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The One-Year Clause of the Statute of Frauds in South Carolina

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LAW NOTE

THE ONE-YEAR CLAUSE OF THE STATUTE OF FRAUDS IN SOUTH CAROLINA

Since the enactment of the Statute for the Prevention of Frauds and Perjuries in England in 1677, it has been of continuing importance, especially in the law of contracts. Although the content and language of the Statute of Frauds as originally enacted and as reenacted in the states of this country vary only slightly from state to state, the interpretation given the Statute by the courts has differed in many instances. When one considers the time which has elapsed since its adoption by the individual states and the vast number of cases requiring construction of the Statute over this period, this variation is understandable. Perhaps another reason for the differences in interpretation has been the strong inclination of the courts to give effect to the intention of the contracting parties wherever possible. Since the Statute of Frauds results in a disregard of intention when the language used by the parties brings the contract within its scope, the courts in some jurisdictions have been hesitant to apply the Statute where effect could be given to the intention of the parties, even if this called for a most stringent construction of the language of the Statute.

The number of decisions appearing in the South Carolina reports is ample evidence that the Statute of Frauds must be taken into account when the question of enforceability of any contract arises. The purpose here is to take the fifth clause of the fourth section of the Statute as it exists in South Carolina, and to show, through a review of the South Carolina cases, how the court has interpreted the language of that clause.

The fifth clause of the fourth section of the Statute states:

> No action shall be brought whereby: . . . (5) To charge any person upon *any agreement that is not to be performed within the space of one year from the making thereof* [italics added]; Unless the agreement upon which such action shall be brought . . . shall be in writing. . . .[1]

1. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 11-101 (5).

"... ANY AGREEMENT ..."

From the language " . . . any agreement . . . ", it would seem that the Statute should be applicable regardless of the particular subject matter involved, if the agreement fell within the fifth clause. While the other provisions of the fourth section relate to the *subject matter of the contract,* the clause here under consideration relates to the *period of the performance.*[2] Oral contracts for employment, services, insurance, and payment of money have been involved most often in the application of the fifth clause, but the South Carolina Court has also applied the Statute to a contract for hire of a slave,[3] and in a recent case,[4] the Court, for the sake of argument, applied this clause to an oral warranty of goods sold.

Where the agreement by reason of the nature of the subject matter is within another clause of the fourth section, such as agreements in consideration of marriage and agreements relating to transfers of real estate, courts in some jurisdictions have held it thereby excluded from operation of the fifth clause even if found not to violate the other clause.[5] The effect which certain statutes relating to real property have upon the fifth clause of the Statute of Frauds when both are involved in a transaction will be discussed later, but suffice it to say at this point that the mere fact that an agreement relates to land does not make the fifth clause inapplicable in South Carolina.[6] Mutual promises of marriage which do not involve a marriage settlement are not within the marriage clause[7] of the fourth section. A few courts, due to the special

2. BROWNE, THE STATUTE OF FRAUDS § 272.

3. Compton v. Martin, 5 Rich. 14 (S. C. 1851).

4. Joseph v. Sears Roebuck & Co., 224 S. C. 105, 77 S. E. 2d 583 (1953).

5. 37 C. J. S., *Frauds, Statute of* § 57 (1943). Lewis v. Tapman, 90 Md. 294, 45 Atl. 459 (1900) (breach of promise of marriage); Sullivan v. Bryant, 40 Okla. 80, 136 Pac. 412 (1913) (promises relating to real estate).

6. *See* Hillhouse v. Jennings, 60 S. C. 392, 38 S. E. 596 (1901); Hampton Park Terrace v. Sottile, 102 S. C. 372, 86 S. E. 1066 (1915). It should be noted that some authorities are to the effect that where there has been part performance sufficient to remove an oral contract for the sale of land from the land clause of the Statute, specific performance will be decreed notwithstanding the fact that the contract may also be one that is not to be performed within the year. Since the doctrine of part performance is generally held to be applicable to proceedings in equity only, and then only to the land clause of the Statute, it is not discussed here. The above situation, however, may be one in which the one-year clause of the Statute is inapplicable to contracts involving real estate. There are no South Carolina cases on this point. 2 WILLISTON, CONTRACTS § 494 (rev. ed. 1936); 2 CORBIN, CONTRACTS § 459 (1950).

7. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 11-101 (3).

character of these contracts, have also excluded them from operation of the fifth clause.[8] This, however, seems not to be the rule in South Carolina. The fact that the contract in regard to marriage is excluded from the marriage clause of the Statute would not, by reason of its subject matter, be excluded from operation of the Statute of Frauds as an agreement not to be performed within the year.[9] Professor Williston's view is that *any* contract if not performable within a year falls within this clause of the Statute, whether or not also objectionable under another clause.[10] This interpretation is the one apparently followed in South Carolina.

"... NOT TO BE PERFORMED ..."

The language of the Statute, "... not to be performed ...", has met with almost literal interpretation in all jurisdictions.[11] Courts have construed these words in their strictest sense, and unless a contract unequivocally cannot be performed within a year, it does not come within the purview of this clause. This has undoubtedly been the long-time position of the South Carolina courts. In an 1831 decision,[12] the Court said that the Statute was applicable " . . . only to contracts wholly executory and not intended, on either part, to be performed within a year." The mere fact that performance within a year is improbable or almost impossible is not sufficient to bring the contract within the fifth clause: the agreement must be one that cannot possibly be performed within a year from its making.[13] A clear example of the type of contract that comes within the Statute was before the Court in the case of *Duckett v. Pool.*[14] There A and B entered into an oral contract in November, 1888, whereunder B was to be employed by A for the year 1889. Obviously the contract could

8. 2 CORBIN, CONTRACTS § 461 (1950).
9. Coggins v. Cannon, 112 S. C. 225, 99 S. E. 823 (1919).
10. 2 WILLISTON, CONTRACTS § 501 (rev. ed. 1936); *See* RESTATEMENT, CONTRACTS § 192, comment a (1932).
11. 2 CORBIN, CONTRACTS § 444 (1950); 49 AM. JUR., *Statute of Frauds* § 23 (1943).
12. Gee v. Hicks, Rich. Eq. Cas. 5 (S. C. 1831).
13. Florence Printing Co. v. Parnell, 178 S. C. 119, 182 S. E. 313 (1935).
14. 33 S. C. 238, 11 S. E. 689 (1890). See also Dukes v. Smoak, 181 S. C. 182, 186 S. E. 780 (1936) (oral contract of employment made in May to commence in September and run nine months); Hillhouse v. Jennings, 60 S. C. 373, 38 S. E. 599 (1901) (oral contract entered into prior to November 21 for one year's employment to begin on November 21); Mendelsohn v. Banov, 57 S. C. 147, 35 S. E. 499 (1900) (oral contract of employment made in July to commence in October and to last for one year).

not be fully performed by either party until the end of the year 1889, a date more than one year from the time the contract was made. There can be no doubt, as this case shows, that contracts for a year's employment to begin at a future date are within the Statute.

If, however, the agreement does not affirmatively show that the performance of it is projected forward more than a year, it is not an agreement that cannot be performed within a year.[15] In one case[16] it was said that this clause refers only to agreements which expressly stipulate that performance is not to take place within the year, and in still another case[17] it is said that there must be a negation of the right to perform within a year to bring the agreement within the Statute. Although seemingly very strict, this latter requirement is not to be taken as requiring negative expression. Since very few contracts set out the time for performance in negative terms, it would seem that where the parties expressly agree that performance is to take place after the year, this in effect negates the right to perform at an earlier date. Certainly a contract for two years is a negation of performance within the year.[18]

In *Jones v. McMichael*[19] there was an oral agreement between A and B under which A was to erect and maintain a steam saw mill on the lands of B and B was to deliver, at his own cost, all the timber growing on a certain tract of land belonging to B. There was no time specified for performance. In holding the agreement to be within the Statute, the Court said:

> The agreement contains no express reference to time, but under it the business was carried on for more than a year, and not half the timber was sawed or even felled. If it appeared, as we assume it did, from the quantity of the timber and the capacity of the mill, that the parties in their agreement, contemplated the lapse of one year before the enterprise could be fully executed, then the agreement was obnoxious to the Statute.

A later case[20] referred to the decision in *Jones v. McMichael*

15. Parham v. Ins. Co., 111 S. C. 37, 96 S. E. 697 (1918).
16. Thompson v. Gordon, 3 Strob. 196 (S. C. 1848).
17. McGehee v. S. C. Power Co., 187 S. C. 79, 196 S. E. 538 (1938).
18. Duckett v. Pool, 33 S. C. 238, 11 S. E. 689 (1900); Dukes v. Smoak, 181 S. C. 182, 186 S. E. 780 (1936).
19. 12 Rich. 176 (S. C. 1859).
20. Walker v. RR Co., 26 S. C. 80, 1 S. E. 866 (1887).

as relaxing so much of the rule previously established by the cases which required that it appear within the agreement that it was not to be performed within a year. The effect of *Jones v. McMichael* is to bring within the operation of the Statute contracts which do not expressly place performance beyond the year, but where it clearly appears from the surrounding circumstances that it was within the contemplation of the parties that performance would extend beyond the year.

All the cases mentioned represent existing authority in this state. It would seem, therefore, that in South Carolina, impossibility of performance within a year must be present to make the one-year clause applicable, but it is sufficient in a given case that impossibility of performance was within the contemplation and intention of the parties.

The interpretation given this particular language of the fifth clause by the Court is of sufficient importance to warrant an examination of specific instances where it has been applied.

I. *Contracts Which Do Not Fix Time for Performance*

It is well established that where no time is fixed by the parties for performance of their agreement, and performance is possible within the year, the Statute does not apply.[21] Thus, if A orally promises to marry B, and no time is set for the marriage, the case is not within the Statute.[22] It is possible that the marriage might take place within the year. The problem arises most frequently in oral contracts of employment,[23] but the same rule would seem to apply regardless of the type of agreement involved.[24]

II. *Contracts for Employment for Life, Indefinite Employment, Permanent Employment*

Contracts for permanent employment,[25] indefinite employ-

21. 49 AM. JUR., *Statute of Frauds* § 27 (1943).
22. Coggins v. Cannon, 112 S. C. 225, 99 S. E. 823 (1919).
23. Batesburg Cotton Oil Co. v. Jones, 96 S. C. 148, 80 S. E. 86 (1913); Parham v. Ins. Co., 111 S. C. 37, 96 S. E. 697 (1918) (although involving a written memorandum).
24. G. H. Crawford Co. v. Dixon, 22 F. Supp. 636 (E. D. S. C. 1938) (contract by a bank to purchase bonds for the joint account of itself and another).
25. Weber v. Perry, 201 S. C. 8, 21 S. E. 2d 193 (1942).

ment,[26] or employment for life,[27] are not within the Statute. The Court reads into such contracts an intention on the part of the parties that employment is to last during the lifetime of the employee, and the contract would be regarded as fully performed if the employee died during the year.[28] The possibility that death could occur at any time is sufficient to remove the contract from the operation of the Statute. This is true no matter how unlikely it appeared that death might occur within a year after the contract was entered into. In *McGehee v. Power Co.*, in consideration of a lifetime job, the plaintiff gave the defendant a release from liability for injuries plaintiff had received while employed by the defendant. In allowing plaintiff to recover in a suit for breach of contract, the Court flatly stated: "Where an oral agreement of employment in terms provides for its continuance during the lifetime of the employee, the contract is not within the Statute."[29] The breach in this case occurred one and a half years after the contract was made, and it would appear that since the possibility of death made it a contract that could be performed within the year, it is immaterial how long the contract actually extends.[30]

III. *Contracts Performable on Death*

Although the principle of law applied by the courts is the same, there is a clear distinction between the type of contract just discussed and one which is to be performed on the death of one of the parties. In the previous group of cases, performance is to continue until one's death, while here performance is not to take place until one of the parties dies. Cases involving contracts of the latter type are, however, decided on the same theory as those involving lifetime employment. The fact that death might occur within the year is sufficient to place the agreement outside the Statute.[30a] It is immaterial,

26. Cline v. RR Co., 110 S. C. 534, 96 S. E. 532 (1918); McGehee v. S. C. Power Co., 187 S. C. 79, 196 S. E. 538 (1938); McLellan v. McLellan, 131 S. C. 245, 126 S. E. 749 (1925); Weber v. Perry, note 25 *supra*.

27. McGehee v. S. C. Power Co., 187 S. C. 79, 196 S. E. 538 (1938).

28. 37 C. J. S., *Frauds, Statute of* § 54 (1943); *see* 2 WILLISTON, CONTRACTS § 495 (rev. ed. 1936).

29. Differentiated from Stuart v. RR Co., 164 S. C. 283, 162 S. E. 348 (1931), on the ground that in the *Stuart* case no release was offered in evidence and the contract was too uncertain. The *Stuart* case seems to hold that a contract for permanent employment is within the Statute. If so, it is opposed to the other cases.

30. Weber v. Perry, 201 S. C. 8, 21 S. E. 2d 193 (1942).

30a. Joseph v. Sears Roebuck & Co., 224 S. C. 105, 77 S. E. 2d 583 (1953).

therefore, when in fact death actually occurs. Where a father transferred chattels to his son in exchange for the son's oral promise that on his father's death he would pay a sum of money to each of his two sisters, the agreement was not within the Statute even though death did not occur until eleven years thereafter.[31]

It was definitely established in one case that an oral agreement to make a will is a contract performable on the death of the promisor and therefore not within the Statute.[32] In reaching this decision, the Court expressly overruled an earlier case[33] which had held such agreement to be obnoxious to the Statute.[34] The life expectancy of the party may be more than a year and such may be the anticipation of the parties, but since death is possible within the year the agreement is without the Statute.[35]

IV. *Contracts the Performance of Which Is Dependent on a Contingency*

It is well settled that where performance depends on the happening of a contingency which may or may not occur within the year, the agreement is not within the Statute.[36] As has already been seen, contracts for life, for permanent employment, and contracts to be performed at the death of one of the parties are not within the Statute because death may occur within the year. In the one case the contract will be regarded as fully performed and in the other death will make performance due immediately. Although the courts in some cases refer to these contracts as dependent on the contingency of death, they are to be distinguished from the type of contingency we are here considering. By definition a contingency is a chance occurrence, and since death is a certainty — only its time being uncertain — such contracts have been referred to as performed or performable on death and not as contingencies.

The type of contingency that is of concern here is illustrated by the case of *Gadsden v. Lance*.[37] There the plaintiff

31. Thompson v. Gordon, 3 Strob. 196 (S. C. 1848).
32. Turnipseed v. Sirrine, 57 S. C. 559, 35 S. E. 757, 76 AM. ST. REP. 580 (1900).
33. Izard v. Middleton, 1 DeS. 116 (S. C. 1785).
34. *See* 9 Selden Society 10 (June 1948).
35. 37 C. J. S., *Frauds, Statute of* § 54 (1943); Jones v. McMichael, 12 Rich. 176 (S. C. 1859) (dicta).
36. 2 WILLISTON, CONTRACTS § 495 (rev. ed. 1936); 49 AM. JUR., *Statute of Frauds* § 31 (1943); 37 C. J. S., *Frauds, Statute of* § 54 (1943).
37. McM. Eq. 87 (S. C. 1841).

orally promised to transfer his right of subscription to one hundred shares of new stock of a local bank to the defendant, *as soon as the books were opened for subscription* and the defendant agreed to pay the plaintiff a certain sum per share. The books were opened two years later, and the plaintiff subscribed for one hundred shares and tendered an assignment which the defendant refused to accept. Although the actual opening of the books took place two years after the agreement, it was held that the Statute was not applicable. The Court found that the opening of the books was a contingency upon which performance was dependent and that such opening could have occurred within the year. The Court said: "... when the agreement is to be performed on a contingency, which may or may not happen within the year, a note in writing is not necessary, unless it appears from the agreement that it was to be performed after the year." The contingency rule has also been applied to a promise to pay a sum of money *when all suits against a bank were ended,*[38] and to a promise to pay a certain amount *when a specific purchase was made* by the plaintiff.[39] In any situation, however, where performance is dependent on a contingency which might occur within a year, it cannot be said that the contract is one which is not to be performed within one year from the making thereof.[40]

Oral agreements to insure for a period of more than a year are prime examples of the application of this rule. It cannot be questioned that such agreements are not within the Statute of Frauds.[41] This seems obvious since by the terms of the contract a contingency may occur within the year which will require full payment on the part of the insurer. "The parties do, indeed, contemplate that the contract is to remain in force for more than a year, in case the contingency does not sooner occur. But it may sooner occur; and in that case full performance is required at once."[42] This view was clearly adopted by the South Carolina Supreme Court in a 1945 decision.[43]

38. Oswald v. Lawton, 187 S. C. 42, 196 S. E. 535 (1938).
39. Hill v. Smith, 12 Rich. 698 (S. C. 1860).
40. 2 CORBIN, CONTRACTS § 445 (1950).
41. 2 WILLISTON, CONTRACTS § 495 (rev. ed. 1936); *See* Annot., 92 A. L. R. 232 (1934).
42. 2 CORBIN, CONTRACTS § 445 (1950).
43. Globe Indemnity Co. v. Cooper Motor Lines, 206 S. C. 154, 33 S. E. 2d 405 (1945).

A situation closely analogous to the insurance cases appeared in *Joseph v. Sears Roebuck & Co.*[44] This case involved an oral warranty of the safety of goods on sale. In effect it was a representation that a certain pressure cooker sold by the defendant would not explode. Assuming for the sake of argument that such warranties were within the scope of the one-year clause of the Statute, the Court held that this agreement was nevertheless dependent upon a contingency which might occur within a year and it was therefore outside the Statute. The Court said that the warranty could be interpreted as an undertaking that " . . . the pressure cooker is not dangerous and will not explode. If it does explode, we shall indemnify you or be responsible in damages." That the explosion of the pressure cooker did not in fact occur until almost two years after the sale was immaterial, because the contingency might have occurred within the year.

The Court, in the *Joseph* case, recognized a definite distinction between an oral warranty, which is in effect a promise to indemnify the purchaser for damages sustained, and an oral promise to repair extending beyond the year. This latter situation confronted the court in the case of *Rowland v. Buck.*[45] There was a written lease for seven years with an oral agreement on the part of the landlord to keep the premises " . . . at all times in repair and in a safe and suitable condition for the purposes for which said premises were leased." The oral agreement to repair was held to be within the Statute. The agreement itself did not mention what was to be the duration of the duty to repair, but from the surrounding circumstances it obviously was to be coextensive with the seven-year lease. The agreement contemplated a continued and repeated course of positive action for seven years and was therefore within the one-year clause of the Statute. The difference between such a contract and one involving an oral warranty is clear: the one contemplating continuous performance in excess of the year; performance of the other depending upon a contingency which might cause performance to be due within a year.[46]

V. *Contracts Which Allow Alternative Performances*

Where the agreement allows alternative performances, it

44. 224 S. C. 105, 77 S. E. 2d 583 (1953).
45. 150 S. C. 490, 148 S. E. 49 (1929).
46. *See* United Merc. & Mfrs. v. S. C. Elec. & Gas Co., 113 F. Supp. 257 (W. D. S. C. 1953).

is not within the Statute if any of the alternatives can be fully performed within a year.[47] Since the parties provide that the performance of any one of the alternatives will satisfy the contract, it cannot be said that the agreement cannot be performed within a year. This point was clearly before the Court in the case of *Elkins v. Plywood-Plastic Corp.*[48] There the defendant was to furnish plaintiff with two sawmills for three years " . . . and/or for so long a period as would be necessary to cut and/or saw timber on tract." The Court in holding this contract not to be within the Statute said that it did not appear from the contract that it could not be performed within a year. In so holding the Court implicitly recognized, if not expressly, that if one alternative may be performed within the year the agreement is enforceable even though the other alternatives may clearly be within the Statute. The problem is more complicated when although there are no alternative performances, there is a right reserved to one of the parties to terminate the contract. Of course where the contract is not within the Statute, the mere fact that it is made defeasible will not cause the Statute to be applicable. Since contracts for permanent employment, indefinite employment, and employment for life are not within the Statute, clearly contracts for permanent employment or for so long as one's work is satisfactory[49] or indefinite employment that is subject to termination by either party[50] would not be affected by the Statute either.

The majority of courts hold that where a contract is one that is not to be performed within a year, an option to terminate does not take it out of the Statute even though the option may be exercised within the year.[51] The reason given is that the Statute contemplates full performance and where the parties agree on a term longer than one year, the fact that one may be excused from further performance by exercising this power to terminate is not sufficient to take the contract out of the Statute.[52] There is some doubt as to whether South

47. 2 CORBIN, CONTRACTS § 454 (1950); 2 WILLISTON, CONTRACTS § 498 (rev. ed. 1936); 49 AM. JUR., *Statute of Frauds* § 25 (1943).
48. 219 S. C. 296, 65 S. E. 2d 243 (1951).
49. McGehee v. S. C. Power Co., 187 S. C. 79, 196 S. E. 538 (1938); Cline v. RR Co., 110 S. C. 534, 96 S. E. 532 (1918).
50. Weber v. Perry, 201 S. C. 8, 21 S. E. 2d 193 (1942).
51. 2 WILLISTON, CONTRACTS § 498 (rev. ed. 1936); 49 AM. JUR., *Statute of Frauds* § 33 (1943); 37 C. J. S., *Frauds, Statute of* § 48 (1943).
52. 37 C. J. S., *Frauds, Statute of* § 48 (1943); Annot., 161 A. L. R. 290 (1946).

Carolina is in accord with the majority view. In *Walker v. Railroad Company*[53] there was an oral agreement whereby plaintiff was to furnish the defendant timber and other materials. There was no specified time for performance, but the contract was to continue until plaintiff was notified to stop. The Court held that since time for performance was indefinite, the agreement was one which could be performed within the year. This in itself was sufficient ground for the opinion, but the Court went further and said:

> There was not only no specified time fixed for the performance of the contract, but it manifestly rested wholly on a contingency. The Railroad Company had authority to terminate it whenever it pleased by simply notifying the plaintiff to stop delivering the material. It depended wholly upon the will of the company whether the contract should terminate at the end of a month or two months or at the end of a year. Such a contract surely cannot be regarded as an agreement not to be performed within a year from the making thereof.

It would seem then, that this case was decided on two distinct grounds: (1) that the time for performance was indefinite and therefore not within the Statute; and (2) that even if the agreement was one that could not be performed within the year, the fact that one party had the power to terminate would be sufficient to exclude the Statute. Presumably this case could be cited as authority for placing South Carolina in accord with the minority view. A later South Carolina case,[54] though not involving the Statute of Frauds here under discussion, could possibly throw some doubt on this construction of the *Walker* case. The case involved a written lease which was to continue from year to year unless one of the parties would give six months' notice of intention to terminate. The Court said:[55]

> This lease required notice to terminate it, and without the intervention of the acts of the parties, the lease should continue indefinitely from year to year, and the parties would act under it, not by virtue of a renewal, but by the continued obligation of the original lease. The lease is, therefore, a lease for more than a year.

53. 26 S. C. 80, 1 S. E. 866 (1887).
54. Hampton Park Terrace v. Sottile, 102 S. C. 372, 86 S. E. 1066 (1915).
55. *See* 1 S. C. L. Q. 119, 142 (1948).

No mention was made of the *Walker* case in this latter opinion. The case is doubtful authority on the precise point in question inasmuch as the Court was interpreting a written lease, and its comments, although clearly in point, were made in determining whether or not a third party could avail himself of a recording act. Although the language used in the *Walker* case may represent the minority view, it is certainly not an impractical one, since where an agreement expressly provides that one party shall have the right to terminate, thereby bringing an end to the agreement, it would seem that the intention of the parties was to enter into a contract that could be performed within the year.[56]

The courts generally hold, although there is authority to the contrary, that an oral contract for a year or less with an option to renew is not within the Statute.[57] This seems to be the more logical view in that the option may not be exercised, and if it is not, complete performance as required by the contract will be accomplished within the year.[58] No South Carolina case can be found dealing with the application of the Statute of Frauds to this type of agreement. However, if it is confronted with the problem, perhaps the Court will find the prevailing view to be consistent with its application of the Statute to other situations.[59]

VI. *Oral Lease for One Year to Begin in Future*

As has been seen, an oral contract for a year's service to begin at a future date is obnoxious to the Statute because full performance is impossible within a year from its making. A different result, however, has been reached in South Carolina in situations which involve not only the one-year clause of the Statute of Frauds but also statutes applicable to oral leases of real estate. The first South Carolina case to involve this problem was *Hillhouse v. Jennings*.[60] After discussion of the then applicable code sections in regard to leases and the requirements of the Statute of Frauds, the Court held in effect that when a tenant enters under a parol lease for a year, the

56. 2 CORBIN, CONTRACTS § 450 (1950).
57. 37 C. J. S., *Frauds, Statute of* § 64 (1943); Annot., 111 A. L. R. 1105 (1937).
58. 2 CORBIN, CONTRACTS § 450 (1950).
59. *See* 1 S. C. L. Q. 119, 138 (1948). This article cites Rainwater v. Hobeika, 208 S. C. 433, 38 S. E. 2d 495 (1946), as holding to the contrary. In the *Rainwater* case, however, both the lease and the option were in writing, and the decision was based on notice and agreement to fix rent.
60. 60 S. C. 392, 38 S. E. 596 (1901).

lease as such being valid, he has a right to possession for twelve months from the time of entry. However, the Court expressly stated: "If a landlord refuses to permit a tenant to enter on the premises under a parol lease, no action shall be brought to charge him upon such contract, even if the lease is not for a term exceeding twelve months." The Court thereby imposed the one-year clause upon an otherwise effective oral lease. The necessity as laid down in the *Hillhouse* case, of the tenant's entering into possession under the parol lease was raised by Justice Cothran in a dissenting opinion in a later case.[61] In this case, however, the majority opinion declared the law of the *Hillhouse* case to be that a parol lease for a period not exceeding one year, commencing at a future date, is not within the Statute of Frauds.

Whatever conflicts of opinion which may have existed earlier, the law in South Carolina was definitely settled in *Wright v. Ritz Theatre Co.*[62] The Court in construing the Landlord-Tenant Act of 1946[63] reasoned that since the Act included no requirement that the length of a lease be calculated from the date it was entered into and in view of the prevailing custom in making such leases, the tenant is entitled to possession for one year under an oral lease. This three-to-two decision was to the effect that an oral lease for a term not exceeding one year is valid regardless of when the term is to commence. The Court said:

> In only rare cases does the lessee take possession simultaneously with the making of the lease. It is unfair to infer that the legislature, with knowledge of these facts, intended to make a parol lease for a term of one year enforceable only in the event that the lessee was permitted by the landlord to enter into possession.

For all practical purposes it can be said that oral leases for one year to begin in the future have been excluded by the South Carolina Legislature from the operation of the one-year clause of the Statute of Frauds. This conclusion is not unlike that of a great many other jurisdictions.[64]

61. Nat'l. Bank v. People's Groc. Co., 153 S. C. 118, 150 S. E. 478 (1929).
62. 211 S. C. 161, 44 S. E. 2d 308 (1947).
63. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 41-51: "A tenancy for not to exceed one year may be created by oral agreement." § 41-52: "Any agreement for the use or occupation of real estate for more than one year shall be void unless in writing."
64. 37 C. J. S., *Frauds, Statute of* § 63 (1943); 2 WILLISTON, CONTRACTS § 501 (rev. ed. 1936); Annot., 111 A. L. R. 1465 (1937).

VII. *Contracts Performable Within a Year by One Party But Not by the Other*

The American Law Institute takes the view that "[w]here any of the promises in a bilateral contract cannot be fully performed within a year from the time of the formation of the contract, all promises in the contract are within Class V [of the Statute]".[65] This also appears to be the majority view, that is, if performance on either side is to exceed or take place beyond a year, the Statute is applicable, even though performance on the other side is to take place within the year.[66] This is not, apparently, the view in South Carolina. At an early date,[67] the Court declared:

> This clause of the Statute was intended to be applicable to contracts wholly executory and not intended, on either part, to be performed within a year. In other words, both the consideration and the promise must be executory, and neither to be done or performed within a year.

This principle has been approved in later cases.[68] In *Mendelsohn v. Banov*[69] the Court said:

> It will take the Contract out of the Statute, if it be intended that either side shall perform its part within a year; there must be an intent that there is not to be complete performance on either side within a year.

The doctrine of full performance on one side removing the bar of the Statute will be discussed later, but it is clear from these cases that even if there has not been full performance on one side, yet if it was intended within the year, the Statute does not operate.

"... WITHIN A YEAR FROM THE MAKING THEREOF."

It is uniformly held that the one-year period intended by the Statute looks to the day the contract is made and not to the day on which performance actually begins or is intended to begin.[70] The general view taken by the American Law Institute[71] is that fractions of a day are disregarded in the

65. RESTATEMENT, CONTRACTS § 198 (1932).
66. 2 CORBIN, CONTRACTS § 456 (1950); 2 WILLISTON, CONTRACTS § 504 (rev. ed. 1936).
67. Gee v. Hicks, Rich. Eq. Cas. 5 (S. C. 1831).
68. Compton v. Martin, 5 Rich. 14 (S. C. 1851); Carter v. Brown, 3 S. C. 298 (1871).
69. 57 S. C. 147, 35 S. E. 499 (1900).
70. 2 CORBIN, CONTRACTS § 444 (1950); 37 C. J. S., *Frauds, Statute of* § 43 (1943).
71. RESTATEMENT, CONTRACTS § 198, comment d (1932).

way most favorable to the enforceability of the contract. Therefore, where employment for one year is to begin on the day following the agreement, the agreement is not within the Statute because performance will be completed on the day exactly one year from the date of the agreement.[72] There is little doubt that a contract for a year's employment to begin on the day of the contract is not within the Statute, but there are a few courts which compute the time strictly and count fractions of days.[73] South Carolina does not as yet seem to have passed on the matter, although there is authority which favors the general proposition disregarding fractions of a day in other situations.[73a]

Where a contract for a year's employment is to begin *in futuro* the contract is within the Statute, but if the parties on the day the employment is to begin make a restatement of the contract, the new agreement is enforceable.[74] One of the leading cases on this point was decided by the South Carolina Supreme Court in 1913.[75] In holding that the restatement of the terms made the contract enforceable, the Court said:

> . . . there is no authority to which we have been referred and nothing in law that suggests itself to this Court that prevents the parties, who have made the contract that is void as to form, from curing the formal defects.

It is beyond the scope of this discussion to go into what constitutes a sufficient restatement of the terms, but mention is only made to point out that it may be used in some cases to prevent the application of the Statute of Frauds to an otherwise enforceable contract.

PERFORMANCE AS REMOVING CASE FROM THE ONE-YEAR CLAUSE

The extent to which performance, partial or total, takes an agreement out of the Statute varies with the particular Statutes of Frauds, and with its particular subdivisions as in

72. 2 WILLISTON, CONTRACTS § 502 (rev. ed. 1936); 2 CORBIN, CONTRACTS § 444 (1950); 37 C. J. S., *Frauds, Statute of* § 62 p. 570 (1943).

73. *See* 2 WILLISTON, CONTRACTS § 502 p. 1463, n. 3 (rev. ed. 1936).

73a. *See* Callahan v. Hallowell, 2 Bay 8 (S. C. 1796); S. C. Nat. Bank v. Guest, ___ S. C. ___, 102 S. E. 2d 215 (1958).

74. 37 C. J. S., *Frauds, Statute of* § 62 p. 570 (1943); 2 WILLISTON, CONTRACTS § 503 (rev. ed. 1936); RESTATEMENT, CONTRACTS § 198 illus. 7 (1932).

75. Catlett v. Burke, 96 S. C. 363, 80 S. E. 610 (1914); *see also* Crosby v. Bradley, 142 S. C. 386, 140 S. E. 702 (1927).

the case of the fourth section.[76] The fourth section is concerned only with executory contracts. Therefore, when there has been complete performance on both sides, the Statute has no application.[77] Although the contract was originally within the Statute, after its complete performance the Statute cannot be used to undo what has been done. The more difficult problem is determining what performance other than complete performance on both sides will remove the bar of the Statute. It is clear that the performance sufficient to invoke the equitable doctrine of part performance is not such performance as will take a contract out of the one-year clause.[78] Since the doctrine of part performance is an equitable doctrine, it is not included in this discussion.[79] We are here concerned only with the effects of the one-year clause on suits for breach of contract and other law actions.

The great weight of authority is to the effect that full performance on one side, especially where it takes place within the year, will remove an agreement from within the Statute.[80] There is no doubt in South Carolina that where full performance on one side takes place within the year the fifth clause is not applicable.[81] In *Bates v. Moore*[82] there was an oral agreement whereby defendant agreed to purchase at a sheriff's sale three slaves belonging to plaintiff, and to pay a certain sum of money in cash at the sale and the remainder of the purchase price in one year. The sum in cash was paid at the sale and the slaves were delivered to the defendant. In a suit for the balance of the sales price the Statute was raised as a defense, the defendant claiming that payment was not due until one year after the sheriff's sale which was more

76. *See* citations under the different clauses of CODE OF LAWS OF SOUTH CAROLINA, 1952 § 11-101.

77. RESTATEMENT, CONTRACTS § 219 (1932); 2 WILLISTON, CONTRACTS § 528 (rev. ed. 1936).

78. 37 C. J. S., *Frauds, Statute of* § 254 (1943); 49 AM. JUR., *Statute of Frauds* § 497 (1943); Jones v. McMichael, 12 Rich. 176 (S. C. 1859); Hillhouse v. Jennings, 60 S. C. 373, 38 S. E. 599 (1901) (employee having started work).

79. *See* 2 CORBIN, CONTRACTS § 459 (1950); *see also* note 6 *supra* (as to land contracts).

80. 6 A. L. R. 2d 1053, 1111 (1949); 49 AM. JUR., *Statute of Frauds* § 497 (1943, Supp. 1957); 2 WILLISTON, CONTRACTS § 504 (rev. ed. 1936); 2 CORBIN, CONTRACTS § 457 (1950).

81. Gee v. Hicks, Rich. Eq. Cas. 5 (S. C. 1831); Compton v. Martin, 5 Rich. 14 (S. C. 1851); Thompson v. Gordon, 3 Strob. 196 (S. C. 1848) (charge to this effect by trial judge approved); Izard v. Middleton, 1 DeS. 116 (S. C. 1785) (overruled in part by a later case, but the law of performance expressly affirmed).

82. 2 Bailey 614 (S. C. 1832).

than a year from the date of the agreement. The Court, in holding that delivery of the slaves was full performance on plaintiff's part, said:

> That part of the Statute, which requires a contract not to be performed within the year to be in writing, has been over and over again held to apply only to cases, where the whole contract was executory; and not to cases, where it had been performed by one of the parties.

This view of full performance on one side as removing the case from the Statute logically follows the cases previously discussed which held that the mere intention that full performance on one side was to take place within the year was sufficient to lift the bar of the Statute. *Joseph v. Sears Roebuck & Co.*[83] was decided on this principle by the trial judge, and in the light of other South Carolina cases on the point it would appear to be a valid decision. The Supreme Court, however, reserved opinion on this point, finding the Statute inapplicable for other reasons.

The cases so far discussed in this section have all involved situations where full performance by one of the parties has taken place *within the year*. From the opinions, however, it may be inferred that full performance by one side, whenever accomplished, takes a contract out of the Statute, and this seems to be the rule adopted by most authorities.[84] Thus, it is stated:[85]

> . . . the same result is and should be reached if the plaintiff has fully performed, even though such full performance was not completed within a year. There is nothing in the Statute to require a distinction; and it is the fact that full performance has been rendered that affords a reason for enforcement, and not the time within which it was rendered.

Despite one case, the law in South Carolina definitely seems to support this view. The case is *Carter v. Brown.*[86] Plaintiff alleged an oral agreement entered into in August, 1864, whereby he agreed to serve the defendant as overseer during the whole of the year 1865 in consideration of a certain

83. 224 S. C. 105, 77 S. E. 2d 583 (1953).
84. 37 C. J. S., *Frauds, Statute of* § 254, p. 774 (1943); 49 AM. JUR., *Statute of Frauds* § 497 (1943, Supp. 1957); 6 A. L. R. 2d 1053, 1115 (1949). *Contra*, 2 WILLISTON, CONTRACTS § 504 (rev. ed. 1936).
85. 2 CORBIN, CONTRACTS § 457 (1950).
86. 3 S. C. 298 (1871).

amount of cotton to be delivered to the plaintiff on January 1, 1866. The plaintiff sued on the contract as made and also on a count of indebitatus assumpsit, alleging performance on his part and failure on the part of defendant to deliver the cotton. This contract clearly seems susceptible to the doctrine here discussed, but the Court explained:

> As this action can be supported on the implied promise it is not necessary that the plaintiff should rest his demand upon the original contract, which was affected by the Statute of Frauds.

The opinion seems to declare that where there has been full performance on one side, a new contract to pay for such performance is implied and on that account the original contract need not be enforced. While the Court purported to rest its decision on the implied contract, it actually gave effect to the original contract by allowing recovery not merely by referring to it to show that the services were rendered pursuant to a contract, but by measuring the recovery by the terms of the original contract. It is difficult to see how this case could be held to militate against the doctrine of full performance as removing the bar of the Statute, since previous cases supporting this view were cited without criticism.[87] In *Walker v. Railroad*,[88] a case decided after the *Carter* case, the Court refused to allow a defense of the Statute to a suit on a contract originally within the Statute but which had been fully performed by the plaintiff, although performance had extended nine years from the date of the agreement. If there might have been a misapprehension of *Carter v. Brown*, the rule was nevertheless laid down in the *Walker* case that full performance long after the year would render the Statute inapplicable. This view has also been adopted in subsequent cases.[89]

None of the cases discussed in this section have mentioned any requirement as to the type of performance necessary to invoke the application of this rule. They have simply stated that where the performance requested of the plaintiff has been fully performed, the defendant cannot avail himself of the Statute as a defense to a suit on the contract. The Court

87. Gee v. Hicks, Rich. Eq. Cas. 5 (S. C. 1831); Bates v. Moore, 2 Bailey 614 (S. C. 1832); Compton v. Martin, 5 Rich. 14 (S. C. 1851).

88. 26 S. C. 80, 1 S. E. 866 (1887).

89. Turnipseed v. Sirrine, 57 S. C. 559, 35 S. E. 757, 76 AM. ST. REP. 580 (1900) (5 years—decided on both performance and implied contract); McLellan v. McLellan, 131 S. C. 245, 126 S. E. 749 (1925) (38 months).

in the *Carter* case did say, in reference to cases allowing performance on one part to remove the case from the Statute, that:

> It is certain that all these cases have been greatly influenced by the manifest injustice of allowing a party, after having obtained the advantage of a contract, to fly to a Statute, intended to prevent frauds, for impunity in refusing performance of his corresponding obligation.

This must have been the portion of the opinion which the Fourth Circuit Court of Appeals in *Sou. States Life Ins. Co. v. Foster*[90] had in mind when the *Carter* case was cited in support of its view that "nonaction is not such part performance[91] as exempts a contract from the Statute." The Court held that an oral waiver of certain rights under a written contract, pursuant to an agreement within the Statute, was not such performance on one side as would remove the bar of the Statute. The holding in this case seems to be that the performance rendered under the particular oral agreement sued upon must be some positive action and not simply nonaction which does not benefit or enrich the other party to the agreement.

Keeping in mind the requirement of positive action set out in this recent case, it may be said that the South Carolina cases seem to be in accord with the American Law Institute's view: "Promises in unilateral contracts are not within Class V however long the time performance of them may require, and promises in bilateral contracts as soon as they have been fully performed on one side are withdrawn from the Class."[92]

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90. 229 F. 2d 77 (4th Cir. 1956).
91. By the term "part performance" the Court undoubtedly meant the same type of performance as has been referred to here as full performance on one side.
92. RESTATEMENT, CONTRACTS § 198, comment a (1932).