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NOTES

THE ONE YEAR PROVISION OF THE KENTUCKY STATUTE OF FRAUDS

Kentucky Revised Statutes section 371.010 states: "No action shall be brought to charge any person . . . (7) Upon any agreement that is not to be performed within one year from the making thereof unless . . . some memorandum or note thereof be in writing and signed by the party to be charged. . . ."

This of course is a standard Statute of Frauds provision, copied virtually verbatim from the original English Statute of Frauds enacted in 1677 during the reign of Charles II.¹ It is the purpose of this note to review the manner in which Kentucky has interpreted this section of its Statute of Frauds.

The problems of interpretation have centered around three key phrases in the Act: (1) the meaning of the word "agreement"; (2) the meaning of the phrase "not to be performed within a year"; and (3) the meaning of the word "year" as used in the Statute.

Meaning of the word "agreement"

The word "agreement" does not necessarily mean "promise." While in common parlance the two terms are often used synonymously, it is evident that for many purposes the two terms cannot be used interchangeably. For example, the performance of a *promise* requires only acts by the promisor. The performance of an *agreement*, on the other hand, requires that both parties to the agreement act. The word "agreement" carries overtones of mutuality; "promise" does not. That the legislature intended the two words to be used differently might be inferred from the fact that subsection (8) of this same section uses the words "promise, agreement or contract."² It could be argued that by

¹ 29 Chas. 2, c. 3 (1677): "No action shall be brought . . . to charge the defendant . . . upon any agreement that is not to be performed within the space of one year from the making thereof . . . unless the agreement . . . is in writing."

Compare, Restatement, Contracts, sec. 178 V (1932): "The following classes of informal contracts are by statute unenforceable unless there is a written memorandum thereof signed by the party against whom enforcement of the contract is sought. . . . (V) Bilateral contracts as long as they are not fully performed by either party, which are not capable of performance within a year from the time of their formation. . . ."

² Ky. Rev. Stat. sec. 371.010 (1953) "No action shall be brought to charge any person: . . . (8) Upon any promise, agreement, or contract . . . for the sale or lease of any real estate. . . ."

including both words the legislature recognized that they have different meanings. However, other portions of the statute lead one to conclude that the legislature regarded the two words as synonyms. In subsection (6) of this same section,³ the legislature declared unenforceable *agreements* in consideration of marriage, but said nothing about *promises* or *contracts* in consideration of marriage. It is unthinkable that this exclusion was intended, and a rather cursory examination of the cases arising under this subsection shows that the courts have treated this language as stigmatizing agreement, promise and contract alike.⁴ It is therefore impossible to tell from the text of the statute whether the legislature intended to make a distinction between the words "agreement" and "promise." However, an analysis of the cases arising under the subsection dealing with contracts not to be performed within a year shows that the courts have made a distinction between the two words.

This is shown by the fact that Kentucky has uniformly held that if one side of an oral bilateral contract has been performed within a year, the counter-promise is enforceable even though performance must extend over a period of more than a year.⁵ Apparently the court has never distinguished between a bilateral contract fully performed on one side, and a unilateral contract, but the same principle would undoubtedly apply. This same result is reached under the *Restatement* rule which applies only to "bilateral contracts so long as they are not fully performed by either party. . . ."⁶

Note that the *Restatement* removes from the Statute of Frauds bilateral contracts which have been fully performed on one side presumably even when this performance necessarily extended over a period longer than one year from the date the contract was made. It is uncertain as to whether the Kentucky Court of Appeals would go so far. In every case examined, the performance had been completed within the year following the formation of the contract and Professor Williston believes that this is required according to the majority rule.⁷ But Kentucky has apparently never been squarely presented with the

³ Ky. Rev. Stat. sec. 371.010 (1953) "No action shall be brought to charge any person: . . . (5) Upon any agreement made in consideration of marriage, except mutual promises to marry. . . ."

⁴ *Stevens v. Niblack's Adm'r*, 256 Ky. 255, 75 S.W. 2d 770 (1934); *Hatcher-Powers Shoe Co. v. Sparks*, 237 Ky. 321, 35 S.W. 2d 564 (1931); *Wesley v. Wesley*, 181 Ky. 145, 204 S.W. 165 (1918).

⁵ *Ferguson v. Rieke*, 223 Ky. 321, 2 S.W. 2d 405 (1928); *E. Tenn. Tel. Co. v. Paris Elec. Co.*, 156 Ky. 762, 162 S.W. 530 (1914); *Jones v. Comer*, 25 Ky. L. Rep. 773, 76 S.W. 392 (1903); *Dant v. Head*, 90 Ky. 255, 13 S.W. 1073 (1890); *West v. King*, 163 Ky. 561, 174 S.W. 11 (1915).

⁶ *Restatement, Contracts* op. cit. supra, note 1.

⁷ 2 *Williston, Contracts* 1472 (Rev. ed. 1936).

issue and might go along with the *Restatement* at least in the case where performance was possible or contemplated within the year, though not actually given until later. For example, in *Dant v. Head*,⁸ the classic Kentucky case on this question, it was stated, as dicta, that the statute was not to apply "to an agreement that *is to be*, or has been performed by one or either" of the parties within a year. (Emphasis supplied). Thus we see the extent to which complete performance by one side will remove such an agreement from the statute. There is dictum in at least one Kentucky case to the effect that *part* performance within the year of one of the promises is sufficient to take the case outside the Statute of Frauds.⁹ But whenever the issue has been squarely presented, part performance has been held insufficient.¹⁰

According to the *Restatement*,¹¹ if either of the promises made in a bilateral contract cannot be performed within a year, the entire agreement is within the statute of frauds, and even the side of the contract which *can* be performed within a year is unenforceable, unless it is in writing.¹²

The Kentucky Court has never been faced with this problem. None of the cases examined presented a situation in which a plaintiff, whose oral promise would require for its performance a period greater than a year, was seeking to enforce the oral counter-promise which could be performed within a year. But in *East Tennessee Telephone Co. v. Paris Electric Co.*,¹³ the Court said, "The contract is within the statute . . . when it is clearly made to appear that it would not and could not be performed by *both* parties within the year." (Emphasis supplied). This principle is in accord with the *Restatement* view and, while not the actual holding of the case, it should not be regarded lightly since it appears in one of the leading Kentucky cases on the subject.

However, there have been dicta in the Kentucky cases to the effect that instead of putting both promises of a bilateral contract within the Statute of Frauds when one promise cannot be performed within the year, *neither* promise should be within the statute.¹⁴ This view is

⁸ *Supra* note 5.

⁹ *Utilities Elec. Machine Corp. v. Joseph E. Seagram & Sons, Inc.*, 300 Ky. 69, 187 S.W. 2d 1015 (1945).

¹⁰ *Mulberry v. Kitchen*, 247 S.W. 2d 380 (Ky. 1952); see also *Purcell v. Campbell*, 261 Ky. 644, 88 S.W. 2d. 670 (1935); *Kleeman & Co. v. Collins*, 72 Ky. (9 Bush) 460, 464 (1872).

¹¹ *Restatement, Contracts*, sec. 198, illustration 4 (1932).

¹² Or, of course, unless the other side has performed. See discussion, *supra*. This is similar to the requirement of "mutuality" in contract law, but is not the same. The mutuality referred to there is mutuality of *obligation*, not of enforceability. A contract is not void for want of mutuality because one side is *unenforceable* for some reason.

¹³ 156 Ky. 762, 162 S.W. 530 (1914).

¹⁴ *Bastin Tel. Co. v. Richmond Tel. Co.*, 117 Ky. 122, 77 S.W. 702 (1903); *Dant v. Head*, *supra*, note 5.

apparently based on the feeling that the statute is completely inoperative as applied to such a contract. However, this seems contrary to the weight of authority and the *East Tennessee Telephone* case probably states the law.

It appears, then, that the Kentucky Court treats the word "agreement" to mean any bilateral contract which is still executory (*i.e.* not yet fully performed by either party) at the end of one year. This holding is in accord with what appears to be the majority rule. However, the court has never specifically repudiated the *Restatement* position that if fully performed on one side, even though that side could not possibly have been performed within a year, the contract is without the statute, and the Kentucky courts may well see fit to adopt that view when presented with such a case.

Meaning of the phrase: "is not to be performed within a year"

Generally, an agreement "is to be performed within a year" when performance by both sides is possible within one year from the date the contract was formed.¹⁵ Obviously a contract stating that it is to be performed within a year is not included within the statute. A contract specifically stating that performance by both sides will continue over a period greater than a year is as obviously within the statute.¹⁶ The problem occurs when no time is stated for performance.

A common example of an agreement which may be performed within a year though no time is set for performance is a promise to insure. This type of contract is usually without the statute since most insurance contracts can be completely performed within a year by the happening of the event insured against, followed by the payment of the proceeds due under the policy.¹⁷ But a promise to re-insure property for successive annual periods was held to be within the statute, since it could not be performed within the year.¹⁸

Another type of agreement which illustrates this, and is common enough to deserve special treatment, is a promise the performance of which is terminated by the death of someone, usually the promisor or the promisee, but occasionally a third party. Since death could occur

¹⁵ What happens when only *one* side can be performed or *is* performed is discussed above.

¹⁶ At least until one side has fully performed and even then only if the broader *Restatement* view is adopted. See text, *supra*.

¹⁷ *Brown v. Home Ins. Co. of N.Y.*, 203 Ky. 715, 262 S.W. 1088 (1924); *Springfield Fire and Marine Ins. Co. v. Snowden*, 173 Ky. 664, 191 S.W. 439 (1917); *Amer. Central Life Ins. Co. v. Leake*, 31 Ky. L. Rep. 1016, 104 S.W. 373 (1907).

¹⁸ *Klein v. Liverpool & London & Globe Ins. Co.*, 22 Ky. L. Rep. 301, 57 S.W. 250 (1900).

within the year the agreement could be fully performed on both sides within the year. Hence a promise to support someone for life is not within the statute,¹⁹ nor a promise to give another property at the donor's death,²⁰ nor a promise to support a child.²¹ The Kentucky Court has sometimes failed to distinguish between a promise which is *performed* upon the death of some person and one which is *excused* by his death.²² For example a promise to support a child until he is twenty-one cannot be performed within a year. However, death of the child would certainly excuse performance. The layman will not criticize the court for refusing to distinguish these cases and in fact would regard such a distinction as over-technical, but to the lawyer such distinctions have apparently seemed significant.²³

An analogous situation is presented when a contract which by its express terms is to extend over a period greater than one year contains a "termination clause" permitting one of the parties to declare it at an end. This is generally held to be *within* the Statute of Frauds for the reason that the law looks to the performance, not to the defeat of a contract. Apparently Kentucky has never been faced with this problem specifically but there are dicta which indicate that Kentucky might well look upon such a contract as one capable of being performed within a year and therefore without the statute.²⁴

It is sometimes stated that all negative promises are without the Statute of Frauds since a promise not to do something can be performed by the promisor as well dead as alive, in fact, *better*, since death guarantees actual performance. This would put without the statute even those contracts in which a person is to refrain from doing something over a definite period of years. However, the more logical view would place this type of contract within the statute, since it is obviously impossible to forbear to do something for a period greater than a year within a year. Death *guarantees* performance but it does

¹⁹ *Waggener v. Howsley's Adm'r.*, 164 Ky. 113, 175 S.W. 4 (1915); *Bull v. McCrea*, 47 Ky. (B. Mon.) 422 (1848); *Howard's Adm'r v. Burgen*, 34 Ky. (4 Dana) 187 (1836).

²⁰ *McDaniel v. Hutcherson*, 136 Ky. 412, 124 S.W. 384 (1910); *Story v. Story*, 22 Ky. L. Rep. 1731, 61 S.W. 279 (1901); *Myles Ex'rs v. Myles*, 69 Ky. (6 Bush) 237 (1869); see also: *Thomas v. Feese*, 21 Ky. L. Rep. 206, 51 S.W. 150 (1899).

²¹ *Myers v. Saltry*, 163 Ky. 481, 173 S.W. 1138 (1915); *Stowers v. Hollis*, 83 Ky. 544, 7 Ky. L. Rep. 549 (1886); *Osborn v. Osborn*, 12 Ky. Op. 361 (1883).

²² *Myers v. Saltry*, supra note 21.

²³ The effect of making this distinction is to let the form rather than the substance of a contract control whether it's within the statute. See *Williston*, op. cit. supra, note 7, 1454 for a fuller development of this idea.

²⁴ *Finley v. Ford*, 304 Ky. 136, 200 S.W. 2d 138 (1947); *Stone v. Smith*, 279 Ky. 213, 130 S.W. 2d 18 (1939); *Mullikin v. Miles*, 204 Ky. 541, 264 S.W. 1086 (1924).

not *constitute* performance. The Kentucky Court of Appeals adopted this view in a well reasoned opinion in the case of *Dickey v. Dickinson*,²⁵ the leading Kentucky case on the subject. The court specifically repudiated the doctrine that all negative contracts are without the statute. However, when no definite time is stated for performance of a negative promise the Kentucky courts have held the Statute of Frauds inapplicable on the grounds that this should be construed as a promise for life. A good example of such a contract is an agreement to refrain from going into a competing business.²⁶

Under the *Restatement* rule, if the contract is in any way capable of being performed within a year the contract need not be in writing.²⁷ However Kentucky does not treat contracts so liberally. Rather it is required that the parties must *contemplate* performance within a year or at least not contemplate performance extending over a period of more than a year.²⁸ The courts however have been extremely inconsistent in interpreting this exception. For example, contracts to perform certain obligations as long as a particular business shall exist have uniformly been held to be without the statute,²⁹ though it is almost certain the parties really intended for the business and the performance to continue over a long period. On the other hand, the court has scrutinized the unexpressed intention of the parties very closely in lumbering contracts, as a rule, holding that if the lumbering could not be performed within a year *with the contemplated equipment* the statute barred enforcement of the promise.³⁰ Likewise, agreements concerning the use of roads³¹ and electric lines³² have been generally held to be unenforceable since full performance was not contemplated within a year. The same result was reached in a case where per-

²⁵ 105 Ky. 748, 49 S.W. 761 (1899).

²⁶ Nickell v. Johnson, 162 Ky. 520, 172 S.W. 938 (1915); *Dickey v. Dickinson*, 105 Ky. 748, 49 S.W. 761 (1899).

²⁷ Restatement, Contracts sec. 178 (1), (V) and sec. 198, especially Comment b, example 11.

²⁸ Williamson v. Stafford, 301 Ky. 59, 190 S.W. 2d 859 (1945); King v. McMillan, 293 Ky. 399, 169 S.W. 2d 10 (1943); Kentucky Utilities Co. v. Hurst, 207 Ky. 448, 269 S.W. 525 (1925); Cumberland & Manchester R. C. v. Posey, 196 Ky. 379, 244 S.W. 770 (1922); E. Tenn. Tel. Co. v. Paris Elec. Co., 156 Ky. 762, 162 S.W. 530 (1914).

²⁹ Frankfort and Cincinnati Ry. Co. v. Jackson, 153 Ky. 534, 156 S.W. 103 (1913); Yellow Poplar Lumber Co. v. Rule, 106 Ky. 455, 50 S.W. 685 (1899).

³⁰ Williamson v. Stafford, *supra* note 28. King v. McMillan, *supra* note 28. But see Niagara Fire Ins. Co. v. Layne, 162 Ky. 665, 172 S.W. 1090 (1915). To some extent this overlaps with the "Sale of Standing Timber" section of our Statute of Frauds, Ky. Rev. Stat. sec. 371.100 (1953).

³¹ Lively v. Elkhorn Coal Co., 101 F. Supp. 1014 (E.D. Ky. 1952).

³² Bastin Tel. Co. v. Richmond Tel. Co., *supra* note 14; E. Tenn. Tel. Co. v. Paris Elec. Co., *supra* note 28.

formance was to continue until a construction job was finished and the completion was expected to take several years.³³

A promise to perform for more than a year or until the happening of some event that could occur within a year, does not lie within the Statute of Frauds.³⁴ Also it might be observed that the mere fact that a promise provides a period greater than a year for performance does not place the promise within the statute if it could be performed within one year from the date made.³⁵

Definition of a year

The general rule is that the year expires at midnight on the first anniversary of the day the promise is made.³⁶ Thus the year is virtually always 365 days plus several hours.³⁷ This definition also disregards leap years, so the year could be 366 days plus. Thus it would seem that a promise to work for a year does not fall within the statute if performance is commenced the following day, since the worker will have completed his year with the employer at the end of the work day on the first anniversary of the contract. Apparently the Kentucky Court of Appeals has never been specifically faced with this problem. The case of *Torson Construction Company v. Grant*³⁸ is sometimes cited as so holding, but in that case the court construed the plaintiff's beginning work on the day following the promise as an act indicating his acceptance of the defendant's offer. The Kentucky Court has had no trouble with the simpler ramifications of this problem, holding contracts to work for one year, commencing on the day made, to be without the statute³⁹ and those for periods of greater than a year,⁴⁰ or those for a year to commence in the future,⁴¹ barred by the statute.

Much litigation has arisen concerning leases of one year which were not in writing. Many suits have sought to enforce such parol

³³ *Cumberland and Manchester R.R. v. Posey*, supra note 28.

³⁴ *Standard Oil Co. v. Denton*, 24 Ky. L. Rep. 906, 70 S.W. 282 (1902).

³⁵ *Morton v. Roll*, 201 Ky. 27, 255 S.W. 817 (1923). But see *Mills v. O'Daniel*, 23 K.L.R. 73, 62 S.W. 1123 (1901).

³⁶ Restatement, Contracts op. cit. supra note 1, sec. 198 Comment d.

³⁷ Compare the length of a year for Statute of Frauds purposes with that for statute of limitation purposes. There the year is deemed to expire at midnight on the first anniversary of the day prior to that from which the time commenced to run. *Geneva Cooperage Co. v. Brown*, 124 Ky. 16, 98 S.W. 279 (1906); *Wilson v. I.C.R.R.*, 29 Ky. L. Rep. 148, 92 S.W. 572 (1906).

³⁸ 251 Ky. 800, 66 S.W. 2d 79 (1933).

³⁹ *Ross v. Columbus Mining Co.*, 204 Ky. 474, 264 S.W. 1071 (1924).

⁴⁰ *Dysart v. Dawkins Log & Mill Co.*, 222 Ky. 415, 300 S.W. 906 (1927); *Bethel v. Booth & Company*, 115 Ky. 145, 72 S.W. 803 (1903).

⁴¹ *Tarry v. Vick*, 214 Ky. 317, 283 S.W. 87 (1926); *Smith v. Theobald*, 86 Ky. 141, 5 S.W. 394 (1887).

agreements⁴² presumably relying on Kentucky Revised Statutes 371.-010(6)⁴³ which states that a lease for a year or less need not be in writing. However this still will be barred by subsection 7 since it cannot be performed within a year,⁴⁴ unless, of course, the lessee's term commences on the day the lease is made.⁴⁵ If the lease is to commence in the future, it is within the statute.⁴⁶

Conclusion

It is submitted that the Kentucky Court of Appeals has in general reached the proper conclusion in most of the problems discussed. It is felt, however, that the Court should not have placed within the statute contracts whose performance was not *contemplated* within a year, even though possible within a year. Such a rule merely adds to the tremendous uncertainty already in the law. While probably the majority view, it is not that adopted by the *Restatement*, which is believed by the writer to be the preferable one.

The Kentucky courts have not been unmindful of the injustices possible under the statute. They have joined the courts of the English-speaking world in according the statute a narrow, most unfriendly interpretation. Furthermore, strictly construed, the statute does not pre-

⁴² Boone v. Coe, 153 Ky. 233, 154 S.W. 900 (1913); Thomas v. McManus, 23 Ky. L. Rep. 837, 64 S.W. 446 (1908); Hayden v. Clark, 32 Ky. L. Rep. 1341, 108 S.W. 845 (1907); Moore v. Terrell, 33 Ky. L. Rep. 822, 11 S.W. 297 (1908).

⁴³ The section of the Kentucky Statute of Frauds dealing with the sale of interests in land.

⁴⁴ Generally speaking, the fact that a contract is not obnoxious to one section of the Statute does not mean that it is free from objection under another section. 2 Williston, op. cit., supra note 7, sec. 1461. However, there is some authority for the view that the specific provisions of the Statute should govern, and the general sections, here that dealing with contracts not to be performed within a year, should yield. 49 Am. Jur. 406 (1943).

⁴⁵ This seldom occurs except when the lease is created by implication when a tenant for a year holds over on a parol agreement. See for example, Abraham v. Gheens, 205 Ky. 289, 265 S.W. 778 (1924).

⁴⁶ A judge known to the writer has stated that in his opinion this provision of the Statute of Frauds has resulted in more injustice than any other part. The scheme is generally worked in connection with a share-cropping arrangement. In December, say, the landlord will promise a tenant that he can work his farm and live on it for the next calendar year, from January through December. Then, in January, when it's too late for the cropper to get another place since such arrangements usually run from January to January, the landlord will inform the tenant that he has several others after the same place and that the tenant's lease is unenforceable. With no other job available to the tenant, the landlord is in a position to drive a hard bargain. Today, the paucity of good tenants renders this less common, but it was widely used during the depression. Relief could be afforded the tenant by construing this to be a contract to *grow crops*, which could of course be performed within a year. Burden v. Lucas, 19 Ky. L. Rep. 1581, 44 S.W. 86 (1898). The court could also give relief if actual fraud on the part of the landlord could be shown. 49 Am. Jur. 885 (1943). This, however, is extremely difficult to prove.

vent the plaintiff from seeking relief in quasi contract.⁴⁷ It has also been suggested by the Court of Appeals that the promisee might rely on a promise, ordinarily within the statute, as a defense, since this does not involve "bringing an action."⁴⁸ Sometimes the courts invoke an ordinary estoppel and refuse to permit the promisor from using the statute as a bar.⁴⁹

Perhaps the best protection to the layman is the amazingly widespread belief that all contracts must be in writing in order to be legally enforceable. Thus to some extent, the layman's ignorance protects him from injustice. If he expects to have a legally enforceable contract, he will require it to be in writing.

The Statute of Frauds is not without its critics.⁵⁰ Yet every American jurisdiction has adopted the Statute of Frauds.⁵¹ The possibility of repeal is summed up by Professor Corbin: "The total repeal of the statute would involve such a wrench to the mental habits of bench and bar that it is very unlikely to occur."⁵²

Possibly the effects of that section of the statute dealing with contracts not to be performed within a year could be ameliorated by lengthening the statutory period. For example, to require a writing for contracts which could not be performed within, say, fifteen months, would remove from the statute most agreements for the duration of a year, *e.g.* agreements to work for a year, since performance of such agreements would usually be commenced within three months from the date of the promise and thus capable of complete performance within the statutory period.

It has been observed that every line of the Statute of Frauds has cost a king's ransom. It is submitted that ransoming kings with money taken from honest, well-intentioned, fair-dealing, though ignorant persons, should be as severely limited as possible and that the Statute of Frauds should be liberalized. Since little help can be expected from the legislature in this endeavor, it is the writer's opinion that the uncordial attitude of the courts toward the statute should be commended, not deplored.

Tom Soyars

⁴⁷ *Bethel v. Booth & Co.*, *supra* note 40; *Weber v. Weber*, 25 Ky. L. Rep. 908, 76 S.W. 507 (1903).

⁴⁸ *Bellew v. Gregory*, 174 Ky. 418, 192 S.W. 492 (1917).

⁴⁹ See *Purcell v. Campbell*, *supra* note 10.

⁵⁰ See the list of articles collected at 2 Corbin, *Contracts*, 8, 9 (1950).

⁵¹ Forty-six states have re-enacted the main provisions of the Statute of Frauds. Another, New Mexico, has the statute by virtue of judicial decision and the forty-eighth, Maryland, has it because of a clause in its constitution. Corbin, *op. cit.* *supra* note 50, 10, note 12.

⁵² *Id.* at 14.