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**STATUTE OF FRAUDS: Application of One-Year Clause; No Time Set  
In Contract; Implied Agreement for Reasonable Time**

The California Supreme Court recently ruled that the one-year clause of the Statute of Frauds<sup>1</sup> applies to those agreements where no time for performance is specified by the parties, but where the court finds they impliedly agreed on a reasonable time, and the jury finds that the period of reasonable time exceeds one year.

In *San Francisco Brewing Corp. v. Bowman*<sup>2</sup> an exclusive distributorship was granted by plaintiff brewery to the defendant with no specific mention of duration by either party. After several years<sup>3</sup> the brewery terminated the relationship and sued for money due on an open account for beer sold and delivered. The defendant cross-complained for breach of contract, and in defense to the cross-complaint, the brewery requested an instruction at the trial on the Statute of Frauds. The trial court refused to so instruct, in effect holding the Statute inapplicable. The supreme court reversed on this point, ruling that ". . . both the express and implied terms of a contract are equally terms of the agreement within the meaning of that phrase as used in the statute."<sup>4</sup> If the jury found on retrial that the oral contract by implication was to endure for a reasonable time, and they then found this period was to exceed one year, the agreement, being wholly oral, could not be enforced.

Two subsequent district court of appeal cases have relied on this ruling, citing the principal case as controlling.<sup>5</sup>

It might appear that the rule expounded represents a novel and unusual interpretation of the one-year clause. Yet a closer look reveals that this is no startling reversal in the attitude of the California courts. The specific issue presented in the principal case had not been previously considered in a California appellate decision, and the history of the state's interpretation of the clause would not refute even a prediction of this ruling.

The general principle, often stated in California, is that, in order to fall within the purview of the Statute's one-year clause, an agreement must be impossible to perform within one year, regardless of whether performance is probable within that time.<sup>6</sup> In addition, this impossibility of performance

<sup>1</sup> CAL. CODE CIV. PROC. § 1973(1), CAL. CIV. CODE § 1624(1), which declare unenforceable an oral agreement ". . . that by its terms is not to be performed within one year from the making thereof."

<sup>2</sup> 52 Cal. 2d 607, 343 P.2d 1 (1959).

<sup>3</sup> The relationship had started in 1936 between the brewery and a partnership composed of the defendant and his father. Subsequently the defendant entered into a new partnership which carried on the distributorship until 1950, when it was dissolved, and the defendant continued the business alone. The court ruled that the present alleged agreement was entered into not earlier than 1950, since the partnership dissolution terminated any previous contract that might have existed.

<sup>4</sup> 52 Cal. 2d at 619, 343 P.2d at 7.

<sup>5</sup> *Arco Bolt & Screw Co. v. Iaia*, 180 Cal. App. 2d 728, 5 Cal. Rptr. 53 (1960); *Connelly v. Venus Foods, Inc.*, 174 Cal. App. 2d 582, 345 P.2d 117 (1959).

<sup>6</sup> *Osment v. McElrath*, 68 Cal. 466, 9 Pac. 731 (1886); *El Rio Oils v. Pacific Asphalt*, 95 Cal. App. 2d 186, 213 P.2d 1 (1949); *Maybourne v. Citizen's Trust & Sav. Bank*, 46 Cal. App. 178, 188 Pac. 1034 (1920); 23 CAL. JUR. SECOND *Statute of Frauds* § 4 at 245 (1955); 49 AM. JUR. *Statute of Frauds* § 28 at 389 (1943); *Annot.*, 129 A.L.R. 534 (1940).

within a year must appear from the very terms of the agreement.<sup>7</sup>

Most of the writers and cases in this country also say that the expectation, understanding, and even the intention of the parties as to whether the agreement would be performed within a year is immaterial, and if the agreement is at all capable of performance within that time, it is not unenforceable under the Statute.<sup>8</sup>

Some courts, without even discussing improbability of performance, have held in effect that the contract must show affirmatively that it was not to be performed within one year.<sup>9</sup> An Illinois case said in dictum that it was necessary that it should appear from the "express" terms of the contract that it is not to be performed within one year, in order to fall within the scope of the Statute.<sup>10</sup>

There is one early California decision which did declare that the expectation of the parties that it would not be performed within a year was immaterial. The agreement was between two former partners, whereby one was to wind up the affairs of the dissolved partnership and pay a share to the other. The court said the agreement was not within the Statute, although, at the time it was made, the parties did not expect that all the business would be wound up within a year.<sup>11</sup>

In spite of this decision, and in spite of the general recognition by California courts that improbability of performance within a year is immaterial,<sup>12</sup> and that impossibility of performance in that time must appear from the terms of the contract,<sup>13</sup> a line of California decisions has given the clause a wider scope than many other jurisdictions have allowed. These cases hold that agreements made without any specific mention of duration, yet for which the parties have "contemplated" that performance would exceed one year, are within the Statute.

In *Swift v. Swift*,<sup>14</sup> money was loaned, to be repaid as soon as nut trees, about to be planted, yielded sufficient income to cover expenses and repay the loan. The court held the oral contract unenforceable, and stated that there are two kinds of agreements that fall within the Statute: First, those that are expressly not to be performed within a year; and second, those where ". . . it is evident from the subject matter of the contract that the parties had in contemplation a longer period than one year as the time for its performance."<sup>15</sup> The case was decided on this second point. *Eickelman v. Perdeu*<sup>16</sup> and *Tostevin v. Douglas*<sup>17</sup> are two of the subsequent California

<sup>7</sup> *Hollywood Motion Picture Equip. Co. v. Furer*, 16 Cal. 2d 184, 105 P.2d 299 (1940); *El Rio Oils v. Pacific Asphalt*, 95 Cal. App. 2d 186, 213 P.2d 1 (1949); *Sessions v. So. Calif. Edison*, 47 Cal. App. 2d 611, 118 P.2d 935 (1941); 23 CAL. JUR. SECOND *Statute of Frauds* § 3, at 243-44 (1955).

<sup>8</sup> 3 WILLISTON, *CONTRACTS* § 495 at 575 (3rd ed. 1960); 49 AM. JUR. *Statute of Frauds* § 28, at 389-90 (1943).

<sup>9</sup> See cases collected in Annot., 129 A.L.R. 534 (1940).

<sup>10</sup> *Taylor v. Scott*, 178 Ill. App. 487, 496 (1913) (dictum).

<sup>11</sup> *Osment v. McElrath*, 68 Cal. 466, 9 Pac. 731 (1886).

<sup>12</sup> See note 6 *supra*.

<sup>13</sup> See note 7 *supra*.

<sup>14</sup> 46 Cal. 266 (1873).

<sup>15</sup> *Id.* at 269.

<sup>16</sup> 140 Cal. 687, 74 Pac. 291 (1903).

<sup>17</sup> 160 Cal. App. 2d 321, 325 P.2d 130 (1958).

cases that have relied on the "contemplation of the parties" rule laid out in *Swift*.

The real meaning of this "contemplation" rule is unclear. Does it mean that the parties' intentions put the agreement within the Statute, regardless of the possibility of performance; or is it to be interpreted as saying there is an implied term of the agreement that performance is to exceed one year, therefore the contract, by its terms, is not to be performed within that time—the basis for the ruling in *San Francisco Brewing Corp. v. Bowman*?

At least by dictionary definition, "contemplation of the parties" as used in the *Swift* case could mean "intention of the parties."<sup>18</sup> And in at least one American jurisdiction, the rule is flatly stated that an oral agreement is within the Statute of Frauds if the intent and understanding of the parties is that it is not to be performed within a year, the mere fact of possibility of performance within that time notwithstanding.<sup>19</sup> This position is strongly rejected by Williston,<sup>20</sup> and is contrary to the weight of American authority.<sup>21</sup> California, by its insistence in other cases on impossibility of performance within a year according to the terms of the agreement, also seems to reject the proposition that the mere intention of the parties, without regard to impossibility of performance, is enough to put it within the scope of the Statute.

Yet neither can it readily be said that the court in the *Swift* case meant by "contemplation of the parties of performance over one year" that there was as an implied term in the contract a stipulation that performance could not be completed within that time. The agreement was self-terminating. It would come to an end when the nut trees yielded a certain income sufficient to pay the loan. There was no real need of having a term in the contract on duration, in order to see what performance was to be.

On the other hand, in the *San Francisco Brewing Corp.* case, the subject matter was a continuous mutual relationship, and in order to even define "performance" of the agreement, a period of time for this relationship had to be found. Whatever this period turned out to be, any shorter time was not performance; and the contract, by its terms, could not possibly be performed before that period expired. The fact situations of the *Swift* and *San Francisco Brewing Corp.* cases were therefore basically different, and their respective rules, though similar, are distinguishable.

Whatever interpretation is taken of the *Swift* "contemplation" doctrine, its assertion by the California Supreme Court seems a clear indication of the course it would take when confronted with the issue in the *San Francisco Brewing Corp.* case. The decision amounts to a new California application of the one-year clause, but it is merely a step ahead in line with the court's previous philosophy.

It seems there are only four cases in other courts of the country that have been faced with the issue, three of which were in the Federal Court of Appeals for the Ninth Circuit, ruling on cases appealed from district courts in California and therefore applying California law. The fourth was

<sup>18</sup> One definition of "contemplation" in Webster's dictionary is "act of intention." (WEBSTER'S NEW INTERNATIONAL DICTIONARY, 2d ed. 1949).

<sup>19</sup> *Marshall v. Lowd*, 154 Me. 296, 147 A.2d 667 (1958).

<sup>20</sup> 3 WILLISTON, CONTRACTS, *op. cit. supra* note 8, § 495 at 584-85.

<sup>21</sup> *Id.*, 49 AM. JUR. *Statute of Frauds* § 27, at 388-89 (1943).

in the Texas Supreme Court. All were decided within the last decade, and were cited and discussed in the principal case.

In *Fibreboard Prods. Inc. v. Townsend*,<sup>22</sup> an agreement for employment for an indefinite time was made under such circumstances that the court ruled a reasonable time had been agreed upon by implication. Although the trial court had found this reasonable time to have been two years, the federal court of appeals rejected a contention that the agreement was within the Statute. Yet it was stated as an additional ground for the decision that ". . . in any event, the detriment suffered by plaintiff is sufficient to estop defendant from asserting the Statute of Frauds."<sup>23</sup> In a concurring opinion, Pope, J., agreed on the estoppel issue, but insisted that the agreement was initially within the scope of the Statute, because its reasonable time for performance was adjudged to have been over one year.<sup>24</sup>

*Millett v. Park and Tilford Distillers Corp.*,<sup>25</sup> involved an oral distributorship contract with no definite agreement on duration, very similar to the one in the principal case. The court ruled that the contract was not terminable until a reasonable time had elapsed, but that the Statute did not bar enforceability here because the reasonable time was found to be exactly one year.

*Hunt Foods Inc. v. Phillips*,<sup>26</sup> decided in 1957, is more directly in point. An oral food distributorship contract was found to be effective for a reasonable time, which was determined by the trial court to be three years. The court in a footnote stated:<sup>27</sup>

Because the trial court held that the contract was for a reasonable time and the reasonable time had not elapsed some sixteen months after the commencement date, it is apparent that the contract is within the Statute of Frauds, being more than one year in duration.

The case finally was decided on the proposition that the defendant was estopped to raise the Statute.

*Hall v. Hall*,<sup>28</sup> a 1957 Texas case, involved an oral employment of a salesman, who was to develop a large sales territory. The court stated that:<sup>29</sup>

. . . [D]espite the strict requirement that impossibility of performance within one year must appear from the terms of the contract, we see no reason why the fact of duration of performance being implied keeps the contract from being within the statute. . . . What is implied on a contract is as much one of its terms as though expressly set forth therein. Where the circumstances justify the law in implying any term of performance, they also justify it in defining the period in regular units of time. . . .

The jury found this employment agreement had been made for an implied reasonable time which was determined to be three years, and the contract was held unenforceable under the Statute of Frauds.

<sup>22</sup> 202 F.2d 180 (9th Cir. 1953).

<sup>23</sup> *Id.* at 183.

<sup>24</sup> *Id.* at 183 (concurring opinion).

<sup>25</sup> 123 F. Supp. 484 (N.D. Cal. 1954).

<sup>26</sup> 248 F.2d 23 (9th Cir. 1957).

<sup>27</sup> *Id.*, n. 3, at 31.

<sup>28</sup> 158 Tex. 95, 308 S.W.2d 12 (1957).

<sup>29</sup> *Id.* at 98, 308 S.W.2d at 14-15.

The rule in these cases is theoretically sound. Its basis—that implied terms of a contract are within the meaning of the phrase “by its terms” in the one-year clause—seems consistent with the general rule that implied contracts are as valid as express ones, the only substantial difference being in the method of proof.<sup>30</sup>

Further, it has been stated rather detachedly as a principle in American law that the “. . . Statute of Frauds applies to contracts implied in fact . . .” (though it is not applicable to those implied in law).<sup>31</sup>

No doubt many other courts will adopt the rule when the issue is presented; yet it can also be safely predicted that some will reject it.

First, a few states have construed the clause so strictly in the past that they will undoubtedly declare there is nothing in the agreement itself to show affirmatively any incapability of performance within a year. As said before, at least one court has already even indicated that the Statute applies only to express terms.<sup>32</sup>

In addition, with reference to the particular facts in *San Francisco Brewing Corp. v. Bowman*, there are basic differences in authority on the duration aspect of distributorship and sales franchise agreements. Some courts consider them permanent arrangements, terminable only by mutual consent, and such termination is not “performance” for purposes of the Statute of Frauds.<sup>33</sup>

Other courts hold these distributorship agreements terminable at will, and in many cases, lacking mutuality of obligation, so they are not enforceable contracts at all.<sup>34</sup>

California law is clear: Distributorship agreements endure for a reasonable time and are terminable only upon reasonable notice.<sup>35</sup> The fact situation in the principal case was therefore a solid foundation for the new rule. It will undoubtedly be extended in application to all oral agreements in which there is an implied term of reasonable duration as the basis for performance, and this time period is adjudged to exceed one year.

The new application is certainly not incompatible with the Statute’s language. There is, however, a question regarding policy. Should the scope of the clause be broadened so that more oral agreements will be held unenforceable?

The argument that the Statute helps to prevent fraud has been sharply criticized by many writers, and some believe it generates as many frauds as it prevents.<sup>36</sup> With regard to distributorship agreements where the manufacturer terminates, many will be upheld by use of estoppel to assert the

<sup>30</sup> *Silva v. Providence Hosp.*, 14 Cal. 2d 762, 97 P.2d 798 (1939).

<sup>31</sup> 37 C.J.S. *Statute of Frauds* § 229, at 728 (1943).

<sup>32</sup> *Taylor v. Scott*, 178 Ill. App. 487, 496 (1913) (dictum).

<sup>33</sup> *Burkle v. Superflow Mfg. Co.*, 137 Conn. 488, 78 A.2d 698 (1950).

<sup>34</sup> *Summer v. Burger Brewing Co.*, 261 F.2d 261 (4th Cir. 1958); *Terre Haute Brewing Co. v. Dugan*, 102 F.2d 425 (8th Cir. 1939); see *Annot.*, 32 A.L.R. 239, 252 (1924).

<sup>35</sup> *San Francisco Brewing Corp. v. Bowman*, 52 Cal. 2d 607, 613-14, 343 P.2d 1, 4 (1959); *Great W. Distillery Prods. v. Wathen Distillery Co.*, 10 Cal. 2d 442, 446-47, 74 P.2d 745, 747 (1937).

<sup>36</sup> 2 CORBIN, *CONTRACTS* § 275 at 2-14 (1950); Burdick, *A Statute for Promoting Fraud*, 16 COLUM. L. REV. 273 (1916).