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CONTRACTS—STATUTE OF FRAUDS—OPTION TO CANCEL IN CONTRACT OF EMPLOYMENT FOR MORE THAN ONE YEAR AS FULFILLMENT OF STATUTORY REQUIREMENT—Plaintiff, Hedda Hopper, sued on an oral agreement for her appearance on a weekly radio broadcast, to be sponsored by Andrew Jergen's Company. The contract was for five years, divided into ten twenty-six week periods. Defendant advertising agency reserved an option to cancel the contract by notifying the plaintiff thereof four weeks prior to the end of any twenty-six week period. Plaintiff was to receive \$1,250 per week for the first twenty-six weeks with an increase of \$250 per week each odd numbered additional period. Defendant repudiated the contract before any performance and plaintiff asks damages amounting to \$495,000. A federal district court in California sustained defendant's motion to dismiss plaintiff's case on the basis that the contract being oral and not by its terms to be performed within a year, was invalid under the California Statute of Frauds.¹ *Held*, reversed. By exercising the option to cancel, one of the alternative modes of performance, the contract could by its terms be performed within a year and was not invalid under the statute. *Hopper v. Lennen & Mitchell, Inc.*, (C.C.A. 9th, 1944) 146 F. (2d) 364.

To fall within this clause of the Statute of Frauds the contract must be such that it *cannot* be performed within a year. Mere improbability of performance within the year is not sufficient to bring it within the statute.² Where there are

¹ Cal. Civ. Code (1941) § 1624: "The following contracts are invalid unless the same, or some note or memorandum thereof, is in writing, and subscribed by the party to be charged or by his agent:

a. An agreement that by its terms is not to be performed within a year from the making thereof; . . ."

² *Mayborne v. Citizens Trust and Savings Bank*, 46 Cal. App. 178, 188 P. 1034 (1920). "To fall within the condemnation of the Statute the contract must be such as to be incapable of performance within one year." *Marble v. Town of Clinton*, 298 Mass. 87, 9 N.E. (2d) 532 (1937); 2 WILLISTON, CONTRACTS, rev. ed., § 495. "It is well settled that the oral contracts invalidated by the Statute because not to be

alternative performances contemplated in the contract and one of these alternatives can be performed within a year the rule seems to be that the contract is not within the statute.³ The real issue before the court, then, is whether the exercising of an option to terminate is performance within the meaning of the statute. The court in the principal case follows some earlier California decisions and says that it is performance. The law in California was set forth by the California court in *Dutton Dredge Company v. United States Fidelity and Guaranty Company*. In this case the defendant agreed to insure the plaintiff and to keep it insured. It was also agreed that the contract could be terminated at any time by either party giving written notice thereof to the other party. The court said, "Under such covenants the contract by its terms could have been performed within a few days, not to mention a year. Such contracts do not come within the statute of frauds."⁴ The California court has followed the line of reasoning laid down by the New York court in a case involving an oral contract for commissions,⁵ one of the terms of which was that it could be terminated by either party at a specified date within a year by giving due notice. The court said, "It is contended that termination is not performance, but rather the destruction of the contract, and this is true where there is no provision authorizing either of the parties to terminate as a matter of right. Performance, however, is simply carrying out the contract by doing what it requires or permits. . . . The permission was a part of the agreement and effective action under it was performance of that part. The contract could be performed in either of two ways: (1) By performance according to its terms without exercising the options. (2) By performance according to its terms until June and then exercising the option. By either mode the contract would be fulfilled in a sense originally contemplated by the parties. . . . The contingency did not defeat the contract, but simply advanced the period of fulfillment."⁶ The several courts holding this

performed within a year include only those which cannot be performed within that period."

³ 2 WILLISTON, CONTRACTS, rev. ed., § 498; "Where a promise is in the alternative, then the contract is not within the Statute if either alternative can be performed within a year, though the other cannot be. . . ." See *Standard Oil Co. v. Denton*, 24 Ky L. Rep. 906, 70 S.W. 282 (1902), where *Standard Oil Company* agreed to furnish oil for five years, or so long as defendant remained in business, court held this was not within statute of frauds since an alternative might have been fully performed in a year. See also *Welsh v. Welsh*, 148 Minn. 235, 181 N.W. 356 (1921) and *Roberts v. Rockbottom Co.*, 7 Metc. (48 Mass.) 46 (1843).

⁴ 136 Cal. App. 574, 29 P. (2d) 316 at 319 (1934).

⁵ *Blake v. Voigt*, 134 N.Y. 69, 31 N.E. 256 (1892).

⁶ Other courts holding same way: Nevada, where oral contract for the duration of a written lease which could have been terminated by act of parties according to its specific provisions was held not within statute. *Girton v. Daniels*, 35 Nev. 438, 129 P. 55 (1913); Texas, where contract which could be canceled by either party giving written notice was held not obnoxious to Statute of Frauds. *Ford Motor Co. v. Maddox Motor Co.*, (Tex. Civ. App. 1928) 3 S.W. (2d) 911, affd., (Tex. Comm. App. 1930) 23 S.W. (2d) 333; Kansas, where an oral contract to furnish horsepower for ninety-nine years terminable on three months' notice if proved unprofitable was held not within the Statute of Frauds. *Johnston v. Bowersock*, 62 Kan. 148, 61 P. 740 (1900).

view divide everything which relates to a contract into performance and breach. Exercising an option isn't breach so it must be performance. However, termination of a contract by exercising such an option is very similar to excusing performance by operation of law. No court would hold that a contract for a fixed period beyond a year is not within the Statute of Frauds merely because some contingency might discharge liability under it within a year. Following this analogy, most of our courts have reached a contrary conclusion.⁷ This is also the view held by the English court. In the case of *Hanau v. Ehrlick*⁸ the House of Lords declared void under the Statute of Frauds a contract for employment for a period of two years terminable by either party on six months notice. However, Lord Atkinson weakened the force of the decision when he said, ". . . I concur, on the short ground that I think the language of the statute is ambiguous, and that it is questionable whether the determination of a contract by merely giving notice within a year can be called a performance of the contract within that year, . . . where . . . a particular construction has been put upon it by a number of authorities, extending over a great length of time, it would be unwise and wrong on our part to adopt a different construction."⁹ Considering the purpose of the statute which is to secure a defendant against unfounded and fraudulent claims there seems to be no reason against holding as the principal case does that the contract is not within the statute. Since defendant can terminate the contract within the year he is not bound on an oral contract for a period longer than a year which was what the drafters of the statute apparently intended to prohibit.

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⁷ See 2 WILLISTON, CONTRACTS, rev. ed., § 498, where it is said: ". . . contracts requiring for their performance a period exceeding a year but which are subject to a right of defeasance, not by operation of law but by the express terms of the contract, within the period of a year, as a contract for several years service containing a provision permitting termination by either party on a week's or month's notice . . . are generally held within the Statute." See also 58 A.L.R. 1007 (1929), headnote: "A contract invalid under the Statute of Frauds because not to be performed within a year is not rendered valid by provision for termination within that period in case of certain contingencies."

For cases following this rule see *Union Car Advertising Co., Inc. v. Boston Elevated Railway Co.*, (C.C.A. 1st, 1928) 26 F. (2d) 755; *Street v. Maddox, Marshall, Moss, and Mallory*, (C.A.D.C. 1928) 24 F. (2d) 617 at 618; *Brest v. Ver Steeg Shoe Co.*, 97 Mo. App. 137, 70 S.W. 1081 (1902); *Packet Co. v. Sickles*, 72 U.S. 580 (1886); *Meyer v. Roberts*, 46 Ark. 80 (1885); *Seder v. Grand Lodge of Ancient United Workmen of North Dakota*, 35 Idaho 277, 206 P. 1052 (1922); *Millikin v. Miles*, 204 Ky. 541, 264 S.W. 1086 (1924).

⁸ *Hanau v. Ehrlick*, [1912] A.C. 39.

⁹ *Hanau v. Ehrlick*, id. at 42.