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# Contracts Not to Be Performed Within a Year under Statute of Frauds in Washington

J. Orrin Vining

in which one or more of such defendants reside.[26] The jurisdiction of justices of the peace, in all civil actions, except as provided in the preceding section, shall be coextensive with the limits of the county " seems a much stronger limitation of jurisdiction than "An action against a corporation may be brought "[27] But the Supreme Court did not so interpret it.

It is submitted that an affirmance of the decision of the Superior Court, that a rural justice of the peace has no jurisdiction over an inhabitant of a city of more than three thousand inhabitants, would have been more in accord with the intent of the Legislature.

H. C. Force.

CONTRACTS NOT TO BE PERFORMED WITHIN A YEAR UNDER STATUTE OF FRAUDS IN WASHINGTON—The statute of frauds in Washington,[1] states that in certain specified cases an agreement, contract and promise shall be void unless the same or some note or memorandum thereof be in writing and signed by the party to be charged therewith. By subdivision I this provision extends to every agreement that by its terms is not to be performed in one year from the making thereof. Two recent decisions of our Supreme Court have gone into an extended interpretation of this subdivision regarding two troublesome questions of law arising thereunder.

The first of these questions is: What is the test for determining whether the oral agreement by its terms is not to be performed within one year from the making thereof?

In the case of *Tonkoff v. Roche Fruit & Produce Co.*,[2] a contract was entered into on November 28, 1922, by the terms of which appellant was to dispose of respondent's 1923 crop of apples for the agreed compensation of fifteen cents per box. The respondent contended that the contract was void for the reason that it was not to be performed within one year from the making thereof. The case was reversed, and the Court answered respondent's contention by stating:

"The contract was made on November 28, 1922, and fixes no time for its performance, and the court cannot say that all its terms could not have been complied with prior to November 28, 1923. It is quite possible that the performance could be entirely made within that time, and it is of no consequence that the appellant and the respondent may have been of the opinion that the contract might extend beyond the year, or that, as a matter of fact, it did so extend.

"The true test is not what the parties expected or what actually happened, but whether the contract by its terms must endure longer than the year."

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[26] Rem. Comp. Stat., §§ 1756-7, P C., §§ 9559-60.
[27] Rem. Comp. Stat., § 206; P C., § 8543.
[1] Rem. Comp. Stat., § 5825; P C., § 7745.
[2] 137 Wash. 148, 242 Pac. 3 (1926).

The case of *In re Field's Estate*,[3] cited in the above decision, dealt with the question of an oral agreement whereby an administrator waived the statutory fees allowed him, as being within subdivision I of the statute of frauds, an agreement not to be performed within one year. The Court held that the agreement was outside the statute, that the contract might have been fully performed within a year, that the administrator might have died, resigned or have been removed. The Court said in part:

"It has been well established by authority that the test is not what the parties expected the duration of the contract would be, but whether of necessity it must be of such duration."

From the *Tonkoff* case, *supra,* reinforced by *In re Field's Estate, supra,* we can safely lay down the rule that an oral agreement, contract or promise is outside of subdivision I of the statute of frauds unless by its terms it must endure longer than a year. If there is a possibility or a contingency whereby performance may take place within a year, the agreement, contract or promise is outside of subdivision I of the statute. Furthermore, it is immaterial (1) what the intention of the parties was, except as expressed in the terms of the contract itself, and (2) that the contract did in fact extend over a year.

The second question is: Will part performance take an oral agreement, contract or promise, which by its terms can not be performed within a year, outside of the statute of frauds?

In the case of *Hendry v. Bird*,[4] the defendant agreed with plaintiff to buy 51% of the capital stock of a corporation for the use of the plaintiff and defendant, and it was further agreed that the plaintiff should pay him for one half of said stock in the sum of $3,000 to be paid in installments of $50 each, payable every month from July, 1917, to July, 1922, the plaintiff's share of the stock to be turned over to him when the last payment was made. The stock was purchased, and plaintiff fully performed his part of the contract by paying the $3,000 in monthly installments. The defendant refused to deliver to plaintiff his share of the stock. The trial court granted the prayer of the complaint and compelled the defendants to perform the contract by delivery of the stock. It is to be noted that here a full performance had been made by one of the parties. The Supreme Court reversed the case, holding that the contract was void as being within the statute of frauds, and that part performance did not take it outside the statute. The Court cited in support of its holding the case of *Union Savings & Trust Co. v. Krumm*.[5] In that case a contract was entered into to cut and deliver logs for a period of two years. The respondent insisted that there was such a part performance as to take the contract out of the statute of frauds. The Court, however, refused to follow the respondent's contention, modified the trial court's decision, and stated the rule to be as follows:

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[3] 33 Wash. 63, 73 Pac. 768 (1903).
[4] 135 Wash. 174, 240 Pac. 565 (1925).
[5] 88 Wash. 20, 152 Pac. 681 (1915).

"The doctrine of part performance, however, has no application to this clause of the statute of frauds. In the nature of the case, where the statute is directed solely to the time of performance and not to the character or subject matter of the contract, part performance could not remove the ban of the statute without in effect repealing the statute."

In the *Hendry* case, *supra,* the Court also reasoned by analogy by reference to the case of *Keith v. Smith.*[6] This case construed another subdivision of the statute of frauds,[7] the agreement therein mentioned likewise being void unless in writing. The suit in the *Keith* case, *supra,* was to recover a commission on the purchase of real estate by oral contract. The Court stated that from its very nature a claim for commission could not be made until earned, and to hold that the performance would take an action of this character out of the operation of the statute would nullify the statute itself. In the *Hendry* case, *supra,* the Court also referred to the case of *Chamberlain v. Abrams,*[8] which case construed Rem. Comp. Stats., §§ 10550, 10551, P C., §§ 1909, 1910, providing "that all conveyances of real estate or any interest therein, and all contracts creating or evidencing any encumbrance upon real estate shall be by deed."

The above statutes do not declare that oral agreements with reference to the conveyances or incumbrance of real estate shall be void, yet in the *Chamberlain* case, *supra,* the Court held that the payment of the purchase price, either in whole or in part, was not a sufficient part performance of an oral agreement to convey lands to take the agreement out of the statute of frauds.

There are several earlier Washington decisions which at first sight appear to be in conflict with the *Hendry* case, *supra,* on the subject of part performance of contracts not to be performed within a year, which should be noted here.

The case of *In re Field's Estate, supra,* not only held that an oral agreement whereby an administrator waived the statutory fees allowed administrators was not void since it could be performed within a year, but also held that even assuming the contract was within the statute, by accepting the office there was a part performance and the administrator was estopped to allege its invalidity. The case, in so far as it is based on the second ground, unless distinguishable by the nature of part performance, is overruled by *Hendry v. Bird, supra.* In the *Field's Estate* case performance was possible within a year, while in the *Hendry* case it was not. Therefore, we may regard the second ground for the decision in the *Field's Estate* case as mere *dicta* and distinguish the two cases on their facts.

In the case of *Borrow v. Borrow,*[9] appellant advanced $1,800 for premises purchased by her parents, taking a deed in her own name, under an oral agreement whereby the parents agreed to repay the

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[6] 46 Wash. 131, 89 Pac. 473 (1907).
[7] See note 1, *supra.*
[8] 36 Wash. 587, 79 Pac. 204 (1905).
[9] 34 Wash. 684, 76 Pac. 305 (1904).

purchase price within two years, with $15 per month as compensation for the loan. The parents made improvements on the property and paid interest on the loan, and sought specific performance on payment of the purchase price. Appellant contended that the oral agreement was void as not to be performed within one year. The case was affirmed on the ground that the trust relation existing and part performance defeated the claim that the agreement was oral and therefore void as not to be performed within a year. The agreement could have been performed within a year, since by its terms payment of the $1,800 could have been made at any time within two years and so was outside of the statute, but the Court did not decide that question. In this case respondents paid interest, entered upon the premises and made improvements thereon. It is a stronger case of part performance than the *Hendry case, supra.* But, nevertheless, in so far as the decision in the *Borrow* case, *supra,* is based on part performance, it would seem to be overruled by the *Hendry* case. It is to be noted, however, that no mention of the *Borrow* decision was made by the Court in deciding the *Hendry* case.

The case of *Maze v. Feuchtwanger* [10] dealt with an agreement to pay a commission on a sale of goods in consideration of the agent's release of an option permitting a sale to another. The Court held that the agreement was not within the statute of frauds, since performance was possible within a year because no time was fixed, especially where it was fully executed on the part of the promisee. The Court's contention of part performance is mere *dicta,* and the *dicta* would seem, at first sight, overruled by the *Hendry* case, *supra.* However, it is to be noted that in the *Hendry* case neither party could have or did perform his part of the contract within a year; while in the *Maze* case, *supra,* assuming that the commission was not to be paid within a year, the promisee could have and did fully perform within the year.

In conclusion, it is to be repeated that the case of *Hendry v. Bird, supra,* is a clear and convincing decision, to the effect that where an oral agreement, contract or promise is void by reason of the fact that it may not by its terms be performed within one year from the making thereof, part performance will not take it outside of the statute.

J. Orrin Vining.

THE "BUT FOR" RULE IN WASHINGTON—The question of proximate cause is one which is of vital importance in determining where the liability for an act or omission shall fall. For this reason certain attempts have been made to set forth rules which should determine whether an act was the proximate cause of a particular result. The so-called "But For" rule for determining proximate cause is an outgrowth of this class of litigation and has been the cause of several interesting and apparently none too well reasoned cases, of which the famous "Bear Case" or *Gilman v. Noyes*[1] is perhaps the best known.

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[10] 106 Wash. 327, 179 Pac. 850 (1919).

[1] *Gilman v. Noyes,* 57 N. H. 627 (1876).