under the statute, did not effect an implied rescission of the former contract. This judgment was based upon the principle that the parties could not be taken to have intended to destroy the contractual rights under the first agreement save by the substitution of an enforceable modification of the original agreement.

The language of Parke, B., in *Moore v. Campbell*, 10 Ex. 323, is quoted with approval where he says:—

“If a new valid agreement substituted for the old one before breach would have supported the plea we need not enquire, for the agreement was void, there being neither note in writing nor part payment nor delivery nor acceptance.”

Stowell v. Robinson, 3 Bing. N. C. 928, is a case where the same principle was applied to an action on a contract within the fourth section. By written agreement an interest in land was to be sold. A day was definitely fixed for the completion of the purchase. By a parol agreement made subsequently, the parties undertook to substitute a new day for the completion. It was held that this attempt to engraft a modification upon the written contract was abortive.

Tindall, C.J., stated:—

“Can a day for the completion of the purchase of an interest in land, inserted in a written contract, be waived by parol agreement and another day be substituted in its place so as to bind the parties? We are of opinion that it cannot. . . . We cannot get over the difficulty which has been pressed upon us, that to allow the substitution of a new stipulation as to the time of completing the contract, by reason of a subsequent parol agreement between the parties to that effect, in lieu of the stipulation as to time contained in the written agreement signed by the parties, is virtually and substantively to allow an action to be brought on an agreement relating to the sale of land partly in writing signed by the parties, and partly not in writing, but by parol only, and amounts to a contravention of the Statute of Frauds.

In that case the plaintiff could not succeed unless he could rely upon the variation; so the case differs in that respect from the case now in hand, but I think the principle applies, for the statute is available to either party, and prevents the new contract being given in evidence at all, save for the purpose of affecting the conscience of the Court, which may in its discretion refuse to give specific performance if the party seeking its aid withholds from his opponent the benefit of the parol varia-