[HIGH COURT OF AUSTRALIA.]

CLARKE . . . . . APPELLANT;
PLAINTIFF,

AND

TYLER . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *July* 26; *Aug.* 12.

Latham C.J., Rich, Dixon, McTiernan and Williams JJ.

Contract—Share-farming—Agricultural holding—Oral agreement—Alleged breach—Action for damages—Effect of statute—Agreement not to be performed within the space of one year from the making thereof—Absence of writing—Agricultural Holdings Act 1941 (*N.S.W.*) (*No.* 55 *of* 1941), *ss.* 5, 15 (1), 24 (1), (2) (*a*)—*Statute of Frauds* (29 *Car. II.*, *c.* 3), *s.* 4.

An oral share-farming agreement to commence at a future date, if it does not expressly provide for its duration, is by ss. 5 (1) and 24 (1) of the *Agricultural Holdings Act* 1941 (N.S.W.), an agreement not to be performed within the space of one year from the making thereof, and therefore one to which s. 4 of the Statute of Frauds is applicable.

Decision of the Supreme Court of New South Wales (Full Court) affirmed.

APPEAL from the Supreme Court of New South Wales.

In an action brought by him in the Supreme Court of New South Wales, William James Clarke claimed damages from Philip Lincoln Tyler for breach of an oral share-farming agreement which he alleged was made between himself and the defendant in April 1945, under which he was to carry on dairy-farming operations on portion of certain land owned by the defendant. There was no express provision as to the duration of the agreement.

The action was tried before *Owen* J. who found that the agreement between the parties was one in which it was agreed that: 1. the plaintiff was to run a dairy-farm on portion of the defendant's property; 2. the plaintiff was to supply the necessary labour and

to be at liberty to occupy free of charge a cottage on the property; 3. the defendant was to provide the milking herd and the necessary plant and equipment and was to improve the existing facilities so as to bring them up to the standards required by the Milk Board; 4. the defendant was to increase the number of the herd to a figure which would ensure that sixty cows would always be in milk—his Honour regarded this as a contractual obligation and not merely as a declaration of intention by the defendant; and 5. the cost of producing and marketing milk and cream was to be charged against the gross returns from the products of the dairy and the parties were then to divide the balance in equal shares.

The trial judge held that by reason of the provisions of s. 24 (1), in conjunction with s. 5, of the *Agricultural Holdings Act* 1941 (N.S.W.) the agreement was an agreement not to be performed within one year from the making thereof and in the absence of writing, which admittedly did not exist, the plaintiff must fail: see Statute of Frauds, s. 4.

An appeal by the plaintiff to the Full Court of the Supreme Court was dismissed, whereupon he appealed from that decision to the High Court.

Other facts and the relevant statutory provisions appear in the judgments hereunder.

Emerton, for the appellant. The parties entered into their own agreement. That agreement was one which was capable of being performed within one year and therefore was not required to be in writing by s. 4 of the Statute of Frauds to be enforceable. The agreement between the parties is all that can be looked at for the purpose of determining whether it is caught by s. 4 of that statute. The provisions of s. 24 of the *Agricultural Holdings Act* 1941 should not be regarded as incorporated in the agreement itself but as something apart, overriding by their own force any provision made in the agreement by the parties themselves. Section 24 does not operate in the absence of a contract but it does operate on any contract proved. It does not preclude parties from entering into their own agreement, nor does it provide that a contract into which the parties have entered cannot stand. They can still provide, and be bound by, their own terms, although, under s. 24, a party is entitled to say that he will not be bound by his agreement. The court determines from the intention of the parties, as ascertained from the contract itself, whether or not it comes within s. 4 of the Statute of Frauds (*Lavalette* v. *Riches & Co.* (1)). If a tenant

(1) (1908) 24 T.L.R. 336.

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chooses to take advantage of it s. 24 of the Act prevents a landlord from putting him out in six months, but he gets that benefit under the Act, not under the contract. That section overrides a provision in the agreement between the parties, but it is not part of the agreement. For that reason s. 4 of the Statute of Frauds does not operate on it. The Act itself deals with contracts of tenancy. It only applies to a share-farming agreement because, under s. 24, the share-farming agreement is assimilated to a contract of tenancy. An oral contract of tenancy might be for a period of three years and yet be enforceable; whereas it is suggested that by reason of the operation of s. 24 of the *Agricultural Holdings Act* a share-farming agreement, which is not otherwise caught by s. 4 of the Statute of Frauds, is rendered unenforceable. This would create an inconsistency which could not have been intended by the Legislature.

C. M. Collins, for the respondent. By his declaration the appellant deliberately purported to bring himself within the terms of the *Agricultural Holdings Act* 1941. When the parties enter into a contract they are to be assumed to know the effect of the law. The appellant went on to the land as a share-farmer knowing that the law was that he could not, once on the land, be put off for a period of two years. It was in the contemplation of the parties that the agreement would last for at least a period of two years. A contract is made in the light of the law then prevailing. The law in existence at the time the subject agreement was made was that neither party could for a period of two years give to the other a notice to quit the land. The parties did not agree upon any particular term, therefore it follows that they entered into the share-farming agreement on the basis of the law. As to the law applying to agreements made between parties see *Parker* v. *Graham* (1). Under the law as existing at material times the minimum period was two years. Reference to the agreement would not be of any avail because a term was not stated by the parties. The trial judge assessed damages on a wrong basis, therefore if the Court is against the respondent as to the effect of the Statute of Frauds, a new trial should be ordered.

Emerton, in reply. In order to determine whether or not a contract is within s. 4 of the Statute of Frauds, the Court takes into consideration the circumstances existing at the time the contract was entered into. The determination at a later date of

(1) (1947) 48 S.R. (N.S.W.) 126.

one of the parties to take advantage of the provisions of s. 24 of the *Agricultural Holdings Act* would not be such a circumstance and should not be taken into consideration. The quantum of damages was correctly assessed.

Cur. adv. vult.

Aug. 12.

The following written judgments were delivered:—

LATHAM C.J. The appellant, William James Clarke, sued the respondent Philip Lincoln Tyler, for damages for breach of an oral share-farming agreement. The agreement contained no provision relating to its duration and therefore, apart from the effect of the statute hereafter mentioned, would have been an agreement determinable upon reasonable notice. It was held by the learned trial judge, *Owen* J., that by reason of the provisions of the *Agricultural Holdings Act* 1941 the agreement was an agreement not to be performed within the space of one year from the making thereof and that therefore no action could be brought upon it: Statute of Frauds, 29 Car. II, c. 3, s. 4. The Full Court dismissed an appeal from the judgment and the plaintiff now appeals to this Court. It was found by *Owen* J. that the oral agreement made between the parties was as follows:—" 1. The plaintiff was to run a dairy farm on portion of the defendant's property; 2. The plaintiff was to supply the necessary labour and to be at liberty to occupy free of charge a cottage on the property; 3. The defendant was to provide the milking herd and the necessary plant and equipment and was to improve the existing facilities so as to bring them up to the standards required by the Milk Board; 4. The defendant was to increase the number of the herd to a figure which would ensure that 60 cows would always be in milk. Although no argument on it was addressed to me, I may say that I regard this as a contractual obligation and not merely as a declaration of intention by the defendant. 5. The cost of producing and marketing milk and cream was to be charged against the gross returns from the products of the dairy and the parties were then to divide the balance in equal shares."

Such an agreement is, it is conceded, a share-farming agreement within the meaning of the definition of that term contained in s. 5 (2) of the *Agricultural Holdings Act* 1941. Section 5 (1) provides that the Act shall (except where otherwise expressly provided) apply to and in respect of share-farming agreements and the parties to any such agreement in like manner as it applies to contracts of tenancy and the parties to any such contract. Section 24 (1) is in

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the following terms :—" Notwithstanding any provision in a contract of tenancy or in any other Act to the contrary, a notice to quit a holding shall be invalid if it purports to terminate the tenancy before the expiration of twelve months from the end of the then current year of tenancy. . . . " Section 5 (3) provides that in the application of the Act to a share-farming agreement and the parties thereto—" (*a*) a reference to a contract of tenancy shall be construed as a reference to a share-farming agreement; (*b*) a reference to a tenancy shall be construed as a reference to the use and occupation of land by a share-farmer; (*c*) a reference to a landlord shall be construed as a reference to an owner who is a party to a share-farming agreement."

The date of the making of the agreement was a date late in April 1945 and the plaintiff was to begin work on the farm on 1st May 1945. The term " current year " in relation to a share-farming agreement in s. 24 should, in my opinion, be construed as referring to the period during which the agreement exists and not to the period when work is intended to be performed under the agreement.

The words " a notice to quit a holding " in s. 24 should, in relation to a share-farming agreement, be construed as a notice to determine the use and occupation of the land held under the share-farming agreement—see s. 5 (3) (a), (b). Accordingly, s. 24 prevents the valid giving of a notice determining the provision entitling, and requiring the owner to allow, the share-farmer to use and occupy the land, and entitling and requiring the share-farmer to use and occupy the land, if it purports to determine the agreement before the expiration of twelve months from the end of any current year of the agreement, i.e., of any year which has begun to run. The section does not deal with the determination of an agreement by reason of a breach thereof. Any agreement may be so determined if the breach goes to the root of the contract, but this consideration does not affect the application of the Statute of Frauds in any case. Section 24 deals with the termination of an agreement by a notice and, once a year has begun to run, prevents the termination of that agreement at any time before the expiration of twelve months from the end of that year. Thus in the present case the share-farming agreement could not be terminated at a date earlier than the end of April 1947. It is therefore in my opinion clear that the agreement was an agreement which could not be performed by either party within the space of one year from the making thereof and therefore the agreement, being oral, was unenforceable by reason of the Statute of Frauds.

It was suggested, however, that a "notice to quit" could be given only by a landlord, and therefore that the tenant (or the share-farmer) was not bound by s. 24. But it is well established that a notice to quit may be given by a landlord as well as a tenant: see cases cited in *Halsbury, Laws of England*, 2nd ed., vol. 20, p. 138: *Foa, The Law of Landlord and Tenant*, 5th ed. (1934), p. 596.

It was contended that the actual agreement between the parties was an agreement not for any definite term and that it was determinable by reasonable notice, and it was truly said that such an agreement would not fall within the statute. But the statute provides what in respect of the duration of a share-farming agreement the obligations of the parties are to be. If it had been the common law which prescribed a minimum term for such an agreement (as, for example, in the case of a tenancy from year to year) it would hardly have been argued that the agreement made between the parties was not an agreement which included the term which the law provided should be part of the agreement. The position is exactly the same when the duration of an agreement is prescribed by statute. The parties make their contract within and subject to the applicable law, which, in this case, for the relevant purpose is the *Agricultural Holdings Act* 1941. In my opinion the decisions of *Owen* J. and the Full Court that the agreement fell within the statute were right and the appeal should be dismissed with costs.

RICH J. This case is an instance of an oral agreement which, containing no express provision for its termination, might have been terminated by either party upon reasonable notice. However the agreement is one to which the *Agricultural Holdings Act* 1941 applies and s. 24 (1) of this Act compels a notice to quit of a duration longer than a year. Thus the agreement falls within the provisions of s. 4 of the Statute of Frauds. From its inception this provision was the subject of hostile criticism. Its "design" Lord *Holt* stated "was not to trust to the memory of witnesses for a longer time than one year" (*Smith* v. *Westall* (1)). This suggestion was not adopted by other judges. But it would appear from the early decisions that considerable ingenuity was used by way of interpretation to minimize the effect of the provision: see an article on "Agreements not to be performed within a year," *Law Quarterly Review*, vol. 50, pp. 82, 85.

In the instant case I can see no escape from its application and accordingly I agree in the decisions of *Owen* J. and of the Full Court and would dismiss the appeal.

(1) (1698) 1 Ld. Raym. 316, at p. 317 [91 E.R. 1106, at p. 1107].

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DIXON J. The appeal is from an order of the Full Court of the Supreme Court of New South Wales by which cross appeals were dismissed from a decision of *Owen* J. sitting without a jury. The appeal to this Court is by the plaintiff in the action. His declaration contained three counts. He has succeeded upon the second and third counts but the amount he has recovered is comparatively small. Under the first count he claimed unliquidated damages for breach of contract. *Owen* J. assessed the damages under this count contingently as £1,025, but held that the plaintiff could not recover upon the count because the contract, which was not evidenced by writing, fell within the fourth section of the Statute of Frauds. The Full Court upheld this decision. The defendant, who is the respondent in this Court, supports the decision as to the application of the Statute of Frauds, but alternatively he attacks the assessment of damages and says that, if the absence of writing is not a bar to the plaintiff's recovery upon the first count, there should be a new trial. I find it unnecessary to deal with the alternative; for in my opinion the contract does fall within the Statute of Frauds and, because there is no writing, the plaintiff cannot recover damages for breach of the contract. The contract is a share-farming agreement falling within the application of the *Agricultural Holdings Act* 1941 (N.S.W.). Section 5 of that Act provides that except where otherwise expressly provided in the Act its provisions shall apply to share-farming agreements in the same manner as they apply to contracts of tenancy falling within the Act. Section 24 (1) makes a special provision as to the duration of notices to quit agricultural holdings and this provision is applicable to share-farming agreements *mutatis mutandis* : s. 5 (3). The effect is to invalidate a notice to quit land occupied under such an agreement if the notice to quit purports to terminate the occupation, that is in effect the agreement, before the expiration of twelve months from the end of the then current year. In the case of an agreement otherwise at will the current year means the year calculated from the date or anniversary of the agreement current at the date when the notice is given.

The question whether the share-farming agreement upon which the first count of the declaration is based falls within the Statute of Frauds depends on these provisions. It is an oral agreement made in April 1945 under which the plaintiff appellant went into occupation of an agricultural holding belonging to the defendant respondent. As I understand, it was a term of the agreement that he should begin working and occupying the holding on 1st May 1945. There was no express term as to the termination of the agreement, which

therefore would, if it were not for the *Agricultural Holdings Act* 1941, be terminable by either party at his will upon reasonable notice to the other. But the Act makes it impossible to give a valid notice to quit unless it has a duration of more than a year. It is on this ground that the contract has been held to fall within the fourth section of the Statute of Frauds. For a contract to answer the description of an agreement that is not to be performed within the space of one year from the making thereof within the meaning of the Statute of Frauds, it is necessary that it should be of such a character that performance within a year by either side is impossible from the beginning. The special case of termination by notice on the occurrence of a condition subsequent with which *Hanau* v. *Ehrlich* (1) deals will need consideration but that is the principle. Prima facie, as the *Agricultural Holdings Act* makes it impossible to bring the contract to an end within twelve months it would appear to be an agreement that is not to be performed within the space of one year from the making thereof. But there are I think six questions which must be answered before the conclusion is adopted that the contract is an agreement of that nature.

First, does the provision contained in s. 24 (1) of the *Agricultural Holdings Act* 1941 apply equally to a notice to quit given by the occupier and to one given by the landowner or person of whom the occupier holds the land? It may be supposed that the purpose of s. 24 (1) was to protect the occupier of an agricultural holding from the possibility of losing the annual fruits of his labour. But that is not inconsistent with an intention to make the consequent requirement of a year's notice mutual. The expression "notice to quit" or "notice to quit land" is used in the law of landlord and tenant indifferently of a notice by a lessee or by a lessor terminating the tenancy. It may be a notice of intention to quit the land given by an occupier or it may be a notice given to him by the person desiring to resume possession requiring him to quit the land he occupies.

Is there enough in the context and subject matter of s. 24 to displace the application of this legal meaning of the expression? In s. 15 (1) will be found a number of exceptions which by s. 24 (2) (a) are incorporated by reference in the provisions of s. 24. The result is that when a notice is given for any of the reasons enumerated in the exceptions s. 24 (1) does not apply so as to require a notice of a year's length. But this does not supply a context which would warrant the inference that s. 24 (1) applies only to notices to quit given by landlords or landowners. Nor is the inference warranted

(1) (1911) 2 K.B. 1056; (1912) A.C. 39.

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by the policy supposedly inspiring the measure even when considered in combination with this context. On the other hand s. 22, which extends the terms of tenancies of less than two years to a period of two years, applies mutually to the landlord or landowner and the tenant or occupier.

The second question is whether the exceptions incorporated in s. 24 by reference to s. 15 may operate so as to make it possible in some contingencies to perform the share-farming agreement within a space of one year from the making thereof. An examination of the exceptions shows that they refer to distinct occurrences, some of which would amount to breaches of the implied stipulations of the share-farming agreement and all of which would be events outside performance. The effect of s. 24 (2) (a) is to indicate by reference a number of distinct events upon which a notice of termination may be given of less than a year's duration so that they operate by way of condition subsequent.

There are six such events. Of these three, those specified in s. 15 (1) (a), (b) and (c), depend on a breach by the occupier of the rules of good husbandry and that I think would mean not performance but breach of the share-farming agreement. One of them, that specified in par. (e) of sub-s. (1) of s. 15, depends on the date on which a notice to quit might validly expire and so carries the matter no further.

But that specified in par. (d) is the bankruptcy of the tenant (or occupier) or a composition by him with his creditors, and that specified in par. (f) is the failure of the tenant or occupier upon request to execute an agreement setting out the terms of his tenancy or share-farming agreement (see s. 5 (3) (a)). On consideration I think that these two events must be treated as statutory conditions subsequent giving an option to one party of terminating the contract possibly occurring within the space of one year and as falling within *Hanau* v. *Ehrlich* (1), rather than within *McGregor* v. *McGregor* (2).

The third question is whether during the interval between the making of the oral share-farming agreement in April and the commencement of operations thereunder on 1st May 1945 it would have been possible to give a valid notice terminating the agreement of less duration than one year. This question depends upon the correctness of the view that perhaps s. 24 (1) does not operate until the tenant or share-farmer goes into possession or occupation. But I think that this cannot be so, at all events unless the circumstances are such that a terminal date for the reasonable notice which the common law would allow might be fixed so as to occur before the

(1) (1911) 2 K.B. 1056 ; (1912) A.C. 39. (2) (1888) 21 Q.B.D. 424.

date for possession or occupation. Clearly enough s. 24 (1) means to prevent the loss of possession or occupation which is being enjoyed except by means of a notice of the required length or in the conditions indicated by s. 24 (2). It may go further, but it is enough in the present case to say it will operate to make a notice to quit of less than the required length useless once possession or enjoyment is assumed, even if the notice has already been given. In the present case it is not clearly proved at what time in April 1945 the agreement was made, but I do not think that we could hold that a notice might have been given in the interval of sufficient length to terminate the agreement before 1st May 1945.

The fourth question is whether the material part of the fourth section of the Statute of Frauds is applicable to a case where it is not the contractual intention of the parties but the provisions of the law that make it impossible to perform the agreement within the space of one year from the making thereof. It is a case in which the relevant character of the contract is fixed by law. The intention of the parties goes no further than to enter into an agreement of the description upon which the law fixes that character. But the intention does go as far as that. It is not a matter upon which there is any authority, but it appears to me to be enough that the parties enter into an agreement the legal character of which prevents performance on either side within a year. I am of course speaking of an agreement to which the law antecedently gives that character. The policy of this part of the fourth section has been a matter of doubt and debate but such a contract is within the meaning the words of the provision convey, gives full effect to the very great restrictions within which authority has confined that meaning, and is within any policy that has hitherto been suggested.

The fifth question, which appears to me to be contained within the point, is whether it is possible to find in the provisions of the *Agricultural Holdings Act* 1941 any legislative intention which would prevent s. 24 (1) producing the result that to be enforceable, so far as executory, share-farming agreements must be in writing. Obviously the result was not before the mind of the draftsman and it is a result tending to make the title of a share-farmer less certain and secure. Is it possible to say that the Act was intended to operate only on the assumption that a valid and enforceable agreement had been made; that its operation was intended so to speak to be subsequent to the fourth section of the Statute of Frauds and to all other matters of contractual form and not to affect such questions?

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I think that for the Court to give effect to such a view would be to travel outside the strict function of applying the law as it stands to what the legislature has done and to attempt to avert the legal consequences of what it has done because they are confidently believed to be unintentional.

The sixth and last question is whether the agreement between the parties can be treated as a contract to establish a relationship like partnership, so that performance consists not in the observance of the obligations arising from the relationship but in the formation of the relationship, a thing that in this case might be considered as done on 1st May 1945. In *McKay* v. *Rutherford* (1) Rutherford sued McKay, a contractor, for an account of the profits of Government contracts entered into by the latter claiming that there had been an agreement to share the profits. Lord *Campbell*, delivering the reasons of the Privy Council, said (2) :—"... the class of cases to which the appellant's counsel referred, are confined to contracts as between the contracting parties for the work that is to be done ; but this contract is not as between the contracting parties who are to do the work ; it is of a totally different nature, namely, as was very properly, and in very correct language, expressed at the bar, this is the vendition of a right. Then, why is it not to be performed within a year ? McKay agreed he would let in Rutherford as a partner. Instead of being performed within a year, it was performed instantly, when the agreement was struck. That being the case, it was not such an agreement as is not to be performed within a year, but it is an agreement which is to be performed *instanter*. The moment the parties entered into this agreement, they had all the mutual rights and liabilities which belonged to them as joint partners in the concern."

In my opinion it is impossible to bring the contract declared upon in the first count within this doctrine. What is declared upon in the count is a contract, not to establish a continuing relationship, but a contract to permit the use and occupation of land, to keep the plaintiff supplied with a specified number of cows, to use the defendant's plant, to pay the plaintiff half the proceeds of the sale of milk and cream produced and to effect certain structural improvements in the buildings.

For the foregoing reasons I am of opinion that all answers fail to the prima facie position that by its legal nature the contract declared upon is one that is not to be performed within the space of one year from the making thereof and must therefore be evidenced by writing.

(1) (1848) 6 Moo. P.C.C. 413 [13 E.R. 743].

(2) (1848) 6 Moo. P.C.C., at p. 429 [13 E.R., at p. 749].

I think that the decisions of *Owen* J. and of the Full Court are right and the appeal should be dismissed with costs.

McTIERNAN J. I agree that this appeal should be dismissed. The oral agreement, entered into between the parties could, apart from the *Agricultural Holdings Act* 1941, have been terminated by reasonable notice given by either party to the other. The effect of the Act upon the agreement was to give it a duration of at least one year: in other words it was an agreement that was not to be performed within the space of one year from the making of it. The agreement was made no less under the Statute of Frauds than under the *Agricultural Holdings Act* 1941. It follows that no action could be brought on the agreement because it was not evidenced by some memorandum or note in writing signed by the respondent or his agent. Perhaps the consequence of the application of the Statute of Frauds to oral agreements given a duration of twelve months by the *Agricultural Holdings Act* 1941 produces an anomaly: the legislature may consider that this consequence is a matter for its attention.

WILLIAMS J. The question on the threshold of this appeal is whether the oral contract which *Owen* J. found was made between the plaintiff (appellant) and defendant (respondent) in April 1945 to operate from 1st May 1945 was an agreement which, although not initially an agreement within the Statute of Frauds, was converted into such an agreement by virtue of the *Agricultural Holdings Act* 1941 (N.S.W.). His Honour found that the terms of the oral contract were as follows: (1) the plaintiff was to run a dairy farm on portion of the defendant's property; (2) the plaintiff was to supply the necessary labour and to be at liberty to occupy free of charge a cottage on the property; (3) the defendant was to provide the milking herd and the necessary plant and equipment and was to improve the existing facilities so as to bring them up to the standards required by the Milk Board; (4) the defendant was to increase the number of the herd to a figure which would ensure that sixty cows would always be in milk; (5) the cost of producing and marketing milk and cream was to be charged against the gross returns from the products of the dairy and the parties were then to divide the balance in equal shares.

Section 4 of the Statute of Frauds provides, so far as material, that no action shall be brought to charge any person upon any agreement that is not to be performed within the space of one year from the making thereof unless the agreement upon which such

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action shall be brought or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized. The oral contract in the present case authorized the plaintiff to use and occupy portion of the defendant's land and to utilize his milking herd and certain plant and equipment in order to carry on a dairy on the terms that the net proceeds of the business should be divided between the parties in equal shares. The plaintiff did not acquire the exclusive possession of any portion of the defendant's land so that a tenancy was not created between the parties at common law and their relationship remained purely contractual, either party being at liberty to terminate the contract on reasonable notice to the other party (*Ex parte Duggan* (1); *Bellinger* v. *Hughes* (2); *Re Tindal*; *Perpetual Trustee Co. Ltd.* v. *Tindal* (3); *Hindmarsh* v. *Quinn* (4)). A contract stating no definite time for its performance is not within the Statute of Frauds unless it appears by the whole tenor of the agreement that the parties contemplated that its performance would extend over a greater space of time than one year (*Peter* v. *Compton* (5); *Souch* v. *Strawbridge* (6); *McGregor* v. *McGregor* (7); *Hanau* v. *Ehrlich* (8)). In *McGregor* v. *McGregor* (7), *Lindley* L.J. said that: "The provisions of the statute have been construed in a series of decisions from which we cannot depart. The effect of these decisions is that, if the contract can by possibility be performed within the year, the statute does not apply" (9).

The present contract was terminable by either party within the year, so that it was originally not a contract not to be performed within the space of one year and therefore not a contract to which the Statute of Frauds applied. But the *Agricultural Holdings Act* 1941 (N.S.W.) altered the agreement of the parties in certain respects. Section 24 (1) provides, so far as material, that notwithstanding any provision in a contract of tenancy, a notice to quit shall be invalid if it purports to terminate the tenancy before the expiration of twelve months from the end of the then current year of tenancy. Section 5 (1) of the Act provides that it shall (except where otherwise expressly provided) apply to and in respect of share-farming agreements and parties to any such agreements in like manner as it applies to contracts of tenancy and the parties to

(1) (1902) 19 W.N. (N.S.W.) 260.
(2) (1911) 11 S.R. (N.S.W.) 419.
(3) (1933) 34 S.R. (N.S.W.) 8.
(4) (1914) 17 C.L.R. 622.
(5) (1693) Skinner 353 [90 E.R. 157].
(6) (1846) 2 C.B. 808, at p. 815 [135 E.R. 1161, at p. 1164].
(7) (1888) 21 Q.B.D. 424.
(8) (1911) 2 K.B. 1056; (1912) A.C. 39.
(9) (1888) 21 Q.B.D., at p. 431.

any such contract. Section 5 (2) defines the meaning of share-farming agreement for the purpose of this section and it is not disputed that the present contract is a share-farming agreement within the meaning of the definition. Section 5 (3) provides that (a) a reference to a contract of tenancy shall be construed as a reference to a share-farming agreement; (b) a reference to a tenancy shall be construed as a reference to the use and occupation of land by a share-farmer; (e) a reference to a holding shall be construed as a reference to land which a share-farmer is authorized to use and occupy pursuant to a share-farming agreement.

When these provisions of s. 5 are read into s. 24 (1) they make the latter section provide that notwithstanding any provision in a share-farming agreement a notice to quit land which a share-farmer is authorized to use and occupy pursuant to a share-farming agreement shall be invalid if it purports to terminate the use and occupation of the land in question by the share-farmer before the expiration of twelve months from the expiration of the then current year of the share-farming agreement. Section 24 (1) therefore operated to convert the oral contract from a contract terminable by either party at any time on reasonable notice to the other party into a contract which, in the absence of a notice to quit authorized by s. 24 (2) (a), could only be terminated by either party at the end of two years. This is a contract not to be performed within the space of one year within the meaning of the Statute of Frauds. The defendant pleaded the Statute, and in my opinion *Owen* J., and the Full Supreme Court of New South Wales on appeal, were right in holding that the Statute was a bar to the plaintiff succeeding on the first count.

I would therefore dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant, *Fitzgerald, Halliday & Co.*, Scone, by *Dowling, Tayler, MacDonald & Pratt.*

Solicitors for the respondent, *H. T. Macready & Eric Jones.*

J. B.