

ERMATINGER, CO. J.:—The doctrine laid down by the English decisions is that the contract, though unenforceable by reason of the statute is still a subsisting contract. Though an action cannot be brought upon the contract, it still exists, with the result that no new contract can be implied from Acts done in pursuance of it: *Smith on Master and Servant*, 5th ed., p. 31.

An action cannot be maintained by a master against a servant for quitting his service, nor by a servant against his master for wrongful dismissal, where the requirements of the statute have not been complied with, because such actions would be based upon the contract which the statute declares unenforceable: See *Snelling v. Huntingfield*, 1 C. M. & R. 19; *Harper v. Davies*, 45 U.C.Q.B. 442. An action may, however, it seems, be maintained by the servant against the master in case of wrongful dismissal of the former, for his services as upon a quantum meruit: *Snelling v. Huntingfield*; *Brittain v. Rossiter*, 11 Q.B.D., at p. 133; *Leake*, 4th ed., 200. It is when we come to consider the case of the servant quitting his service without justifiable cause that there would appear to be a dearth of authority both here and in England in favour of the enforcement of a claim for services rendered under a contract unenforceable by reason of the Statute of Frauds.

As already said no new contract may be implied when there is already an existing though unenforceable contract: *Brittain v. Rossiter*; *Harper v. Davies*, ante. From that point of view it is rather hard to see the distinction between cases where the servant has been dismissed and where he has voluntarily abandoned the service under the unenforceable contract. It was even suggested on the argument that Lord Lyndhurst's dictum in *Snelling v. Huntingfield* does not bear out the dictum of Thesiger, L.J., in *Brittain v. Rossiter*, and statements of text writers, in favour of a servant's right to recover in the former case.

It seems, however, to be assumed to be the law in England that where the servant has been wrongfully dismissed or where illness prevents his completing his term of service, he may recover for the services rendered, notwithstanding the statute. But no English or Canadian case has, though counsel have searched diligently, been found to authorize his recovering for his services where he has abandoned his employment voluntarily under a contract unenforceable under the statute.

Though there is apparently a lack of authority in our own and the English Courts upon this latter question, the same cannot be